

**IN THE SUPREME COURT OF OHIO**

<b>PAMELA ARGABRITE,</b>	<b>:</b>	<b>Case No.: 2015-0348</b>
<b>Appellants,</b>	<b>:</b>	
<b>v.</b>	<b>:</b>	
<b>JIM NEER, Individual and in his official Capacity Miami Township Police Department, et al.,</b>	<b>:</b>	<b>On Appeal from the Montgomery County Court Of Appeals, Second Appellate District Court of Appeals Case No. 26220</b>
<b>Appellees.</b>	<b>:</b>	

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**REPLY BRIEF OF PLAINTIFF-APPELLANT, PAMELA ARGABRITE**

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## ARGUMENT

### **I. Introduction**

Defendants' briefs are remarkable not for what they contain, but for what they do not contain. Defendants opine that abrogating the "no proximate cause" rule is good public policy and increases citizen safety, yet they fail to provide any evidence that a lesser standard in other jurisdictions yields more dangerous results. Defendants suggest the "no proximate cause" rule comports with the traditional principles of proximate cause, yet they fail to provide any case law indicating that evaluating the egregiousness of the tortfeasor's conduct is part of the proximate cause element of negligence, rather than the breach of duty element. Defendants suggest the "no proximate cause" rule does not usurp the legislature's enactment of R.C. 2744.03(A)(6), yet they fail to provide any authority indicating the legislature intended that R.C. 2744.03(A)(6) does not apply to police officers during high-speed chases. The Defendants' argument is based on speculation and conjecture. In contrast, Plaintiffs argument is founded on concrete legal authority and principles, and shows that the "no proximate cause" rule should be abandoned.

### **II. Ohio Appellate Courts usurped the legislature by creating the "no proximate cause" rule and the "extreme or outrageous" standard.**

When the Ohio General Assembly crafted RC 2744.03(A)(6), it explicitly mandated the standard governing the liability of employees of political subdivisions, such as police officers. *Estate of Graves v. Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, 983 N.E.2d 266, ¶21-23. Under R.C. 2744.02(A)(6), the legislature stated police officers are immune from suit unless their actions were performed "with malicious purpose, in bad faith, or in a wanton or reckless manner." When the Generally Assembly imposed this standard, they did so unambiguously. *Estate of Graves, supra* at ¶21-23. They left no room for interpretation - "wanton or reckless" is

the standard of conduct, which removes liability from police officers acting within the scope of their duties. *Id.*

The “no proximate cause rule” was created by the Ninth District in *Lewis v. Bland*, and states an officer cannot be held liable for injuries to innocent third-parties that were sustained during a high speed chase, unless the officers’ *conduct* was “extreme or outrageous.” *Lewis v. Bland*, 75 Ohio App.3d 453, 456, 599 N.E.2d 814 (9th Dist. 1991). The “no proximate cause” rule considers whether the *conduct* of the officers rises to the level of “extreme or outrageous”, and if it does, the officers may be held liable.<sup>1</sup> *Id.* By heightening the acceptable standard of conduct, the “no proximate cause rule” defies and usurps the General Assembly’s mandate that police officers are not immune from suit where their conduct was “wanton or reckless”. R.C. 2744.02(A)(6).

Put differently, the General Assembly has mandated that a pursuing officer in a high speed chase may be liable for injuries to innocent third-parties where: (1) the officer’s conduct was wanton or reckless; and (2) the officer’s wanton or reckless conduct caused the plaintiff’s injuries. In contrast, the Ninth District defied the legislature and stated that a pursuing officer in

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<sup>1</sup> The plaintiff must also show that the officers’ extreme or outrageous conduct proximately caused the injuries to the innocent third-party in order to fully establish liability. *Lewis*, at 456-57. Therefore, the “no proximate cause rule” establishes two elements that must be met in order to prove the overarching proximate cause element. Under the “no proximate cause rule”, proximate cause is not established solely by determining the officer’s conduct was the natural and probable cause of the injury, but rather, proximate cause is established by showing: (1) the conduct of the officer was extreme or outrageous; and (2) the officers’ extreme or outrageous conduct caused the injuries. This court has never adhered to the principle that the tortfeasor’s *conduct* is relevant to the analysis of the proximate cause element. Rather, this court has held that proximate cause is established where the “negligent [act]... in a natural and continuous sequence produces a result which would not have taken place without the act.” *Strother v. Hutchinson*, 67 Ohio St.2d. 282, 287, 423 N.E.2d 467 (1981). The defendant’s conduct is evaluated separately from the cause, then, after the conduct has been evaluated, it is decided whether the defendant’s conduct caused the injury. The “no proximate cause rule” imports a standard of *conduct* into the test for *causation*.

a high speed chase may be liable for injuries to innocent third-parties where: (1) the officer's conduct was extreme or outrageous; and (2) the officer's extreme or outrageous conduct caused the plaintiff's injuries. The Ninth District usurped the legislature by judicially-imposing a heightened level of culpable conduct necessary to establish liability for a police officer in the context of high speed chases. Therefore, the "no proximate cause rule" should be abandoned and the standard created by the legislature in R.C. 2744.02(A)(6) should be applied.

**A. The "no proximate cause" rule does not comport with traditional principles of proximate cause.**

According to *Lewis v. Bland*, 75 Ohio App.3d 453, 599 N.E.2d 814 (9th Dist.1991), and the cases that follow it, police officers must engage in "extreme or outrageous conduct" before there can be proximate cause. This approach is contrary to traditional notions of proximate cause, which focus on the foreseeability of the consequence, not on the wrongfulness of the conduct that produces the result."

....

The argument that *Lewis* involves "proximate cause" as opposed to "duty" could devolve into a historical or pedagogical discussion of duty versus proximate cause. *See, e.g., Palsgraf v. Long Island R.Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). Suffice it to say, the bottom-line concerning potential responsibility is the same. It may or may not be good public policy to require "extreme or outrageous" conduct to remove immunity and impose liability upon police officers who pursue a fleeing suspect, but that question has been decided by the legislature when it only required "reckless" conduct.

Opinion of the Second District Court of Appeals at ¶ 34, 37 (Froelich Dissenting).

One may believe the "no proximate cause" rule is or is not good policy, but there can be no question it defies traditional principles of proximate cause. Proximate cause focuses on the foreseeability of the tortfeasor's conduct. It is an evaluation of whether or not the tortfeasor's conduct had a causal connection to the plaintiff's injuries. In contrast, the duty element of negligence focuses on the conduct of the tortfeasor. The duty/breach element of negligence is an

evaluation of how reasonable or unreasonable the tortfeasor's conduct was, separate from whether or not the tortfeasor's conduct caused the plaintiff's injuries. Under the "no proximate cause" rule, the culpability of the tortfeasor's conduct is evaluated in order to determine whether or not there was a causal connection. This is an improper evaluation of proximate cause. Simply, the "no proximate cause" rule defies traditional notions of negligence actions and proximate cause.

In *City of Caddo Valley v. George*, the Arkansas Supreme Court refused to adopt the "no proximate cause" rule on the basis that it defies traditional notions of proximate cause. *City of Caddo Valley v. George*, 340 Ark. 203, 212-14 (2000). The defendants in that case, the City of Caddo Valley, moved for a directed verdict in its favor on the question of proximate causation and on the issue of whether the fleeing suspect's actions constituted an efficient intervening cause. *Id.* at 212-13. The Court refused to decide the proximate cause issue as a matter of law and thoroughly explained why the "no proximate cause" rule defies traditional principles of proximate cause:

Because [proximate cause and intervening cause] are so closely intertwined, we consider them together. Proximate cause has been defined as that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury, and without which the result would not have occurred. Proximate causation is usually an issue for the jury to decide, and when there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. In other words, proximate causation becomes a question of law only if reasonable minds could not differ.

On the issue of whether or not there was an efficient intervening cause, this question is simply whether the original act of negligence or an independent intervening cause is the proximate cause of an injury. Like any other question of proximate causation, the question whether an act of omission is an intervening or concurrent cause is usually a question for the jury.... The original act or omission is not eliminated as a proximate cause by an intervening cause unless the latter is of itself sufficient to stand as the cause of the injury. The intervening cause must be such that the injury would not have been suffered except for the act, conduct or

effect of the intervening agent *totally independent* of the acts of omission constituting the primary negligence.

In this case, there was evidence to establish a causal connection between the actions of the police officers and the injuries to [the plaintiff]. But for their actions in continuing to pursue [the fleeing suspect], the jury could have reasonably found that the accident likely would not have happened. The events occurred in a natural and continuous sequence, thus making the officers' acts a proximate cause of the [plaintiff's] injuries. In short, the jury could have easily concluded that the actions of [the fleeing suspect], while admittedly an intervening cause were proper questions for the jury.

*Id.* at 212-14.

Ohio should adopt Arkansas' view on proximate causation in the context of high speed police pursuits that result in injuries to innocent third-parties.<sup>2</sup> Unlike the "no proximate cause" rule; the Arkansas approach is fair, comports with traditional notions of proximate cause, and does not usurp the legislature's enactment of Political Subdivision Tort Liability Act.

**III. The "no proximate cause" rule is a vestige of joint and several liability, which is no longer applicable in Ohio.**

The "no proximate cause rule" is a vestige from a time when Ohio had joint and several liability. The "no proximate cause" rule has a better justification in jurisdictions that apply the joint and several liability doctrine. Often times in high speed pursuit situations, fault can be allocated to both the fleeing suspect and the pursuing officer. Further, it is likely the fleeing suspect will be more at fault for the innocent plaintiff's injuries than the pursuing officer. In a "no proximate cause" rule jurisdiction with joint and several liability, the limitations on police officer liability shield the officer from the consequences of potentially paying the entirety of the plaintiff's damages when he may only have caused a small percentage of the damage; or, as otherwise stated in *Dewald v. State*, from being the "insurers of the conduct of the culprits they

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<sup>2</sup> The Arkansas approach to proximate cause rejects the "no proximate cause" rule and is the majority approach across the country.

chase.” *Dewald v. State*, 719 P.2d 643, 649 (Wyo. 1986). Put differently, the “no proximate cause” rule protects officers from the harsh consequences of pure joint and several liability because often times the fleeing suspect is more at fault than the pursuing officer. Thus, the “no proximate cause” rule makes more sense and is more logically applicable in joint and several liability jurisdictions as opposed to jurisdictions who do not apply pure joint and several liability.

Both Ohio and Wyoming adopted the “no proximate cause” rule when pure joint and several liability applied. *See Anderson Highway Signs and Supply, Inc., v. Close*, 6 P.3d 123, at 126-127 (Wyo. 2000) (stating Wyoming abolished joint and several liability in 1986 and adopted a scheme of several liability to replace it); *see also State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062, (1999) (striking down constitutionality of 1996 tort reform act and returning to the application of pure joint and several liability, which was the law in 1991 when Ohio adopted the “no proximate cause” rule). Thus, the initial adoption of the “no proximate cause” rule was more logical in Ohio and Wyoming at the time, because both states had an increased incentive to protect police officers from the harsh consequences of joint and several liability in pursuit situations.

However, Ohio has since abandoned the use of pure joint and several liability. In 2003, Ohio adopted a different fault allocation system - modified joint and several liability. *See R.C. §§ 2307.22 & 2307.23*. Under the modified scheme, a defendant can only be held jointly and severally liable for the entirety of a plaintiff’s economic damages where he is found to be greater than 50% at fault for the plaintiff’s injuries. *Id.* Further, each defendant is only responsible for plaintiff’s damages based on the amount of fault apportioned to him/her. *Id.* Thus, the newly adopted scheme heals many of the ills of the old pure joint and several liability scheme. Most

importantly, it protects defendants who are minimally at fault from being forced to pay for the conduct of another defendant who was apportioned a greater amount of fault.

Because Ohio has abandoned joint and several liability and adopted its new scheme, the “no proximate cause” rule is unnecessary. The adoption of the modified scheme defeats the need to protect officers from the severe effects of joint and several liability. No longer does the pursuing officer who is found to be 10% at fault have to pay the entirety of the plaintiff’s economic damages. No longer is the officer the insurer of the conduct of the insolvent fleeing suspect. Rather, the modified scheme states an officer pays only for his unreasonable conduct and the fleeing suspect pays for his.

However, Ohio’s decision to continue to apply the “no proximate cause” rule under its new fault appropriation scheme, has left innocent plaintiffs empty handed. Instead of receiving a small recovery from the wanton, malicious, or reckless police officer, the innocent plaintiff is left with nothing but the bleak hope that he may recover from the often insolvent, fleeing criminal.

Ohio’s new fault allocation scheme sought to heal the ills of joint and several liability by encouraging a system where tortfeasors pay only for their own negligent conduct. However, the “no proximate cause” rule unjustifiably flies in the face of that scheme. Instead of allowing a jury to allocate fault and payment responsibility to the potential tortfeasors, Ohio Appellate Courts have continued to apply the “no proximate cause” rule and left innocent plaintiffs perpetually empty handed. The continued application of the “no proximate cause” rule defies the legislature’s enactment of its fault allocation system and the Political Subdivision Tort Liability Act. In essence, the Appellate Courts have stated: ‘We follow the legislature’s clear mandate of fault allocation and police officer liability, except during high speed pursuits.’ This is impermissible.

**IV. Defendants' contention that the "no proximate cause" rule is the law in Kentucky, Indiana, Minnesota and Missouri is misleading and inaccurate.**

**A. Missouri has not adopted the "no proximate cause" rule.**

Defendants propose that the "no proximate cause" rule has been adopted by Missouri. However, this is inaccurate. Missouri has not adopted the "no proximate cause" rule, but rather, has simply held that an officer may not be the proximate cause of injuries to innocent third-parties under certain, fact-sensitive circumstances. *Stanley v. City of Independence*, 995 S.W.2d 485, 488 (Mo. 1999) (holding that officers were not proximate cause of injuries to innocent third-party under the facts before the court, but stating it, "[N]eed 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."); *See Moyer v. St. Francois Cty. Sheriff Dept.*, 449 S.W.3d 415, 418 (Mo.App. E.D. 2014); *See also Frazier v. City of Kansas*, 467 S.W.3d 327, 335-36 (Mo.App. W.D. 2015).

In *Moyer v. St. Francois*, the Eastern District of Missouri held that a pursuing officer could be the proximate cause of injuries sustained by an innocent third-party during a high speed pursuit. *Moyer*, supra at 418. The court stated that that the case was factually distinguishable from *Stanley*, a case decided by the Supreme Court in which a pursuing officer was held not to be the proximate cause of injuries to a third-party. *Id.* The court acknowledged the Supreme Court of Missouri, in *Stanley*, expressly stated the proximate cause inquiry in the high speed pursuit context was a fact-sensitive one, and that "other fact situations [may exist] where the alleged negligence of a police officer may in fact proximately cause a collision between the fleeing vehicle and a third-party." Thus, at least one appellate court in Missouri has rejected the "no proximate cause" rule.

Similar to the Eastern Division Missouri Appellate Court in *Moyer*, the Western Division Appellate Court in *Frazier v. City of Kansas* refused to adopt the “no proximate cause” rule. *Frazier*, 467 S.W.3d 335-36. In *Frazier*, the court analyzed the proximate cause rules applicable to police officers in the context of high speed pursuits that result in injuries to innocent third-parties. *Id.* The court conducted a factual comparison between the case at bar and three other cases in which a high speed pursuit ended in an injury to a third-party. *Id.* The court compared *Stanley*, *Moyer*, and *Dilley v. Valentine*, 401 S.W.3d 544 (Mo.App. W.D. 2013). *Id.* The court found that *Moyer* was factually distinguishable from the case before it, *Stanley*, and *Dilley*. *Id.* The court held that the officer was not the proximate cause of the third-party’s injuries and stated, “we find no distinction in the duration of pursuit, nor in any other significant fact that would make the application of *Dilley* and *Stanley* inappropriate to the facts in the case at bar.” *Id.* Thus, the court made a fact-sensitive inquiry in coming to its decision that the police officer was not the proximate cause of the third-party’s injuries. *Id.* The court did not adopt a bright-line “no proximate cause” rule, but instead stated that proximate cause was a fact-sensitive inquiry and can be proven under certain factual circumstances. *Id.*

Therefore, Missouri has not adopted the “no proximate cause” rule as stated by Defendants. Rather, Missouri has adopted a fact-sensitive analysis of proximate cause, where the circumstances of each case must be closely evaluated.

**B. Indiana has not adopted the “no proximate cause” rule.**

Indiana Courts do not apply the “no proximate cause” rule where a police officer “continues pursuit under circumstances where a reasonable officer, who observes the dangerous activities of the fleeing [suspect], would have called off the chase.” *Smith v. Ciesielski*, 975 F.Supp.2d 930, 946 (S.D. Ind. 2013) quoting *City of Indianapolis v. Earl*, 960 N.E.2d 868, 871

(Ind.App. 2012). Put differently, Indiana police officers may be the proximate cause of injuries to innocent third-parties where he/she takes actions that foreseeably resulted in the fleeing suspect's negligence. *Ciesielski*, 975 F.Supp.2d at 945. Thus, officers may be held liable for injuries to innocent third-parties where, in initiating or continuing the chase, they failed to properly weigh the foreseeable risks to public safety created by their decision to chase the fleeing suspect.<sup>3</sup> *Id.*; *See also, Yancey v. City of Hobart*, Ind. Super. No. 45D02-0808-CT-00224, 2011 WL 7070240 (June 13, 2011) (Verdict and Settlement Summary) (questions of police officer's liability and proximate causation were presented before a jury where an innocent, third-party plaintiff was injured by a fleeing suspect during a high-speed chase); *Yancey v. City of Hobart*, Ind. Super. No. 45D02-0808-CT-00224, 2011 WL 6813700 (Lake County) (June 14, 2011).

In coming to its conclusion, the district court acknowledged *Bailey v. L.W. Edison Charitable Found. Of Grand Rapids, Inc.*, the case cited by the Defendants for the proposition that Indiana abides by the "no proximate cause" rule. *Id.* at 944. The district court stated that the *Bailey* court merely held that police cannot be the proximate cause only where they were engaged in a reasonable pursuit. *Id.* However, while officers may not be liable for the negligence or recklessness of the suspect they are pursuing, they are liable for their own unreasonable conduct. *Id.* distinguishing *Bailey v. L.W. Edison Charitable Found. Of Grand Rapids, Inc.*, 152 Ind. App. 460, 284 N.E.2d 141 (1972). Thus, officers may be the proximate cause for injuries to third-parties where their own negligence contributed to the injuries.

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<sup>3</sup> This is precisely the type of negligence for which Argabrite bases her claim. First, Argabrite alleges the officers failed to properly weigh the foreseeable risks to the public by initially engaging in the high-speed pursuit of a suspect known only to have stolen a television. Second, Argabrite alleges the officers failed to properly weigh the foreseeable risks to the public by failing to terminate their pursuit in a timely manner when the speeds and conditions of the pursuit were unreasonably dangerous.

**C. Minnesota has not adopted the “no proximate cause” rule.**

Minnesota has not adopted the “no proximate cause” rule as suggested by Defendants. Defendants rely on the appellate decision rendered in *Pletan v. Gaines*, which held that, “In order for [an] officer’s conduct to be a proximate cause [to innocent third-parties], either the officer’s own driving must have been a substantial factor in bringing about the [harm to the innocent third-party] or it must be foreseeable that his own driving would cause such damage.” *Pletan v. Gaines*, 481 N.W.2d 566, 569-70 (Minn.App. 1992). The court went on to state that the injured plaintiff failed to offer any evidence that the officer’s driving, and not the driving of the fleeing suspect, was the cause of the plaintiff’s injuries/death, and therefore could not be the proximate cause. *Id.* at 570. Thus, the court was not adopting a bright line rule about proximate causation, but rather, it found proximate causation could not be found under the facts of the case before it.

*Pletan v. Gaines* was appealed and later heard by the Minnesota Supreme Court. *See Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992). The Court held the police officer engaged in pursuit was protected by official immunity because his decision to pursue was discretionary and because the officer’s conduct was not willful or malicious, and therefore, an exception to immunity was not applicable. *Id.* at 41. The Court declined to address whether the officer’s conduct, as a matter of law, was the proximate cause of the plaintiff’s injury. *Id.* Thus, the Minnesota Supreme Court has failed to address the issue. Further, if the court wished to fashion a bright line rule that an officer could not be the proximate cause of injuries to innocent third-parties resulting in a collision with the fleeing suspect, it could have easily done so.

Moreover, the Supreme Court in *Pletan v. Gaines* alluded to several important factors present in Minnesota that are not present in Ohio, which helped them in coming to their decision

that the pursuing officer was protected by official immunity. *Id.* at 42-43. The Minnesota Legislature passed the Crime Victims Reparations Act which, “expressly provides that the state will provide economic loss compensation to third party victims for ‘injury or death caused by a driver of a motor vehicle in the immediate act of fleeing the scene of a crime in which the driver knowingly and willingly participated.’” *Id.* at 42. Additionally, Minnesota is a No-Fault state which helps to ensure that the injured innocent third-party will be compensated in situations like those presented in our case and in *Pletan v. Gaines*. *Id.* at 43. Thus, Minnesota courts may be more likely to grant immunity to its police officers than Ohio courts because there are additional avenues of recovery and compensation for injured innocent third-parties which are not available to similarly situated Ohio plaintiffs.

Furthermore, *Xia v. Yang*, provides additional evidence Minnesota has not adopted the “no proximate cause” rule. *See Xia v. Yang*, NoA07-1921, 2008 WL 4007401 (Minn.App. 2008). In *Xia v. Yang*, an innocent-third party sought relief against a pursuing officer for the injuries he sustained when the fleeing suspect collided with his vehicle. *Id.* at \*1. The court held that the pursuing officer was not entitled to official immunity because he failed to activate his sirens, a ministerial duty. *Id.* at \*7. Proximate cause was not discussed by the court and the case was not heard on appeal or remand by another court. *Id.* If there were a bright line no proximate cause rule, the case would have been disposed of on those grounds, but it was not. Thus, Minnesota has not adopted the “no proximate cause” rule.<sup>4</sup>

For these reasons, it is improper to conclude that Minnesota has adopted the “no proximate cause” rule.

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<sup>4</sup> *Plaster v. City St. Paul* presents a similar pursuit situation in which an innocent third-party was injured. *See Plaster v. City of St. Paul*, No. A10-1738, 2011 WL 1833131, (Minn.App. 2011). In *Plaster*, the court ruled that the pursuing officer was entitled to immunity. However, it failed to address or dispose of the case on proximate causation grounds. *Id.*

**D. Kentucky has not adopted the “no proximate cause” rule.**

Kentucky has not adopted the “no proximate cause” rule. The case relied on by Defendants for the proposition that Kentucky has adopted the “no proximate cause” rule was deemed “NOT TO BE PUBLISHED,” and therefore, under Kentucky Court Rule 76.28(4)(c), its holding has no authority in Kentucky. *See Plummer v. Lake*, Ky. App. No. 2012-CA-001559-MR, 2014 WL 1513294, (Apr. 18, 2014). Under Kentucky Court Rule 76.28(4)(c), “Opinions that are not to be published shall not be cited or used as binding precedent[.]” However, unpublished appellate decisions rendered after January 1, 2003, may be cited, but only for “consideration” where there is “no published opinion that would adequately address the issue before the court.”<sup>5</sup> K.C.R. 76.28(4)(c). As a result, *Plummer v. Lake*, is not binding precedent.<sup>6</sup> At most, the decision may be used for “consideration.”

Further, Defendants’ reliance on *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky. 1952) is improper because that case does not fashion a bright line “no proximate cause” rule. In *Chastain v. Ansman*, the Western District of Kentucky held that whether a fleeing suspect’s intervening criminal acts supersede a pursuing officer’s negligence is a fact sensitive inquiry. *Chastain v. Ansman*, W.D. Ky No. 3:07-CV-601-S, 2009 WL 2761740 (Aug. 31, 2009). The court stated that, “*Chambers* does not hold that all intervening criminal acts are not reasonably foreseeable.” *Id.* In *Ansmann*, though the negligent officer was in front of the fleeing suspect

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<sup>5</sup> As will be discussed *infra*, *Chastain v. Ansman* adequately addresses the issue of the “no proximate cause” rule and holds that the state of Kentucky does not apply a bright line “no proximate cause” rule. *See Chastain v. Ansman*, W.D. Ky. No. 3:07-CV-601-S, 2009 WL 2761740, at FN 6 (Aug. 31, 2009).

<sup>6</sup> In arguendo, if *Plummer v. Lake* was found to be binding precedent, it is nevertheless invalid because it improperly relies on *Chambers v. Ideal Pure Milk Co.* for the proposition that Kentucky has adopted a bright line “no proximate cause rule.” As discussed *infra*, *Chastain v. Ansman* explicitly held that *Chambers* was not meant to be read as fashioning a bright line “no proximate cause” rule. *See Chastain v. Ansman*, at FN 6.

waiting on his arrival rather than actually pursuing the fleeing suspect, the court held that, “[The officer] is not absolved from liability in this case merely because [the fleeing suspect] was fleeing from the police when he rear-ended the [innocent third-party plaintiff].” *Id.* at \*3. Thus, *Chambers* did not fashion a bright line “no proximate cause” rule in the context of police pursuits. Rather, proximate cause is a fact sensitive inquiry because the mere fact that a suspect was fleeing police does not absolve the causal connection between the officer’s negligence and the innocent plaintiff’s injuries.

For these reasons, Kentucky has not adopted the “no proximate cause” rule as alleged by Defendants.

### CONCLUSION

For these reasons, the court should abandon the “extreme or outrageous” standard. If this Court decides to abandon the “extreme or outrageous” standard, Argabrite asks that her case be remanded for further proceedings under the “wanton or reckless” standard prescribed under RC 2744.03. However, if the court applies the “extreme or outrageous” standard, it should hold that an issue of fact exists as to whether Defendants’ conduct was “extreme or outrageous” and the proximate cause of Argabrite’s injuries.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

PAMELA ARGABRITE, : Case No.: 2015-0348  
Appellants, :  
v. :  
JIM NEER, Individual and in his official : On Appeal from the Montgomery  
Capacity Miami Township Police : County Court of Appeals, Second  
Department, et al., : District Court of Appeals Case No. 26220  
Appellees.

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APPENDIX OF PLAINTIFF-APPELLANT, PAMELA ARGABRITE

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IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

PAMELA ARGABRITE

Plaintiff-Appellant

v.

JIM NEER, et al.

Defendants-Appellees

Appellate Case No. 26220

Trial Court Case No. 12-CV-7402

(Civil Appeal from  
Common Pleas Court)

.....  
OPINION

Rendered on the 16th day of January, 2015.  
.....

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HALL, J.

{¶ 1} Around noon on July 11, 2011, Miami Township police officers Jim Neer and Gregory Stites pursued fleeing burglary suspect Andrew Barnhart along streets in Miami Township and Washington Township while Deputy Chief John DiPietro supervised from the police department. Deputy Tony Ball and Sergeant Daniel Adkins of the Montgomery County Sheriff's Office were also providing assistance. The pursuit ended when the suspect pulled into the opposing traffic lane and crashed head-on into the oncoming vehicle driven by Pamela Argabrite. The suspect was killed, and Argabrite was seriously injured. Argabrite filed a negligence action against the five officers involved in the pursuit to recover damages for her injuries.

{¶ 2} The defendants all moved for summary judgment, contending that they are immune from liability under R.C. 2744.03(A)(6)(b) of the Political Subdivision Tort Liability Act, which "provides immunity to employees of a political subdivision for acts that are not committed in a wanton or reckless manner," *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 39. The defendants also contended that they were not the proximate cause of Argabrite's injuries under the rule applied by this Court in *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 (2d Dist.)<sup>1</sup>, which requires extreme or outrageous conduct by police officers before proximate cause is established in a pursuit where the injuries result from a crash by the pursued vehicle. The county officers also argued that they were not pursuing the suspect. Argabrite argued that the pursuit was wanton and reckless because the officers engaged in a high-speed chase

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<sup>1</sup> We note that *Whitfield* was effectively overruled, in part, on other grounds by *Anderson v. Massillon*, 134 Ohio St.3d 380, at ¶ 29-31.

through commercial and residential areas during heavy traffic when the suspect was not violent and could have been later apprehended with a warrant.

{¶ 3} The trial court granted the summary judgment motions on the proximate-cause issue. As to the county officers, the court concluded that no reasonable juror could find that the conduct of either officer was extreme or outrageous. Officer Adkins, said the court, was not involved in the pursuit, and Officer Ball's tracking of the suspect was at a distance and at reasonable speeds, breaking off well before the accident in favor of the Miami Township officers. As to the township officers, the trial court concluded that their conduct was reckless, but no reasonable juror could conclude that their conduct was extreme or outrageous.

{¶ 4} Argabrite appealed, alleging in the sole assignment of error that the trial court erred by granting summary judgment. Our review of a summary judgment decision is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). This means we use the same standard that the trial court should have used, and we determine whether the evidence presents a genuine issue of fact for trial. *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980). The trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist. 1993). Therefore, we could review and analyze whether the trial court's conclusion that Township officers Neer and Stites were reckless is supported by the record or, if a genuine issue of recklessness is found, whether that behavior was the proximate cause of Barnhart's collision with the Argabrite vehicle. If there is no genuine issue of either recklessness or proximate cause resulting from recklessness, then the officers are entitled to immunity under R.C. 2744.03(A)(6). But we

need not, and do not, engage in that analysis at this juncture because of our determination that the no-proximate-cause rule of *Whitfield v. Dayton*, requiring extreme or outrageous conduct, is dispositive of this appeal.

{¶ 5} Argabrite asks us to reconsider the proximate-cause rule applied in *Whitfield*. This rule comes from the Ninth District's "no proximate cause" holding in *Lewis v. Bland*: "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." 75 Ohio App.3d 453, 456, 599 N.E.2d 814 (9th Dist.1991). We adhered to this holding in *Whitfield* because we recognized it as "established law" in Ohio. *Whitfield*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, at ¶ 59. "Ohio appellate districts, including our own," we said, " \* \* \* apply the 'no proximate cause' holding of *Lewis* to cases where pursuits end in injury to innocent third parties or to occupants of the pursued vehicle without direct contact with a police vehicle." *Id.* at ¶ 57, citing *Jackson v. Poland Twp.*, 7th Dist. Mahoning Nos. 96 CA 261, 97 CA 13, and 98 CA 105, 1999 WL 783959 (Sept. 29, 1999); *Pylypiv v. Parma*, 8th Dist. Cuyahoga No. 85995, 2005-Ohio-6364; *Shalkhauserv. Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129 (9th Dist.); *Heard v. Toledo*, 6th Dist. Lucas No. L-03-1032, 2003-Ohio-5191, ¶ 12 (rejecting an argument that *Lewis* is "outdated, contrary to sound public policy and should no longer govern Ohio cases"); and *Sutterlin v. Bamard*, 2d Dist. Montgomery No. 13201, 1992 WL 274641 (Oct. 6, 1992) (a previous case in which this district followed *Lewis's* approach).

{¶ 6} According to Argabrite, the "no proximate cause" rule is the minority position in this country: "The majority of jurisdictions, focusing on the importance of public safety, adopt the longstanding, general rules of proximate causation in which a police officer may be liable for damages where his actions are a substantial factor in bringing about the end result, or at least when their conduct is reckless. Courts that reject the 'no proximate cause rule' have urged that using the majority standard increases public safety and is generally more consistent with the policies of police agencies." (Brief of Plaintiff-Appellant, Pamela Argabrite, 25). Argabrite also cites the dissenting judge in *Whitfield*, Judge Brogan, who disagreed with the "no proximate cause" rule. He agreed with the dissenting judge in *Lewis* that the rule fails to recognize that " 'multiple actors can combine to provide causation in a given instance.' " *Whitfield* at ¶ 118 (Brogan, J., dissenting), quoting *Lewis* at 459 (Cacioppo, J., dissenting). Judge Brogan agreed with the majority view, that if a plaintiff alleges police negligence in a pursuit, the issue of proximate cause should be considered simply a question of fact. Rather, we should say that Judge Brogan *agrees* with the majority view. He is the trial judge in this case, and in his summary-judgment decision he urges us to reverse *Whitfield* on this point.

{¶ 7} The "no proximate cause" rule is still the established law in this state. Since *Whitfield*, no Ohio court has questioned the rule, and at least one has rejected an argument not to follow it, see *Perry v. Liberty Twp.*, 11th Dist. Trumbull No. 2012-T-0056, 2013-Ohio-741, ¶ 18-21. We are not convinced that this is the case in which to reconsider the rule.

{¶ 8} The remaining issue is whether the trial court applied the "no proximate cause" rule correctly in this case. To ~~determine~~ whether the police officers' conduct was extreme

or outrageous in *Whitfield* we referred to the description of extreme and outrageous conduct adopted by the Ohio Supreme Court: The conduct is " '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, Teamsters, Chauffeurs, Warehousemen, & Helpers of America*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983), quoting 1 Restatement of the Law 2d, Torts, Section 46, Comment d (1965). "Obviously, this is an exceptionally difficult standard to meet." *Whitfield*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, at ¶ 61.

(¶ 9) "In a case decided on summary judgment, we must determine whether an issue of material fact remains to be litigated, whether the moving party is entitled to judgment as a matter of law, and whether when viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach a conclusion that is adverse to the nonmoving party." *Snyder v. Ohio Dept. of Natural Resources*, Slip Opinion No. 2014-Ohio-3942, ¶ 20, citing Civ.R. 56(C), and *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). The evidence here is primarily the depositions of the defendant police officers plus the depositions and affidavits of two experts retained by Argabrite. About the relevant facts the evidence shows no genuine dispute. The question here is whether a reasonable mind, viewing the evidence most strongly in Argabrite's favor, could find that the conduct of any of the officers was extreme and outrageous, that is, "atrocious, and utterly intolerable in a civilized society."

{¶ 10} At 11:37 a.m. on July 11, 2011, Sergeant Rex Thompson was sitting in his office at the Miami Township Police Department when he heard on his police radio dispatch that there was a burglary in progress in Washington Township. The suspects were identified as two black males who had just broken into a residence, taken some items, and were leaving in a white vehicle without a front license plate. About 15 minutes later, the suspects' vehicle was further described as a white, older model "box style" Chevy Caprice, missing its hubcaps. The suspects were said to be wearing white t-shirts and fleeing in the direction of Interstate 675.

{¶ 11} Sergeant Thompson was the shift supervisor of the Miami Township police road patrol division that day and was in charge of all the Miami Township police officers and responsible for any police pursuits. Thompson left his office and got into his cruiser so that he could monitor the roadways nearby in the event the suspects' vehicle drove past. While Thompson monitored the roadway, he heard on the radio one of his patrol officers tell officer Gregory Stites that the description of the car involved in the burglary sounded like a car last seen at a residence on Mardell Drive. Thompson radioed Stites that he would meet him on Mardell Drive to investigate.

{¶ 12} Thompson arrived first. Parked in the driveway at 2037 Mardell Drive, he saw an older, white Chevy Caprice with no hubcaps. The driver's side door was open and someone was sitting in the driver's seat with a leg draped out the door. Thompson pulled into the driveway and parked his cruiser 6 to 8 feet behind the car. Meanwhile, Stites had arrived and pulled up to the curb.

{¶ 13} Thompson got out and slowly approached the car, hoping to catch its occupant off-guard. Thompson was within 10 feet of the open driver's side door when the

person sitting in the driver's seat exited the car, talking on a cell phone. He startled when he saw Thompson and immediately turned around and got back into the car. Thompson, concerned that the man might be attempting to get a weapon, drew his gun and started shouting at the man to stop. But he didn't stop. Instead, he slammed the car door closed and started the engine. Thompson moved to within touching distance of the driver's side and continued to shout to the suspect through the open driver's side window, "Police, stop, don't do it." (Thompson dep. 21). The suspect didn't listen. He revved the engine, dropped the car into reverse, and tires spinning, slammed into Thompson's cruiser. The suspect then threw the car into drive and smashed into the brick garage in front of him. Again the suspect dropped into reverse and slammed into the cruiser. Suddenly, the passenger-side door opened and a man, who Thompson had not seen, leapt out and started to run. At the same time, the suspect threw the car into drive and cranked the steering wheel to the right. Its tires spinning, the car tore off a corner section of the brick garage and escaped down the side yard. The car drove through several back yards before making it back to Mardell Drive.

{¶ 14} Thompson called in the license plate of the fleeing car. Then, since there were other officers around, he turned his attention to the fleeing passenger. Thompson found the man laying in the ravine behind the house, where the man had broken his leg. After calling for medical assistance, Thompson stayed with the man and asked him the name of the driver, but the man refused to say.

{¶ 15} Miami Township police officer Jim Neer was on patrol a few blocks away from Mardell Drive when he heard the radio broadcast about the burglary and the white car on Mardell Drive. He headed that way, arriving on the street just in time to see the car going

through the side yard. Neer turned on his lights and sirens and told dispatch that he was in pursuit. Officer Stites, parked in front of the Mardell Drive house, joined Neer in the pursuit.

{¶ 16} John DiPietro was the Deputy Chief of Police for Miami Township. When the radio broadcast about the burglary went out, he was at the police service garage. Initially, DiPietro only heard a small portion of the information relayed over the radio as he was talking with people at the garage, and the radio did not have his full attention. DiPietro did hear a transmission from Thompson stating that he was on patrol looking for the suspects' vehicle. Then DiPietro thought he heard Thompson say that he had been hit. Shortly thereafter, when DiPietro heard Thompson say that he was out of service, he started paying attention. DiPietro was not entirely sure what had just occurred, but based on what he had heard, he assumed that some sort of violent encounter had taken place between Thompson and the suspect. After it became apparent to DiPietro that several officers were now pursuing the suspect, and that Thompson was out of service, DiPietro realized that it was his duty, as the next highest ranking officer listening to the radio, to assume control of the pursuit, which he did at 11:54 a.m. By then, DiPietro had left the service garage and was heading back to the police department. He began monitoring the pursuing officers' actions and asked them to keep calling out their locations and any other information. DiPietro's intention was to have other officers get ahead of the pursuit and deploy Stop Sticks to halt the suspect's vehicle. He also asked dispatch to issue an alert to surrounding agencies.

{¶ 17} From Mardell Drive the suspect's car headed south on Graceland Street and then east on State Route 725. At the Lyons Road intersection the light was red, and the

suspect slowed as he approached the intersection before going into the opposing lane, through the red light, and north on Lyons Road. Neer, then Stites, cautiously followed through the intersection. By the time Neer was on Lyons Road, the suspect was more than 100 yards ahead of him. At McEwen Road, the suspect slowed and turned south. As the suspect approached S.R. 725, he slowed and waited for traffic to clear before continuing. Neer and Stites also slowed before proceeding through the intersection, "inch[ing] [their] way through it as well." (Stites dep. 39). Captain Karen Osterfeld of the Montgomery County Sheriff's Office assisted by blocking westbound traffic from entering the S.R. 725-McEwen Road intersection.

{¶ 18} Further south of S.R. 725, on McEwen Road, is the Montgomery County Sheriff's Office Washington Township substation. Deputy Tony Ball was there when he heard over his radio that Miami Township officers were headed into Washington Township. Ball got into his cruiser and headed north on McEwen Road. Before he got to S.R. 725, a white car that matched the description of the vehicle being driven by the suspect passed him in the opposite lane, traveling "faster than normal" and going into opposing lanes of travel. (Ball dep. 14-15). Ball could not see any police vehicles in pursuit, though he saw their lights in the distance and figured that they had gotten "held up" at an intersection. (*Id.* at 17). He decided to follow the suspect to at least keep eyes on it until the Miami Township officers caught up. Ball turned on his lights and siren, made a u-turn, and immediately turned off the lights and siren. At Spring Valley Pike intersection, Ball again turned on his lights and siren briefly and followed the suspect west. Ball looked back to see whether the Miami Township officers were close enough so that he could "get out of their way," (*Id.* at 22), as he was only trying to keep the suspect in sight and did not intend to pursue. They

hadn't caught up yet. As he followed the suspect, Ball activated either his lights or his lights and siren when he was passing vehicles or going through intersections in order to warn motorists that he and the Miami Township officers were coming through the area. Finally, Ball saw that the Miami Township police officers had caught up, so he began looking for a place to pull over to allow them to pass. Fearing that if he pulled over or tried to maneuver out of their way, they would follow him, Ball radioed the officers to pass him when he was just east of Washington Church Road. When he pulled into the middle lane and slowed, Neer and Stites passed him. Ball continued west on Spring Valley Pike without his lights or siren, though he occasionally turned on his lights to pass a vehicle.

{¶ 19} After Neer and Stites passed Ball, they accelerated because the suspect was now well ahead of them. They slowed as they crested a hill to see if the suspect had gone down a side street, but Neer saw the white car ahead of them, at the S.R. 741 intersection. The suspect slowed, or stopped, and waited for traffic to clear the intersection before going through a red light and turning south.

{¶ 20} Sergeant Daniel Adkins of the Montgomery County Sheriff's Office heard the radio broadcast about the burglary while he was on patrol in Washington Township. While driving to the scene of the burglary, Adkins heard that the suspects had left the area in an older white car, so Adkins started driving around the general area, hoping to find it. When he heard over the radio that Miami Township officers were in pursuit, Adkins began to follow the pursuit from the north, thinking that they might need him to assist in clearing intersections or to wait for the suspect to flee on foot. He worked his way over to S.R. 741, reasoning that if the suspect went north on that road, he (Adkins) would need to help direct traffic because at that time of the day traffic would be "horrendous." (Adkins dep. 12). But

the suspect went south, and Adkins never saw him.

{¶ 21} When Neer reached the Spring Valley Pike and S.R. 741 intersection, he slowed, then stopped, and made sure no traffic was coming in either direction before proceeding. Once on S.R. 741, Neer accelerated in order to catch up to the suspect, who was well ahead of him and cresting a hill near Waldruhe Park. Neer and Stites lost sight of the suspect until they crested the same hill. When they caught sight of him again, they watched him move left into the opposing lane of traffic and crash head-on into Argabrite. The crash was announced over the radio at 11:57 a.m. When Ball heard the announcement, he was stopped at a red light at the S.R. 741 intersection. When the light turned green, he turned on his lights and siren and responded to the crash to assist.

{¶ 22} Argabrite contends that the pursuit was extreme or outrageous because the officers pursued at high speeds through residential areas, because the police officers violated their respective policies on motor vehicle pursuits, and because they knew who the suspect was and could have arrested him with a warrant.

{¶ 23} In all, the pursuit covered just under 6 miles and lasted just under 7 minutes. The speed limits along the route ranged from 25 m.p.h. on Graceland Street to 45 m.p.h. on S.R. 725 to 35 m.p.h. on Spring Valley Road to 55 m.p.h. on S.R. 741. Ball estimated that while on McEwen Road he drove 45-50 m.p.h. Stites testified that on Spring Valley Road, before he reached Washington Church Road, he was traveling at 45-50 m.p.h. Neer testified that, after he passed Ball, he accelerated to between 60 and 80 m.p.h. because the suspect was now well ahead of him. Stites said that on S.R. 741 he never went over 70 m.p.h. The weather during the pursuit was clear, dry, and sunny. Neer and Stites both testified that the traffic during the pursuit was generally light. Stites said that he was able

to negotiate it without any problems. Under the described circumstances, no reasonable juror could conclude that the officers' speeds during the pursuit were extreme or outrageous.

{¶ 24} The Miami Township Pursuit of Motor Vehicles Policy allows an officer to pursue a fleeing suspect who the officer has probable cause to believe committed a burglary or felonious assault. (Miami Township Pursuit of Motor Vehicles Policy, 41.2.8(C)). But the policy also states that "[i]f the risk to the public from the initiation or continuation, of a pursuit outweighs the risk from not initiating the pursuit or discontinuation, the pursuit shall be terminated." (*Id.*). An officer "must terminate a pursuit" when "[t]he risks to personal safety and/or the safety of others outweigh the dangers presented if the suspect is not apprehended" or when "[t]he identity of the offender is known and risk of escape poses less threat than risk from attempt to capture." (*Id.*, at 41.2.8(C)(7)(b)(1) and (2)). An officer must also terminate a pursuit "when the probability of harm to the officer or general public is increased by the actions of the suspect vehicle," which occurs when "[t]he suspect vehicle travels into oncoming traffic" or when "[s]peeds increase to a level unsafe for conditions." (*Id.* at 41.2.8(C)(8)(a)(1) and (4)). According to the Montgomery County Sheriff's Office pursuit policy, the only offense for which a deputy may pursue a suspect is a "felony involving the infliction or threatened infliction of serious physical harm." (General Orders Manual, 5.1.4(A)(2) (5th Ed.)).

{¶ 25} Even if it is assumed for the sake of analysis that the officers did violate their respective pursuit policies, their conduct was not extreme or outrageous. The most that can be said of a violation of a "departmental policy enacted for the safety of the public" is that it "may be relevant to determining the culpability of a course of conduct." *Anderson*, 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 (saying, "a violation of an internal departmental procedure is irrelevant to the issue of whether appellees' conduct constituted willful or wanton misconduct"). "Without evidence of an accompanying knowledge that the violations "will in all probability result in injury," *Fabrey [v. McDonald Village Police Dept.]*, 70 Ohio St.3d [351] at 356, 639 N.E.2d 31 [ (1994) ] evidence that policies have been violated demonstrates negligence at best." *Anderson* at ¶ 38, quoting *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 92. Here, even if there is a factual question as to whether either Neer or Stites violated their pursuit policy, there is no evidence to conclude that either knew that the violation would probably cause someone injury. Neer testified that he knew that under the pursuit policy he could pursue a fleeing suspect who had committed a burglary or felonious assault. DiPietro testified that he did not believe that any of the information that he received from his officers during the pursuit warranted terminating the pursuit. Although DiPietro never asked for the speeds of the vehicles, we note that, in all, he was in control of the pursuit for only about 3 minutes. With regard to Ball and Adkins not only is there is no evidence that either of them knew of any violation of their pursuit policy, but if there was a violation, there is no evidence that either knew that the violation would probably cause someone injury and, regardless of the standard applied, their actions were not the proximate cause of the eventual crash. Each of Argabrite's experts states in his affidavit that the defendants intentionally disregarded their respective pursuit policies. (See *McDevitt Aff.* ¶ 5; *Ashton Aff.* ¶ 6). This evidence, though, "does not create any issues of fact, but merely states appellant's position with respect to appellees' culpability, which is a legal conclusion." (Citation omitted.) (Emphasis

sic.) *Shalkhauser* at 51.

{¶ 26} Neer and DiPietro each testified that he did not know who the suspect was until after the crash. But Stites knew early on. Three months earlier, the same white car had failed to stop for another officer, and Stites and that officer discovered that the car was registered to Andrew Barnhart's mother. One could speculate whether the officers should have discontinued the pursuit, and at what point that decision should be made. But that's not the right question here. The question is, was the pursuit extreme or outrageous? We do not think that a reasonable person could fairly say that it was.

{¶ 27} 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. While one of Argabrite's experts states in his affidavit that Neer's, Stites's, DiPietro's, and Ball's conduct was outrageous and unconscionable, (see *McDevitt Aff.* ¶ 5), such evidence, as we said above, states a legal conclusion, not a factual assertion. The trial court disagreed and so do we.

{¶ 28} Lastly, we need not address whether the officers are immune under the Political Subdivision Tort Liability Act. As we said in *Whitfield*, "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." *Whitfield*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, at ¶ 44. That issue is dispositive.

{¶ 29} The sole assignment of error is overruled.

{¶ 30} The trial court's judgment is affirmed.

WELBAUM, J., concurs.

FROELICH, P.J., dissenting.

{¶ 31} I dissent from the majority's conclusion that *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 (2d Dist.), should continue to be followed.

{¶ 32} A claim for personal injuries requires the existence of a duty, the defendant's breach of that duty, and injury or damages that are proximately caused by that breach. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, ¶ 22. Without proximate cause, there can be no liability.

{¶ 33} Proximate cause is the law's distinction between the injury's cause in fact and causation for which society holds an actor responsible.<sup>2</sup> The Supreme Court of Ohio has discussed proximate cause, stating:

The term, "proximate cause," is often difficult of exact definition as applied to the facts of a particular case. However, it is generally true that, where an original act is wrongful or negligent and in a natural and continuous sequence produces a result which would not have taken place without the act, proximate cause is established, and the fact that some other act unites with

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<sup>2</sup> Everything causes everything. As we stated in *Didier v. Johns*, 114 Ohio App.3d 746, 684 N.E.2d 337 (2d Dist.1996):

In our universe, all events can be analyzed as caused by all other events. It is a weary truism now, thanks to the explorations of chaos theory, that "but for" the flapping of a butterfly's wings in Mexico, Dorothy would never have been blown to Oz.

On the scale of human (not just physical) events, historical interactions have been thoroughly revealed and explored. In short, the "but for" analysis casts a net so wide that conceivably all events are traceable to all other events, and the touchstone of individual responsibility sinks beneath a sea billowing with enumerable occurrences all jostling each other.

(Footnotes omitted.) *Id.* at 753 (Young, J.).

the original act to cause injury does not relieve the initial offender from liability.

*Clinger v. Duncan*, 166 Ohio St. 216, 222, 141 N.E.2d 156 (1957). An injury is the natural and probable consequence of an act if the injury complained of "could have been foreseen or reasonably anticipated" from the conduct. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 287, 423 N.E.2d 467 (1981).

{¶ 34} According to *Lewis v. Bland*, 75 Ohio App.3d 454, 599 N.E.2d 814 (9th Dist.1991), and the cases that follow it, police officers must engage in "extreme or outrageous conduct" before there can be proximate cause. *Id.* at 456. This approach is contrary to traditional notions of proximate cause, which focus on the foreseeability of the consequence, not on the wrongfulness of the conduct that produces the result.

{¶ 35} Ohio's sovereign immunity statute sets forth standards imposing liability of governmental entities and their employees for wrongful conduct. R.C. 2744.03(A)(6) grants employees of political subdivisions immunity from liability, unless any of three exceptions to that immunity applies. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 21. Those exceptions are (1) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (2) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; and (3) civil liability is expressly imposed upon the employee by a section of the Revised Code. R.C. 2744.03(A)(6)(a)-(c). Thus, of relevance here, police officers involved in police chases have a duty not to proximately cause injury by acting maliciously, in bad faith, or in a wanton or reckless manner. R.C. 2744.03(A)(6)(b). They are immune from suit, unless their actions were performed "with malicious purpose,

in bad faith, or in a wanton or reckless manner." *Id.*

{¶ 36} As we stated in *Moon v. Trotwood Madlson City Schs.*, 2014-Ohio-1110, 9 N.E.2d 541 (2d Dist.):

The terms "wanton" and "reckless" describe different and distinct degrees of care and are not interchangeable. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph one of the syllabus. They are sometimes described "as being on a continuum, i.e., willful conduct is more culpable than wanton, and wanton conduct is more culpable than reckless." *Id.* at ¶ 42 (Lanzinger, J., concurring in judgment in part and dissenting in part).

Recklessness is a high standard. *Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶ 37. "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* at ¶ 34, adopting 2 Restatement of the Law 2d, Torts, Section 500 (1965).

*Moon* at ¶ 20-21.

{¶ 37} By requiring extreme and outrageous conduct to establish proximate cause (which is required for liability), *Lewis* usurps the legislative determination as to the type of conduct that is required of employees of political subdivisions for immunity from liability. Under *Lewis*, even if a police officer is reckless, the officer would still be immune from liability unless the conduct is extreme or outrageous. The argument that *Lewis* involves

"proximate cause" as opposed to "duty" could devolve into a historical or pedagogical discussion of duty versus proximate cause. See, e.g., *Palsgraf v. Long Island R.Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). Suffice it to say, the bottom-line concerning potential responsibility is the same. It may or may not be good public policy to require "extreme or outrageous" conduct to remove immunity and impose liability upon police officers who pursue a fleeing suspect, but that question has been decided by the legislature when it only required "reckless" conduct.

{¶ 38} If the legislature desired a different standard for immunity when police officers are pursuing fleeing suspects in their vehicles, the legislature could have expressly created such an exception. The legislature has created an exception to political subdivision liability for negligent operation of a motor vehicle when a police officer "was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct." R.C. 2744.02(B)(1)(a). No specific immunity provision exists for police officers regarding their pursuit of a fleeing suspect other than that found in R.C. 2744.03(A)(6)(b).

{¶ 39} I concede that *stare decisis* weighs in favor of following *Whitfield*, which followed *Lewis*. However, *Anderson* has since clarified certain definitions regarding the degrees of care for purposes of the sovereign immunity statute. Moreover, I believe that *Whitfield* was wrongly decided at the time, the decision defies practical workability, and abandoning the precedent would not cause undue hardship for those who have relied on it. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 215, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 48 (adopting a standard to determine when courts may vary from established precedent).

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340 Ark. 203  
Supreme Court of Arkansas.

CITY OF CADDO VALLEY  
v.  
Joan GEORGE.

No. 99-182. | Jan. 27, 2000.

Driver filed negligence action against city police officers and others, seeking damages for injuries sustained when her vehicle was struck by suspect's vehicle, which was being pursued at high speeds by officers. After permitting city to substitute itself for officers as real party in interest, the Circuit Court, Hot Spring County, John W. Cole, J., entered judgment on jury verdict for driver, but limited city's liability to \$25,000 insurance policy. City appealed, and driver cross-appealed. Upon certification from the Court of Appeals, the Supreme Court, Glaze, J., held that: (1) officers were not immune from liability; (2) city was liable to extent of its liability coverage on vehicles for officers' negligence; (3) officers' conduct was proximate cause of driver's injuries, despite intervening cause of suspect's actions; and (4) driver was entitled to recover \$50,000, which was limit of liability insurance for both city vehicles involved in pursuit.

Affirmed.

Thornton, J., filed a separate dissenting opinion, in which Smith, J., joined in part.

**Attorneys and Law Firms**

\*\*482 \*206 M. Keith Wren, Little Rock, for appellant.

Boswell, Tucker & Brewster, by: Dennis J. Davis, Bryant, for appellee.

**Opinion**

\*\*483 TOM GLAZE, Justice.

This case began as a tort suit filed in Hot Spring County Circuit Court by Joan George against two officers of the Caddo Valley Police Department. It is now before us following certification from the Court of Appeals pursuant to

Ark. Sup.Ct. R. 1-2(b)(1) and (6) as that court found that the appeal involved an issue of first impression and questions of statutory construction.

The following events led to this litigation: Officer John Whittle of the Caddo Valley Police Department heard a BOLO (be on the lookout) report regarding a truck stolen from the parking lot of a gas station in Malvern. When Whittle saw the truck, driven by Patrick Sherman, pass through Caddo Valley, he flipped on his police vehicle's siren and lights and began pursuit. After hearing Whittle's radio call that he was in pursuit, Sergeant John Kelloms also joined in the chase. As the pursuit reached speeds of somewhere between seventy-five and ninety miles per hour, the officers heard radio reports from Arkadelphia that police there were in the process of setting up a roadblock across Highway 67. Sergeant Kelloms told Officer Whittle to back off from the fleeing truck in the hopes that they could get Sherman to slow down before reaching town. When Whittle did not back off far enough, Kelloms told him to do so again. Despite Whittle's eventual backing off, however, Sherman failed to slow down.

Meanwhile, in Arkadelphia, Lieutenant Mike Smith and Officer David Turner had positioned their cars partially across the highway, with one vehicle blocking a portion of the northbound lane and the other blocking part of the southbound lane. There was just enough room between the police vehicles for a car to pass through if it were going at a slow, safe speed. Several cars had made it through before Sherman arrived. Plaintiff Joan George's Jeep was caught between the police cars when Sherman crested the hill just \*207 above the roadblock. Lieutenant Smith was standing on the center line with his pistol drawn, hoping to slow Sherman down. However, Sherman accelerated the stolen vehicle, forcing Smith to jump out of the way, and slammed it into George's car. The impact threw the Jeep off the road and tossed George out of the vehicle and into the ditch.

George filed her complaint in September of 1998, naming as defendants, among others, Sherman, Whittle, and Kelloms. She alleged negligence on the parts of Whittle and Kelloms, claiming that they pursued Sherman at a high rate of speed when they knew, or should have known, that the pursuit was likely to injure innocent victims; that they failed to disengage from the pursuit when they knew, or should have known, that the Arkadelphia police were setting up a roadblock; and that they failed to end the pursuit when they knew, or should have

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known, it was no longer prudent to chase Sherman under the conditions.

Whittle and Kelloms denied negligence, and in addition, they argued that they were immune from liability or damages because they were acting in their official capacities as employees of Caddo Valley. Eventually, they filed a motion for summary judgment on these same grounds. In response, George asserted that the officers were indeed negligent because they were engaged in conduct which gave rise to her injuries. She also pointed out that the officers were not protected by tort immunity only to the extent that they had minimum liability insurance as required by Arkansas law. The trial court denied the summary-judgment motion, but did permit the City of Caddo Valley to substitute itself as the real party in interest, in place of the two officers.

The case proceeded to trial. At the close of George's case, Caddo Valley moved for a directed verdict, arguing that there was no evidence that the officers had been negligent in the operation of a motor vehicle, that Sherman's actions constituted \*\*484 an intervening cause which superseded the officers' liability, and that even if they were negligent, they were immune from suit. The court denied the motion at this time and again at the close of trial. The case was submitted to the jury, which found that Sherman, Whittle, and Kelloms were all negligent, and that liability should be apportioned ninety percent to Sherman and five percent each to Whittle and Kelloms. At a posttrial hearing, the trial court determined that \*208 Caddo Valley was jointly and severally liable for the judgment, but limited their liability to \$25,000.00, the amount of the minimum required insurance coverage. George contended that, because there were two police cars involved, she should get twice that amount, but the court rejected that argument.

On appeal, Caddo Valley now argues that (1) the trial court erred in ruling that the city is not immune from liability in tort; (2) the court erred in denying the city's motion for a directed verdict on the basis that any liability of the officers was cut off by the efficient intervening cause of the acts of Patrick Sherman; (3) no evidence was presented that Officers Whittle and Kelloms negligently operated their motor vehicles; and (4) no evidence was presented indicating that the officers' negligent operation of their motor vehicles, if any, proximately caused Joan George's damages. On cross-

appeal, George argues that the trial court erred in limiting Caddo Valley's liability to \$25,000.00.

[1] [2] Caddo Valley's first argument is that the police officers were immune from suit. Ark.Code Ann. § 21-9-301 (Supp.1999) provides that it is the "declared ... public policy of the State of Arkansas that all ... *municipal corporations ... shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.* No tort action shall lie against any such political subdivision because of the acts of its agents and employees." (Emphasis added.) The immunity granted to municipalities extends to the city's officials and employees when they are being sued in their official capacities. *Matthews v. Martin*, 280 Ark. 345, 346, 658 S.W.2d 374, 375 (1983). However, that same subchapter of the code also provides that "[a]ll political subdivisions shall carry liability insurance on their motor vehicles or shall become self-insurers, individually or collectively, for their vehicles, or both, in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, § 27-19-101 et seq." Ark.Code Ann. § 21-9-303(a) (1996). Under this section, "[t]he combined maximum liability of local government employees ... and the local government employer in any action involving the use of a motor vehicle within the scope of their employment shall be the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act..." Ark.Code Ann. § 21-9-303(b). The minimum amount defined in that act is \$25,000.00 per vehicle insured. Ark.Code Ann. § 27-19-713(b)(2) (Supp.1999).

[3] \*209 Thus, a municipal corporation's immunity for negligent acts only begins where its insurance coverage leaves off. An instructive case is *City of Little Rock v. Weber*, 298 Ark. 382, 767 S.W.2d 529 (1989). There, Weber was injured when a Little Rock police officer, driving a city police car with the lights flashing and siren running, ran a red light and struck her vehicle. The city had moved for summary judgment, which was denied, and Weber won a jury verdict for \$4,750.00. On appeal, the city argued that it was absolutely immune from tort liability arising out of a city policeman's negligent operation of an authorized emergency vehicle. *Weber*, 298 Ark. at 383-84, 767 S.W.2d at 530. This court rejected the city's reliance on earlier cases which held that immunity could be breached only when the public employee breached a duty imposed on him by law in common with all other people, as opposed to a situation in which the negligent conduct arose out of a duty peculiar to his

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\*\*485 employment. The *Weber* court explained, stating the following:

The city's reliance on these cases is misplaced. The test used previously in those cases allowed an injured party to side step governmental immunity and seek relief against the employee when the duty the employee breached was common to all people. It cannot be used by the city to create governmental immunity not otherwise available, *as where a statute specifically provides that all political subdivisions shall carry liability insurance on their motor vehicles.*

There is no indication in § 21-9-303 that the legislature intended to distinguish in any manner the circumstances to which it applied. In any event, we see no reason why a person injured by an emergency vehicle should be left without a remedy while persons may seek redress against a municipality for its employees' negligence in the operation of all other vehicles.

*Weber*, 298 Ark. at 385, 767 S.W.2d at 531 (emphasis added).

[4] Although *Weber* is factually distinguishable (there, the police car was physically involved in the accident), the underlying principle is the same. A city is not immune to the extent that it has liability insurance. Here, Caddo Valley strenuously urges that it was not the officers' negligent operation of their motor vehicles that caused the accident in this case; rather, it says, it was an exercise of discretion in the performance of their official duties that led to the wreck. However, the question of negligence is not so easily divisible

\*210 from the question of discretion. In *Weber*, the officer had also, for some reason, made a decision to turn on his lights and sirens prior to his collision with Weber, and that decision, as in the instant case, involved an exercise of discretion; nonetheless, this court held that he was not immune from suit. In other words, once the officers here exercised their discretion and made the decision to pursue the stolen vehicle, any actions taken subsequent to that decision were required by law to be taken with ordinary care. AMI Civ.3d 911, which was given in this case without objection, speaks to this very question as follows:

The driver of an emergency vehicle is relieved of the obligation to obey a speed limit[, but t]he existence of this privilege does not relieve the driver of an emergency vehicle of the duty to

exercise ordinary care for the safety of others using the highway.

It was the officers' failure to exercise ordinary care, once the decision to pursue Sherman was made, that led to the accident; therefore, to the extent of the city's liability coverage, they are not immune from suit and may be found liable for their negligence.

Caddo Valley argues that two cases from other jurisdictions should control our decision here. However, both of those cases are distinguishable. In the first, *Thornton v. Shore*, 233 Kan. 737, 666 P.2d 655 (1983), the Kansas Supreme Court held that an officer pursuing a fleeing vehicle was immune from suit on the basis of a Kansas statute, similar to Ark. Code Ann. § 27-51-202 (Repl.1994), which relieves drivers of emergency vehicles of the responsibility to obey speed limits. However, in *Thornton*, there was no finding that the police officer was driving negligently. Here, the trial court found sufficient evidence of the officers' negligence to place that issue before the jury. In addition, the Kansas statute provides that the emergency vehicle privilege does not relieve the driver of the duty to "drive with due regard for the safety of all persons." Kan. Stat. Ann. § 8-1506(d) (1982). The "due regard" language was interpreted in *Thornton* to be some degree of care less stringent than the standard of "ordinary negligence." *Thornton*, 666 P.2d at 661. To the contrary, Arkansas law, as applied by our court in *Weber*, requires an ordinary-care standard. Thus, the logic of *Thornton* does not control the situation here.

\*\*486 Nor do we find Caddo Valley's reliance on the case of *Kelly v. City of Tulsa*, 791 P.2d 826 (Okla.Ct.App.1990), controlling. First, \*211 we emphasize that, to the extent that *Kelly* can be read to immunize an officer when he or she is negligent during a hot pursuit, Arkansas law is well settled, as discussed above, that such officers must exercise ordinary care. In any event, the *Kelly* case differs factually from the case at hand. There, the driver of the fleeing vehicle lost control and swerved into the plaintiff's car, resulting in injury. Thus, in *Kelly*, it was simply the police officer's decision to initiate pursuit which was the basis of the plaintiff's complaint, and the Oklahoma Supreme Court found that this was "not the consideration addressed by [Oklahoma's emergency vehicle statute]." *Kelly*, 791 P.2d at 828. In the present case, however, the police officers continued to pursue Sherman at a high rate of speed even after they knew that

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Arkadelphia police officers were setting up a roadblock a short distance down the highway. Arkadelphia police officer Mike Smith testified that there was only enough room for a vehicle traveling at a slow, safe rate of speed to pass between the police vehicles making up the roadblock. In sum, the question here was whether the officers were negligent in continuing the pursuit once they knew of conditions which could create a danger to innocent bystanders. It was their failure, once they knew of the roadblock, to exercise ordinary care for the safety of others using the highway, that leads to the conclusion that they were negligent.

[5] [6] [7] [8] This leads us to Caddo Valley's second argument, *i.e.*, that the officers were not negligent, and that the trial court erred in refusing to direct a verdict in its favor on that point. Our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence, which is evidence that goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997) (citing *Southern Farm Bureau Casualty Ins. v. Allen*, 326 Ark. 1023, 934 S.W.2d 527 (1996)). It is not this court's province to try issues of fact; we simply review the record for substantial evidence to support the jury's verdict. *Id.* In determining whether there is substantial evidence we view the evidence in the light most favorable to the party against whom the motion is sought and give the evidence its strongest probative force. *Id.* Stated another way, if there is any substantial evidence to support the verdict, we affirm the trial court. *Grendell v. Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987).

[9] [10] \*212 Negligence is the failure to do something which a reasonably careful person would do and a negligent act arises from a situation where an ordinarily prudent person in the same situation would foresee such an appreciable risk of harm to others that he would not act or at least would act in a more careful manner. *Mergen*, 329 Ark. at 412, 947 S.W.2d at 784. While a party can establish negligence by direct or circumstantial evidence, that party cannot rely on inferences based on conjecture or speculation. *Id.*

Once again, the evidence presented at the trial of this case showed that the two Caddo Valley officers in pursuit knew that a roadblock was being set up in Arkadelphia. Officer Whittle stated that he was approximately 100 feet

behind the fleeing vehicle while the suspect was driving at approximately 90 to 100 miles an hour. He was twice told by his superior officer, Kelloms, to back off. This was Whittle's first high-speed pursuit, and he had been given no training or instructions on "what factors to consider when pursuing a high-speed pursuit."

Sergeant Kelloms joined the pursuit after having told Officer Whittle to back off. Testimony of Arkadelphia Police Officer Jackie Woodall revealed that the Caddo Valley officers were only about four or five car lengths behind the stolen truck, which \*\*487 was being driven at an estimated 75 to 80 miles an hour. On cross-examination, Woodall stated that it was only a matter of seconds from the time he heard the radio transmission telling Whittle to back off until the moment of the collision.

The foregoing is substantial evidence from which the jury could have concluded, without resort to speculation or conjecture, that the Caddo Valley officers were pursuing the suspect too closely at high speeds, and continued to do so after they knew of the presence of the roadblock in Arkadelphia. An ordinarily prudent person in the same situation could have foreseen an appreciable risk of harm to others; thus, we hold that there was sufficient evidence of negligence from which the jury could have reasonably found the officers to be at least partially or minimally at fault in the accident with George.

[11] [12] For its next two points on appeal, Caddo Valley argues that the trial court erred in refusing to direct a verdict in its favor on the question of proximate causation and on the issue of whether \*213 Patrick Sherman's actions constituted an efficient intervening cause. Because these two issues are so closely intertwined, we consider them together. Proximate cause has been defined as "that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury, and without which the result would not have occurred." *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 181, 952 S.W.2d 658, 662 (1997). Proximate causation is usually an issue for the jury to decide, and when there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. *Id.* In other words, proximate causation becomes a question of law only if reasonable minds could not differ. *Id.*

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[13] [14] On the issue of whether or not there was an efficient intervening cause, this question is “simply ... whether the original act of negligence or an independent intervening cause is the proximate cause of an injury. Like any other question of proximate causation, the question whether an act of omission is an intervening or concurrent cause is usually a question for the jury.” *Hill Constr. Co. v. Bragg*, 291 Ark. 382, 385, 725 S.W.2d 538, 540 (1987) (quoting from *Larson Machine v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980)). The *Bragg* court went on to say that the “original act or omission is not eliminated as a proximate cause by an intervening cause unless the latter is of itself sufficient to stand as the cause of the injury. The intervening cause must be such that the injury would not have been suffered except for the act, conduct or effect of the intervening agent *totally independent* of the acts of omission constituting the primary negligence.” *Bragg*, 291 Ark. at 385, 725 S.W.2d at 540 (emphasis added).

In this case, there was evidence to establish a causal connection between the actions of the police officers and the injuries to Joan George. But for their actions in continuing to pursue Sherman, the jury could have reasonably found that the accident likely would not have happened. The events occurred in a natural and continuous sequence, thus making the officers' acts a proximate cause of George's injuries. In short, the jury could have easily concluded that the actions of Sherman, while admittedly an intervening cause, were not totally independent of the acts of negligence performed by the Caddo Valley police officers. As already discussed, the questions of proximate cause and the presence of an intervening cause were proper questions for the jury. As there was sufficient \*214 evidence from which the jury could have found negligence, the trial court did not err in refusing to direct a verdict on these two issues.

[15] Caddo Valley's last argument is that the trial court erred in finding it to be jointly and severally liable for the \$150,000.00 judgment rendered against it and Sherman. The jury had assessed Sherman \*\*488 to be ninety percent at fault in the accident, and Whittle and Kelloms to each be five percent at fault (making Caddo Valley's total liability ten percent). At a posttrial hearing on the form of the judgment, the trial court ruled that Caddo Valley, like any other corporate entity, could be jointly and severally liable. See *Walton v. Tull*, 234 Ark. 882, 356 S.W.2d 20 (1962) (when the combined negligence of all joint tortfeasors

exceeds the negligence of the plaintiff, each tortfeasor is jointly and severally liable for the plaintiff's damages after they have been reduced in proportion to the degree of his own negligence); see also AMI Civ.3d 2111. Following Arkansas's law of joint and several liability, if George could not recover any of her loss from Sherman, she could look to Caddo Valley for satisfaction of the \$150,000 judgment. Even so, the court limited Caddo Valley's total liability to \$25,000.00, the maximum liability of a local government employer in an action involving the use of a motor vehicle. Ark.Code Ann. § 21-9-303(b). In its brief, Caddo Valley argues that it is immune from suit and that there is no exception to tort immunity which permits a plaintiff to collect more than the amount actually owed by a local government. However, the city cites no authority which compels such a conclusion, and, therefore, we reject its argument. We have stated on occasions too numerous to count that we will not reverse where the appellant has offered no convincing argument or authority and it is not apparent without further research that the argument is well taken. See *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999).

[16] On cross-appeal, George presents us with a related question. She argues that because there were two police vehicles involved in the accident, she should be able to recover \$50,000.00—twice the amount determined by the trial court to be Caddo Valley's maximum liability, or \$25,000.00 for each police car. The trial court interpreted Ark.Code Ann. § 21-9-303 to read in terms of an “occurrence” involving a city vehicle (or vehicles), rather than applying the insurance requirements to each vehicle involved in an accident. The trial court reads language into § 21-9-303 that is not \*215 there. Arkansas's motor vehicle liability insurance statute plainly provides that a vehicle owner's insurance policy must insure the policyholder “against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the vehicle or vehicles ..., with respect to each vehicle” for a minimum of \$25,000.00. Ark.Code Ann. § 27-19-713(b)(2) (emphasis added). Thus, because there were two Caddo Valley vehicles involved in the accident, and each officer was found five percent at fault, Caddo Valley, as a joint tortfeasor, would be jointly and severally liable in the amount of \$25,000.00 for each of the city's vehicles. George therefore should recover \$50,000.00 against Caddo Valley, and the trial court erred in ruling otherwise.

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For the foregoing reasons, the decisions of the court below are affirmed on direct appeal and reversed on cross-appeal.

ARNOLD, C.J., not participating.

THORNTON and SMITH, JJ., dissent.

RAY THORNTON, Justice, dissenting.

I respectfully dissent. The rule in Arkansas has long been that local governments are generally immune from tort liability. Ark.Code Ann. § 21-9-301 (Repl.1996). However, this unlimited immunity was modified in 1968 to permit recovery for damages in *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968), where the plaintiff was injured when her vehicle was struck as a result of negligence on the part of a city's garbage truck driver. The Legislature's response to *Parish* was Act 165 of 1969, which provided that all local governments "shall be immune from liability and suit, except to the extent that they may be covered by liability insurance, for damages." *Id.* This act also provided that all political subdivisions carry liability insurance \*\*489 or become self-insurers to the legal requirement of \$25,000. Based on these enactments we have allowed recovery for damages when a municipal vehicle is involved in an accident. See *Sturdivant v. City of Farmington*, 255 Ark. 415, 500 S.W.2d 769 (1973).

This is the first case in Arkansas presenting the issue whether immunity from suit is waived when a municipal vehicle is pursuing a suspect's vehicle in accordance with the officer's duty under Ark.Code Ann. § 14-52-203 (Repl.1998). Notwithstanding the duty to apprehend a fleeing suspect, and the statutory authorization for an \*216 emergency vehicle to exceed speed limits under certain circumstances, the majority's decision imposes liability upon the City of Caddo Valley for the actions of the city's employees where the city's vehicles were not involved in the collision itself.

Faced with a similar issue, our neighboring courts in Oklahoma and Kansas have determined that a city emergency vehicle may not be held responsible for an accident caused by a fleeing suspect. In adopting their rule, these states accepted the general rule expressed by New Jersey in *Roll v. Timberman*, 94 N.J.Super. 530, 229 A.2d 281, cert. denied 50 N.J. 84, 232 A.2d 147 (1967), and I agree that the views

of the New Jersey Superior Court are very persuasive. That court stated:

The decisive issue in this case is whether a police officer is liable for damage caused by a vehicle operated by a fleeing law violator who is being pursued by the officer in the performance of his duty. The precise question has not been dealt with in any of the reported decisions in our State. However, the majority view expressed in other jurisdictions in similar cases holds that the police officer is not liable.

*Id.* (citations omitted).

The New Jersey Superior Court opinion points out that:

When Officer Martin observed Timberman violate the motor vehicle laws it became the officer's duty to apprehend him. When he pursued Timberman the officer was exempt from speed regulations. He was performing his duty when Timberman, in gross violation of the motor vehicle laws, crashed into plaintiff's car. To argue that the officer's pursuit caused Timberman to speed may be factually true, but it does not follow that the officer is liable at law for the results of Timberman's negligent speed. Police cannot be made insurers of the conduct of the culprits they chase.

*Id.* (citations omitted). Similar analysis has been made by many other jurisdictions. Contrary to the opinion issued today by the majority, the general rule relative to the liability of municipalities in such circumstances is that a municipality responsible for the conduct of a police officer is nevertheless not liable for personal injuries, death, or property damage inflicted by a vehicle being pursued by a police vehicle where the police vehicle is only involved to the extent that it was being driven in pursuit of the fleeing vehicle which actually causes the injury or damage complained of. See \*217 *Thornton v. Shore*, 233 Kan. 737, 666 P.2d 655 (1983).

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See e.g., *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky.Ct.App. 1952); *Morris v. Combs' Adm'r*, 304 Ky. 187, 200 S.W.2d 281 (Ct.App. 1947); *Pagels v. City and County of San Francisco*, 135 Cal.App.2d 152, 286 P.2d 877 (D.Ct.App.1955); *Draper v. City of Los Angeles*, 91 Cal.App.2d 315, 205 P.2d 46 (D.Ct.App.1949); *United States v. Hutchins*, 268 F.2d 69, 83 A.L.R.2d 447 (6 Cir.1959); *Wrubel v. State of New York*, 11 Misc.2d 878, 174 N.Y.S.2d 687 (Ct. Claims 1958).

To extend the test of due care to include acts of fleeing motorists whom an officer is attempting to apprehend has the effect of making the officer, and the municipality, the insurer of the fleeing violator—or, in this case, the insurer as well of the actions of another police department. As the Kansas court noted in *Thornton, supra*, “who can say whether the greater harm \*\*490 would result from the imposition or nonimposition of a duty upon municipalities to refrain from pursuing a lawbreaker already engaged in reckless and dangerous operation of a motor vehicle on the public streets?”

The reasoning underlying the rejection of liability in these cases is twofold: (1) “[I]t is the duty of a police officer to apprehend those whose reckless driving makes use of the highway dangerous to others; (2) the proximate cause of the accident is the reckless driving of the pursued, notwithstanding recognition of the fact that the police pursuit contributed to the pursued's reckless driving.” *Thornton, supra*. Here, the proximate cause of the accident also included the actions of the Arkadelphia police in setting up the roadblock (though they were not named as defendants in the underlying complaint). The Caddo Valley officers were engaged in pursuit as required of them by statute, but,

according to their own testimony, they had begun backing off the pursuit for safety considerations. Our inquiry should be whether the officer's pursuit was so extreme or outrageous as to pose a higher threat to public safety than that ordinarily incident to a high-speed chase. I would hold that the actions of the Caddo Valley officers, under this analysis, did not meet the test of negligent conduct and that a directed verdict in favor of Caddo Valley should have been granted.

Lastly, even if the majority is not mistaken in adopting the rule that the city becomes the insurer for a fleeing violator, I cannot understand the reasoning leading to the majority's decision that the \*218 insurance policy limits should be applied to both police cars. The trial judge had determined that the real party in interest was the city of Caddo Valley, and there was absolutely no showing that the pursuit by two cars rather than one caused the fleeing suspect to travel any faster or drive more recklessly. As the majority has determined that liability is to be imposed, I would affirm the trial court's determination that there was only one occurrence. For the above stated reasons, I respectfully dissent.

SMITH, J., joins in this dissent, but because he does not believe any negligent acts of the officers caused the injuries to the plaintiff, he would not reach the issue of insurance liability limits.

Dissent.

#### All Citations

340 Ark. 203, 9 S.W.3d 481

2011 WL 6813700 (Ind.Super.) (Trial Order)  
Superior Court of Indiana.  
Lake County

Mildred H. YANCEY, as Personal Representative of The Estate of Cornell D. Yancey, deceased, Plaintiff,  
v.  
CITY OF HOBART, Hobart Police Department and Nicholas Wardrip, Defendant.

No. 45D020808CT00224.  
June 14, 2011.

Cause No. 45D10-1010-CT-00201

**Judgment**

John R. Pera, Judge.

This matter was submitted to Trial by Jury on June 6, 7, 8, 9, 10 and 13, 2011. The Plaintiff, Mildred H. Yancey, as Personal Representative of The Estate of Cornell D. Yancey, appeared in person and with counsel, Brock P. Alvarado and David W. Conover. The Defendants, City of Hobart, Hobart Police Department, and Defendant Nicholas Wardrip, who appeared in person, appeared by counsel, John P. Bushemi and Jeremy J. Butler. Evidence was presented to the jury and arguments of counsel were heard. After retiring to deliberate, the jury returned into open court with its verdict in favor of the Defendants, City of Hobart, Hobart Police Department and Nicholas Wardrip. The Court now enters judgment on the verdict.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff take nothing by way of her Complaint against the Defendants.

SO ORDERED this 14<sup>th</sup> day of June, 2011.

<<signature>>

JOHN R. PERA, JUDGE

LAKE SUPERIOR COURT

CIVIL DIVISION, ROOM SIX

*Distribution by the Court:*

Brock P. Alvarado/David W. Conover

John P. Bushemi/Jeremy J. Butler

Dated: 6-14-11

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2011 WL 7070240 (Ind.Super.) (Verdict and Settlement Summary)

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WEST'S JURY VERDICTS - INDIANA REPORTS

No Recovery After High Speed Police Chase Ends With Fatality

Superior Court of Indiana, Lake County.

Yancey v. City of Hobart

**Type of Case:**

Wrongful Death • Adult

Vehicle Negligence • Motor Vehicle v. Motor Vehicle

Vehicle Negligence • Emergency Vehicle

Vehicle Negligence • Hot Pursuit

Vehicle Negligence • Excessive Speed

Vicarious Liability

Negligence-Other

**Specific Liability:** Police officer initiated and maintained high speed chase beyond his jurisdiction in a congested area, causing pursued driver to strike and kill bystander motorist

**General Injury:** Death

**Jurisdiction:**

State: Indiana

County: Lake

**Related Court Documents:**

Plaintiff's complaint: 2008 WL 8724770

Pretrial order: 2010 WL 8230388

Plaintiff's brief on recovery of lost love, care and affection damages: 2011 WL 6779885

Verdict form: 2011 WL 6779787

**Judgment:** 2011 WL 6813700

Case Name: Mildred H. Yancey, as personal representative of the estate of Cornell D. Yancey, deceased v. City of Hobart, Hobart Police Department and Nicholas Wardrip

Docket/File Number: 45D02-0808-CT-00224

Verdict: Defendants, \$0

Verdict Range: \$0

Verdict Date: June 13, 2011

Judge: John R. Pera

**Attorneys:**

Plaintiff: Brock P. Alvarado, Robert D. Brown, David W. Conover and Kenneth J. Allen, Kenneth J. Allen & Associates, Valparaiso, Ind.

Defendants: John P. Bushemi and Jeremy J. Butler, Burke, Costanza & Carberry, Merrillville, Ind.; John P. Bushemi, Butler, Hoepfner, Wagner & Evans, Merrillville, Ind.; John P. Bushemi, Burke, Costanza & Cuppy, Merrillville, Ind.

Trial Type: Jury

**Experts:**

Plaintiff: Paul Palumbo, police training, University of Illinois, Champaign, Ill.

Defendants: Michael W. Reath, emergency vehicle operations, Indiana Law Enforcement Academy, Plainfield, Ind.; John E. Cavanaugh, MD, MS, forensic pathologist, Lake County Coroner's Office, Crown Point, Ind.

**Breakdown of Award:**

\$0

**Summary of Facts:**

Nicholas Wardrip, a patrol officer with the city of Hobart, Ind., reportedly drove an unmarked 2006 Ford Mustang police vehicle south on Martin Luther King Drive on the afternoon of Jan. 29, 2007, and initiated pursuit of a reportedly stolen Chrysler PT Cruiser. Wardrip allegedly proceeded at a high rate of high speed, eventually chasing the vehicle near the intersection of northbound Harrison Street and 25th Avenue in Gary, Ind.

At the same time Cornell Yancey reportedly was driving his Cadillac east on 25th, passing through its intersection with Harrison near a high school. The Chrysler Wardrip was chasing reportedly crashed into the vehicle Cornell was driving, allegedly causing Cornell to sustain injuries which led to his death.

Mildred Yancey, Cornell's mother and personal representative of her deceased son's estate, brought a lawsuit against the city of Hobart, the Hobart Police Department and Wardrip in August 2008. The plaintiff alleged Wardrip was grossly negligent, and the co-defendants vicariously liable, for initiating and maintaining a high speed chase beyond their jurisdiction, in a congested residential area, in the proximity of school zones, and at or near the end of the school day when children were likely to be present.

Mildred alleged the defendants engaged in a high speed chase in violation of applicable rules, regulations, statutes, policies and/or guidelines without justification or excuse; failed to immediately or timely terminate the pursuit to safeguard pedestrians, bystanders and motorists; and/or failed to use the same care and caution that reasonably prudent officers/police departments would have exercised under the same or similar circumstances.

The plaintiff sought monetary damages for being deprived of the companionship, love, affection, support and services that Cornell had provided prior to the collision, plus medical, hospital, funeral, burial expenses and attorney fees.

The defendants contended in the pretrial order that Wardrip was not negligent in his pursuit of the Chrysler; Wardrip was fulfilling his duty as a police officer to apprehend alleged offenders. They claimed the officer's actions were reasonable as a matter of law and as measured by the circumstances and information known at the time of the pursuit; and the danger created to life and property by the driver of the reported stolen vehicle outweighed the danger created by commencing or continuing the pursuit.

The defendants also argued that because he engaged in a reasonable pursuit, Wardrip's conduct could not, as a matter of law, be the proximate cause of Cornell's death. The plaintiff's recovery was barred, they said, because Cornell's death was caused by the criminal actions of a party other than those sued, Cornell was contributorily negligent and the city and its police department were not vicariously liable as a result of Wardrip's pursuit of the alleged stolen vehicle.

The case proceeded to a jury trial before Judge John R. Pera.

Jurors returned a verdict June 13, 2011, in favor of the defendants. Judge Pera rendered judgment in accord with the verdict June 14.

Court: Superior Court of Indiana, Lake County.

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