

IN THE SUPREME COURT OF OHIO

REGINA HARDESTY,)	Case No. 2015-2038
)	
Appellee,)	On Appeal from the
)	Cuyahoga County Court of Appeals,
vs.)	Eighth Appellate District
)	
OFFICER JOSE ALCANTARA,)	
)	Court of Appeals
Appellant.)	Case No. CA-15-102684
)	

APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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This case is not a case of public or great general interest, nor does it pose a substantial constitutional question. With his three propositions of law, Defendant-Appellant Officer Jose Alcantara simply seeks to re-litigate disputed facts and summary judgment rendered against him in the trial court and affirmed by the appellate court. This case does not warrant the Supreme Court's exercise of its discretionary jurisdiction. Jurisdiction is granted "only if there is a substantial constitutional question or if the case is of public or great general interest." *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, 540 N.E.2d 1381; Section 2(B)(2)(e), Article IV, Ohio Constitution; S.Ct.Prac.R. 7.08(B)(4). This case simply does not present either issue.

First, this case simply does not raise a constitutional question. Despite Alcantara's claims to the contrary in his introductory explanation in support of jurisdiction, the substantive arguments presented in his brief do not actually raise any constitutional question. He attempts to couch this case in constitutional terms with a lengthy quote from *Scott v. Harris*, 550 U.S. 372 385-86, 127 S. Ct. 1769, 1778-79, 167 L.Ed. 2d 686 (2007), which ultimately concludes that it is not unconstitutional for a police officer to "attempt to terminate a dangerous high-speed car chase." In fact, one of the key disputed facts in the instant case is whether or not Alcantara actually terminated the car chase. The evidence surrounding Alcantara's *failure* to terminate this high-speed chase plays into the question of whether his conduct was wanton or reckless. *Scott* and the other cases Alcantara cites in support of this proposition simply have no application to the instant case. Even further, the Complaint in this case does not allege unconstitutional conduct, and Defendant-Appellant's briefs before the lower courts did not raise any constitutional questions. This case simply does not raise a constitutional question.

Therefore, the only question before this Court is whether this case involves “public or great general interest.” And Plaintiff-Appellee Regina Hardesty contends that it does not, which means that this Court does not have jurisdiction to hear the appeal. Defendant-Appellant Alcantara’s own memorandum in support of jurisdiction makes this clear. The only issues he raises concern his desire – expressed three separate ways in his propositions of law – for immunity pursuant to O.R.C. § 2744. Alcantara tries to explain why this is an issue of “public or great general interest” by saying that “a police officer who, during a pursuit of a suspected dangerous felon, operates his police cruiser with due care and diligence and never strikes another vehicle, pedestrian, or object, is entitled to immunity under the Political Subdivision Tort Liability Act, Chapter 2744 of the Ohio Revised Code.” But Plaintiff-Appellee *agrees* that such an officer, who operates his vehicle with due care and diligence, is entitled to immunity. The problem is that Alcantara is not such an officer. Or at least there are disputed facts that underlie the question of whether Alcantara is such an officer.

Both of the lower courts laid bare the disputed facts that preclude summary judgment. These disputes go directly to whether Alcantara’s operation of his police cruiser constituted wanton and/or reckless conduct – and whether he is entitled to immunity – under O.R.C. § 2744.03(A)(6)(b). In other words, the courts below already found that a reasonable jury could conclude that Alcantara did *not* operate his cruiser with due care and diligence. Case law from around the state considering the question of reckless and/or wanton conduct by police officers during high-speed chases supports this conclusion. Alcantara’s appeal is groundless.

Further, Alcantara’s single attempt to build a public policy issue of “public or great general interest” into the appeal fails: it is improper to raise an issue on interlocutory appeal that was not raised below. Alcantara never raised the issue of indemnification or cost to the public below. Further, even if the appeal were proper, is not yet ripe as there is not yet a judgment against

Alcantara. This is very simply an appeal of summary judgment involving genuinely disputed issues of material fact and established questions of law.

The myriad case-specific facts necessary to determine whether Alcantara was an officer driving “with due care and diligence,” and whether the number of disputed facts make it possible for a reasonable jury to find that he was wanton or reckless in his conduct make this a one-of-a-kind case with very little import for the “public or great general interest.” No novel legal issues are presented here. All three of Alcantara’s propositions of law before this Court necessarily depend upon a single question of law that has been asked again and again: what is reckless or wanton conduct under O.R.C. § 2744.03(A)(6)(b)? Trial and appellate courts across the state have considered this question widely and frequently, and the specific contours of what constitutes reckless or wanton conduct in a high-speed chase case are already well established.

The only tasks Alcantara asks this Court to undertake are (1) to accept *his* version of the facts, which contradict other evidence in the record, and (2) to declare new law which would overwrite the plain language of O.R.C. § 2744.03(A)(6)(b). This simply cannot be allowed. This Court does not have jurisdiction to fulfil Alcantara’s requests and should decline to hear his appeal.

STATEMENT OF THE CASE

On March 28, 2012, Plaintiff-Appellee Regina Hardesty suffered serious personal injuries after Defendant-Appellant Jose Alcantara initiated a traffic stop, and then chased the fleeing vehicle. Alcantara chose to initiate this chase in undoubtedly dangerous conditions: evening rush hour, in heavy traffic, on a main thoroughfare. The chase covered more than a mile and lasted approximately one minute. Alcantara undisputedly failed to use sirens for at least fifty percent of the chase – which quickly reached speeds of 100 miles per hour – providing no audible warning to the public that high speed vehicles were heading their way. The chase ended when the car

Alcantara was chasing (Antoine Howard's car) struck Regina Hardesty's car. As a result, Ms. Hardesty suffered several serious, permanent, injuries. Alcantara was subsequently disciplined for his failure to end the dangerous high-speed chase, which violated Euclid Police policies.

On August 20, 2013, Appellee filed a Complaint in the Court of Common Pleas for Cuyahoga County, naming Antoine R. Howard, Officer Jose Alcantara, and Officer Donna Holden as defendants. On January 23, 2014, Appellee voluntarily dismissed Howard. On October 10, 2014, Alcantara and Holden filed a Motion for Summary Judgment. February 11, 2015, the trial court granted the Motion with respect to Holden. However, the trial court denied the Motion as to Alcantara. On March 3, 2015, Alcantara filed a notice of appeal to the Eighth District. On November 5, 2015, the Eighth District Court of Appeals denied Alcantara's appeal, affirming the decision of the trial court. On December 18, 2015, Alcantara filed his Memorandum in Support of Jurisdiction before this Court. Plaintiff-Appellee now files her Memorandum in Opposition.

STATEMENT OF FACTS

This event began when Antoine Howard pulled his vehicle to the curb to pick up a friend on East 193rd Street in Euclid, Ohio. Defendant-Appellant Officer Jose Alcantara decided to stop the vehicle shortly thereafter. He provided different justifications for the stop, which do not necessarily comport with other evidence in the record. See Alcantara Affidavit at 8 (R. 27); Alcantara Dep. at 34:16-17; 35:4-16; 37:5-10; 38:8-20; 41:20 – 42:14 (R.31); Euclid Report at P. 2 (R. 31); Howard Dep. at 12:23-24 (R. 40). Alcantara told dispatch "he was trying to get a car to stop for him," and twenty six seconds of radio silence later, his next communication was that the vehicle was "taking off on him." Alcantara Aff. at 24 (R. 27). Just moments before, Alcantara received information from dispatch that a felony domestic violence warrant was attached to the owner of the vehicle (but Alcantara did not know the identity of the driver, whether the driver was

connected to the warrant, had no idea how old the warrant was, whether it was current, or any other details, and Alcantara had not witnessed *any crime at all* and had no idea whether the driver had committed any past crime, and there was no indication that the driver was dangerous). Alcantara Dep. at 41-46; 42-43; 45:1-6; 95:1-97:14 (R. 31). Despite having virtually no information about the driver other than the alleged (and disputed) violation of “impeding traffic” and a fleeing vehicle, Alcantara initiated a high-speed chase. Alcantara Dep. at 97:10-99:13 (R.31).

Alcantara testified that he commenced the chase in “not a lot of traffic” (Alcantara Dep. at 56:12-13 (R. 31)), but in his dispatch communication after the car fled, Alcantara said, “It’s taking off on me radio, taking off on me. We are westbound on Euclid - Upper Valley. Traffic’s heavy.” Alcantara Aff. at 24 (R. 27) (Emphasis added). The amount of traffic during this high speed chase on a busy thoroughfare, during rush hour, is a genuinely disputed material fact in this case.

The actual dispatch tape provides valuable insight into the chase. See Alcantara Aff. at 24 (R. 27); Dispatch Tape, Exhibit 1 to Plaintiff’s Opposition to Summary Judgement (R. 47). Despite Alcantara’s claims that he never exceeded 70 MPH and slowed at intersections, there is evidence to the contrary on the dispatch tape, with Alcantara’s contemporaneous statements in the heat of the moment. He states, “Doing about 80 miles an hour radio. Still westbound, 80 miles an hour.” Alcantara Aff. at 24 (R. 27). Then Alcantara stated, “Still westbound. Doing about 100 radio. 100 miles an hour. Still Westbound. Traffic’s very heavy.” Alcantara Aff. at 24 (R. 27); Exhibit 1, Dispatch Tape at 17:03:46 (R. 47). Alcantara admitted that when he called out the 100 MPH speed, he was still in pursuit of the vehicle. Alcantara Dep. at 77:14-18 (R. 31). At no time during the chase did Alcantara tell the radio that he slowed down, broke off, or terminated the chase.¹ The

¹ Alcantara knew that Euclid Police rules required him to report if he broke off a chase, and he did not follow that requirement without any good explanation. Alcantara Dep. at 62:8-15 (R. 31).

speed at which Alcantara operated his cruiser is a disputed issue of material fact in this case.

In addition, most of the stop lights on Euclid Avenue encountered by Howard and Alcantara were red: Alcantara chased Howard as he was “very reckless driving through every red light, disregarding pedestrians, bystanders and motorists in the area.” See Ex. 2 to Alcantara Dep. and Alcantara Dep. at 61 (R. 31); Howard Dep. at 25:15-26:13 (R. 44). After Alcantara reported that the chase was flying down Euclid Avenue at 100 MPH, his next contemporaneous statement was, “They just wrecked. They just wrecked radio. Just wrecked. Vehicle just wrecked radio. We’re at Ivanhoe and Belvoir. Ivanhoe Belvoir. They’re bailing. They are bailing out.” Alcantara Aff. at 24 (R. 27). Alcantara described the events as they happened, as an eyewitness. Dispatch Tape at 17:03:35- 17:03:46 (R. 47). Alcantara’s claim that he slowed at intersections to 35 MPH and went no more than 70 MPH at all other times is simply implausible.

And yet, despite these contemporaneous statements of what he saw unfolding in front of him, Alcantara claimed in his deposition and in his police report that he stopped chasing Howard. Alcantara reported he was approximately 1/3 of a mile behind Howard and “no longer in active pursuit.” Euclid Report at P. 2 (R. 31). Interestingly, he also failed to inform dispatch that he had allegedly terminated this high-speed chase. Alcantara Dep. at 61:19 – 62:15 (R. 31). The conclusion that Alcantara did not terminate the chase is also supported by Howard’s testimony and marking of a map about where he saw Alcantara: when Howard was “way past London Avenue,” Alcantara was “right behind me.” Howard Dep. at P. 18-21 (R. 40); Exhibits to Howard Dep. (R. 44).² Whether Alcantara terminated the chase, and whether he continued to pursue Howard at high speed are disputed issues of material fact. Further, the question of whether Alcantara ended the

² Any attack by Alcantara on the credibility of Howard’s testimony, at minimum, raises a question of fact, which is inappropriate for summary judgment. See *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 1993-Ohio-176, 617 N.E.2d 1123.

chase sheds light on the speed at which he was operating his cruiser. His driving speed is another disputed material fact: it is implausible that Alcantara could have contemporaneously reported the crash (saying, “Going right. They just wrecked. They just wrecked radio. Just wrecked. Vehicle just wrecked radio. We're at Ivanhoe and Belvoir. Ivanhoe Belvoir. They're bailing. They are bailing out. Bailing out.”) had he been 1/3 of a mile away. Dispatch Tape (R. 47).

Finally, Alcantara was disciplined for failing to terminate the chase. The reprimand letter from then-Lieutenant Robert Payne dated April 5, 2012 states that “***This Oral Reprimand is being issued because you failed to terminate the pursuit.***” It continues, “[g]iven all the circumstances, the crime, the warrant, the time of day, the location, the vehicular traffic, and the actions of the fleeing vehicle, it would have been prudent and advisable to end the pursuit in a timely fashion. ***The risk to the public was too high.***” See Oral Reprimand from Lieutenant Robert Payne to Officer Alcantara, April 5, 2012, Exhibit 4 to Alcantara’s Deposition (R. 31) (emphasis added).

Then-Lieutenant (now Captain) Payne also authenticated the two-page “Review and Critique of Pursuit” prepared by a committee of two police captains and four police officers “*that had specialized expertise in the policy for pursuit driving.*” See Payne Dep. at 28:12-25; 29:14-30:7; Alcantara Dep. Ex. 4 (R. 31). The committee concluded:

Due to inherent danger of any pursuit, officers will continually evaluate the seriousness of the known violation against the risks of continuing the pursuit.” Officers must continually evaluate the conditions of the roadway surface(s), the weather, and the traffic. *Termination of this pursuit was the better course of action in this pursuit due to the traffic conditions.*

Alcantara Dep. Ex. 4 at P. 2 (R. 31) (emphasis added). This conclusion was consistent with Payne’s own reprimand. Payne Dep. at 30:19-20. Prior to issuing his reprimand, Payne reviewed much information, including Alcantara’s report that claimed he “terminated the pursuit,” and spoke with Alcantara. Payne Dep. at 28:4-8. Payne testified that “***the truth was [Alcantara] failed to***

terminate the pursuit, like it says.” Payne Dep. at 44:9 (emphasis added). Neither the committee nor Captain Payne believed Alcantara terminated the chase.

Additionally, Euclid Police Standard Operating Procedure 08-001-442 states that pursuits may only be initiated “when the pursuit will be executed with caution *so as not to create extreme or unreasonable danger* for either the police or the public.” Euclid Police Standard Operating Procedure 08-001-442, Alcantara Dep. Ex. 5 (R. 31) (emphasis added). Assessing “extreme or unreasonable danger” requires an officer to consider several factors including, but not limited to:

(A) The seriousness of the violation as known by the officer at the initiation of the pursuit. Due to inherent danger of any pursuit, officers will continually evaluate the seriousness of the known violation against the risks of continuing the pursuit.

(B) The condition of the roadway surface(s) the weather and the traffic.

(C) Direction of traffic flow.

(*Id.* at Section I.) Discipline against Alcantara for failing to terminate the chase indicates Alcantara “create[d] extreme or unreasonable danger,” particularly in light of the heavy traffic and as Alcantara had not witnessed any crime. Further undermining – and explaining – Alcantara’s decision to engage in a high-speed chase is his failure to attend a mandatory driving inservice just eight months before the chase in this case. See July 21, 2011 Make-Up Driving Inservice Instruction, Ex. 7 to Payne Dep. (R. 46); Expert Report of Dr. Geoffrey Alpert at paras. 11, 16, Ex. 2 to Plaintiff’s Motion for Summary Judgment (R. 47). Payne testified that this mandatory training included training for “vehicle pursuits.” Payne Dep. at 16. While Alcantara claims he did make up that class, his personnel file provided contains no verification of that claim. And, despite promises from counsel during Payne’s deposition to provide documentation of the make-up class, no such documents have been produced. Payne Dep. at 21:20-25.

Further putting the public at a greater risk, Alcantara failed to activate his siren for at least

fifty percent of the chase. On the dispatch tape, no siren is audible at any point – not even a blip – when Alcantara toggled his radio on and off. Alcantara Aff. at 24 (R. 27); Dispatch Tape (R. 47); Alcantara Dep. at 69:5-70:23 (R. 31). Significantly, he admitted that “while he was transmitting, the siren was not being heard.” Alcantara Dep. at 71:21-22 (R. 31). Further, there is no independent corroboration that he even used the siren, and both Howard and Plaintiff-Appellee Hardesty were asked about whether they could hear a siren and neither said they could. Howard Dep. at 23:12; 52:12-20 (R. 40); Hardesty Dep. at 17:4-5 (R. 41). However, even if he used his siren as he claims, Alcantara was transmitting only about 30 seconds (or approximately 50% of the chase): Alcantara drove approximately half of the chase – traveling somewhere between 70 and 100 MPH, barreling down a main road during rush hour – with no siren to warn the public.³ This was an extremely dangerous set of circumstances, and yet another telling material fact in this case. The danger of not using the siren is evident in Euclid Police pursuit procedures, which require that “[a]ll police vehicles involved in a pursuit will use Emergency lights and sirens throughout the pursuit. **Sirens should be in continuous operation mode throughout. (ORC 4513.21).**” Euclid Police Standard Operating Procedure 08-001-442, Alcantara Dep. Ex. 5 (R. 31) (emphasis added). Alcantara conducted this chase in obvious violation of his duty to use his siren in a “continuous operation” to warn the public, and in violation of other Euclid Police procedures. See, e.g., Euclid Police Standard Operating Procedure 08-001-442 at Sections IV.C, IX.E.1, Alcantara Dep. Ex. 5 (R. 31).

³ Alcantara contacted dispatch 6 times from the beginning of the chase until the crash. The Affidavit identifying the recording has “ending” times for all the transmissions but not starting times. Plaintiff has identified the starting times from the recording for each one: (1) start 17:02:39- end 17:02:47 (8 seconds); (2) start 17:02:58 – end 17:03:01 (3 seconds); (3) start 17:03:02- end 17:03:11 (9 seconds); (4) start 17:03:25- end 17:03:27 (3 seconds); (5) start 17:03:28- end 17:03 35 (7 seconds); (6) 1 second- the impact occurred shortly after the beginning of the transmission. TOTAL transmissions - **31 seconds**. Alcantara Aff. at 24 (R. 27).

Heavily disputed issues of fact in this case, when resolved in favor of the non-moving party, show extreme and outrageous conduct by Alcantara with substantial risk to pedestrians and the motoring public, like Ms. Hardesty. Ultimately, approximately ten seconds after Alcantara called out the 100 MPH speed, still in pursuit, a horrific crash occurred involving Regina Hardesty's vehicle. Had Alcantara actually terminated this reckless, wanton, dangerous, high-speed chase, Ms. Hardesty's permanent, serious injuries could have been prevented. See Howard Dep. at 40:11-23, 77:15-21, 85-86 (R. 41).

ARGUMENT AGAINST JURISDICTION

Counter-Proposition of Law I:

O.R.C. § 2744.03(A)(6) Specifically Contemplates that a Law Enforcement Officer Who Engages in Any Course of Conduct, Including Pursuing a Fleeing Violator who Ultimately Injures a Third Party, Is Not Immune from Liability when the Officer's Conduct is Wanton or Reckless.

Defendant-Appellant Alcantara boldly asks the Court to declare a new *per se* rule that law enforcement officers engaged in chases are categorically immune from liability so long as they do not injure a third party with their own vehicles. This absurd request would require the Court to overwrite the plain language of O.R.C. § 2744.03(A)(6), which states that an officer is ***not*** immune for conduct if his "(b) ... acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." *See also Anderson v. Massillon* (2012), 134 Ohio St. 3d 380, 381, 2012-Ohio-5711, 983 N.E.2d 266. To eliminate the analysis of whether the officer engaged in a chase in such a manner would overwrite the plain letter of the law and this Court's jurisprudence.

Eliminating the reckless or wanton analysis would also give a free pass to law enforcement to engage in chases no matter the risk: a new *per se* rule requested by Alcantara would allow officers to undertake chases, for example, in a school zone when school lets out, the streets and sidewalks full of children, parents' vehicles, and school buses, and so long as the officer is not the

one who mows down an innocent child, he would not be liable. This hypothetical, though extreme, would be the direct result of the *per se* rule requested by Alcantara, and is the very type of situation that necessitates the reckless and wanton analysis. There is no sound reason to create a categorical exception like the one requested by Alcantara to eliminate the reckless and wanton analysis in determining whether an officer is immune.

It is also worth noting that Alcantara's analysis of *Lewis v. Bland*, 75 Ohio App. 3d 453 (Ohio Ct. App., Summit County 1991) grossly misstates the case's conclusions: Alcantara claims that *Lewis* stands for the proposition that "the possibility that the violator will injure a third party is too remote to create liability [to the pursuing officer]." But Alcantara left out the most important part of the quotation: "the possibility that the violator will injure a third party is too remote to create liability ***until the officer's conduct becomes extreme.***" *Id.* at 456. *Lewis* recognizes that extreme behavior by an officer creates liability, and does not cut short the reckless and wanton analysis required under O.R.C. § 2744.03(A)(6).

Additionally, Alcantara conflates the issue of proximate cause with immunity under O.R.C. § 2744(A)(6) when he discusses *Argabrite v. Neer* (Jan. 16, 2015), 2015-Ohio-125. Notwithstanding the many ways in which *Argabrite* is distinguishable from the instant case,⁴ the entire quotation he takes from *Argabrite* applies to the question of proximate cause, and not to the question of immunity, which is the basis for Alcantara's instant appeal. *Id.* at 880-881. *Argabrite* explicitly recognizes the reckless and wanton analysis required by O.R.C. §2744.03(A)(6), stating, "If there is no ***genuine issue of either recklessness or proximate cause resulting from***

⁴ In *Argabrite*, the evidence was "primarily the depositions of the defendant police officers plus the depositions and affidavits of two experts retained by *Argabrite*" (*Argabrite* at ¶9), no evidence was offered to contradict police about the facts surrounding the chase (such as Howard's deposition), and there were no contradictions between the defendant officers' testimony and their own reports, radio recordings, and disciplinary records.

recklessness, then the officers are entitled to immunity under R.C. 2744.03(A)(6).” *Id.* at 881 (emphasis added). Raising questions of proximate cause is not proper and such questions are not at issue in this interlocutory appeal, which concerns only on the question of immunity.

And based on the disputed facts in this case, as the trial and appellate courts found, this question of whether Alcantara’s conduct is reckless or wanton must be left to the jury: “Because the line between [wanton or reckless conduct] and ordinary negligence is sometimes a fine one depending on the particular facts of a case, it is generally recognized that such issue is for the jury to decide.” *Reynolds v. Oakwood*, 38 Ohio App.3d 125, 127, 528 N.E.2d 578 (2d Dist.1987); see also *Botto v. Fischesser*, 174 Ohio St. 322, 325-26, 189 N.E.2d 127 (1963); *Kellerman v. J. S. Durig Co.*, 176 Ohio St. 320, 325, 199 N.E.2d 562 (1964); *Hawkins v. Ivy*, 50 Ohio St.2d 114, 117, 363 N.E.2d 367 (1977). “The issue should not be withheld from the jury where reasonable minds might differ as to the import of the evidence.” *Reynolds v. Oakwood*, 38 Ohio App.3d at 127. Thus, Alcantara’s first proposition of law must fail and this Court should decline jurisdiction.

Counter-Proposition of Law II:

An Officer Who Pursues a Fleeing Violator for Less Than 59 Seconds Over a Distance of 1.2 Miles, with the Police Cruiser’s Overhead Lights and Siren Activated, with Clear Visibility, on a Dry, Straight Roadway, while Slowing at Intersections, while Maintaining a Constant Look-Out for Other Vehicles and Pedestrians, and Never Strikes Another Vehicle, Pedestrian or Object Might Not Be Wanton or Reckless: But That’s Not What the Facts Show in this Case, and Alcantara Is Not Entitled to Immunity under O.R.C. §2744.03(A)(6).

Alcantara’s Second Proposition of Law is absurd. Maybe an officer who operated his cruiser pursuing a fleeing violator for less than 59 seconds over 1.2 miles, with the cruiser’s overhead lights and siren activated, with clear visibility, on a dry, straight roadway, slowing at intersections, maintaining a constant look-out for vehicles and pedestrians, and never striking another vehicle, pedestrian or object might not be wanton or reckless. But that is simply not the

case before this Court, and it is illogical for Alcantara to ask the Court to consider such a question.

Plaintiff-Appellee's Memorandum above delves deep into the disputed facts in this case: they are many, and they are supported by various pieces and types of evidence, including Alcantara's own testimony, radio recordings, and reports, discipline from his supervisors, and testimony of other witnesses. Contradicting his own proposition of law, Alcantara admitted the *siren was off* during at least half of the chase. Alcantara also neglects to mention in this Proposition of Law that he undertook this chase at *rush hour*, on a *main thoroughfare*. Further, he forgets that his own statements establish that *traffic was heavy* at the time. Moreover, his own radio transmissions and his contemporaneous statements of what he witnessed belie his claim that he slowed to 35 MPH at intersections and never went above 70 MPH. Instead, the evidence shows that Alcantara was flying along Euclid Avenue closely behind Howard, going 80 and 100 MPH, and watching suspects crash and bail out of the car in real time as a witness, which would have been impossible had Alcantara slowed down as he claims. He was *disciplined* by his supervisors for *failing to terminate the chase* because it *posed undue danger*, and the way he undertook and continued the chase (without terminating it) violated several Euclid Police procedures.

Alcantara can discuss all he likes about visibility and the dryness or straight shot of the roadway, but these facts are irrelevant in light of the many disputed issues of material fact here. The trial and appellate courts considered a litany of cases establishing that the disputed facts here (in particular, his failure to use the siren continuously, if at all) do not permit summary judgment in Alcantara's favor. It is clear that reasonable minds could differ on whether he acted "with reasonable caution and due regard for the safety of the public." Summary judgment on immunity is necessarily precluded: "The issue should not be withheld from the jury where reasonable minds might differ as to the import of the evidence." 38 Ohio App.3d 125, 127, 528 N.E.2d 578 (2d

Dist.1987). Determining “whether acts demonstrate the presence of wantonness, recklessness, or merely negligence is normally a decision for the jury, based on the totality of the circumstances.” *Whitfield v. Dayton* (2006), 167 Ohio App. 3d 172, 2006-Ohio-2917 at *P39, citing *Hunter* at 972, and *Garrison v. Bobbitt* (1999), 134 Ohio App.3d 373, 385. Alcantara is not entitled to immunity, his second proposition of law must fail, and this Court should decline jurisdiction.

Counter-Proposition of Law III:

Proximate Cause is Not Properly the Subject of this Interlocutory Appeal, and the Law Is Clear that there is NOT A *Per Se* Rule Declaring that Law Enforcement Officers Are Never the Proximate Cause of Injuries to a Third Party.

In his Third Proposition of Law, Alcantara asks the Court to declare a new rule that any law enforcement officer engaged in a chase is never the proximate cause of a third party’s injuries. But he again fails to remember the most important part of his *Lewis* quotation: “the possibility that the violator will injure a third party is too remote to create liability *until the officer’s conduct becomes extreme.*” *Lewis v. Bland*, 75 Ohio App. 3d 453, 456 (Ohio Ct. App., Summit County 1991). Per *Lewis*, when an officer engages in **extreme** conduct during a chase, he is the proximate cause of the third party’s injury. *Lewis* does not categorically preclude the officer’s conduct as the proximate cause of the injury.

And Alcantara asks this Court to disregard myriad disputed material facts of the chase (80 to 100 MPH; rush hour; main road; heavy traffic; no siren for at least half of the chase). Alcantara was disciplined for how operated his cruiser while chasing Howard: “***This Oral Reprimand is being issued because you failed to terminate the pursuit,***” and “[g]iven all the circumstances, the crime, the warrant, the time of day, the location, the vehicular traffic, and the actions of the fleeing vehicle, ...***[t]he risk to the public was too high.***” Oral Reprimand from Lt. Robert Payne, April 5, 2012, Exhibit 4 to Alcantara’s Deposition (R. 31) (emphasis added). Whether an officer’s conduct

proximately caused the plaintiff's injuries is a question of fact for the jury. *Lewis v. Bland, supra*, Dissent at 459, citing *Stark v. Los Angeles* (1985), 168 Cal.App. 3d 276, 284-285, 214 Cal.Rprt. 216, 221-222, *Kuzmics v. Santiago* (1978), 256 Pa.Super. 35, 41, 389 A.2d 587, 590.

Further, Alcantara's Third Proposition of Law again conflates immunity with proximate cause, and misstates the conclusions of the cases he cites, as well as others from across the state. On appeal before the Eighth District, Alcantara's only Assignment of Error was that "The Trial Court Erred by Denying the Motion for Summary Judgment of Officer Jose Alcantara as Officer Alcantara Is Entitled to Immunity Pursuant to R.C. Chapter 2744." He did not raise an Assignment of Error on Proximate Cause. Further, the only issue decided by the Eighth District was the issue of immunity as proximate cause was not ripe for review. Thus, his Third Proposition of Law is not properly before this Court, and this Court should decline jurisdiction.

CONCLUSION

For the reasons set forth above, this case does not involve matters of public and great general interest, nor does it involve a substantial constitutional question. Wherefore, Appellee Regina Hardesty respectfully requests that this Court decline jurisdiction over Defendant-Appellant Jose Alcantara's appeal.

Respectfully submitted,

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