IN THE SUPREME COURT OF OHIO

CASE NO. 2017-1391

JIM DAVID, JR. AS ADMINISTRATOR OF THE ESTATE OF JAMES DAVID SR., *et al.*
Plaintiff-Appellees,

-vs-

JEFFREY MATTER, *et al.*,
Defendant-Appellants.

ON APPEAL FROM THE SANDUSKY COUNTY COURT OF APPEALS SIXTH APPELLATE DISTRICT
Case No. 17CAS6

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLEES

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AMICUS CURIAE'S STATEMENT OF INTEREST

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals may have justice and wrongdoers are held accountable. The OAJ is comprised of approximately one thousand five hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and to promote public confidence in the legal system.

The OAJ submits this brief out of concern that the employees of political subdivisions are enjoying a steadily expanding immunity from civil liability that the General Assembly neither envisioned nor intended. The position offered by Defendant-Appellants Jeffrey Matter and Erik Lawson ("the Matter Defendants") would collapse the analysis of political subdivision employee immunity into what should remain a separate analysis regarding liability, thereby fast-forwarding the resolution of legal disputes that belong to a jury. Moreover, Matter invites the sort of semantic legal wizardry that our legal system left behind in the era of the common law forms of action. As if parrotry could carry the day in a Court of last resort, *Amici Curiae* Ohio Association Of Civil Trial Attorneys ("OACTA") and Ohio Municipal League ("OML") have offered a similarly-mistaken view. In the interest of offering a proper plain-language understanding of R.C. 2744.03(A)(6), the OAJ offers the following argument.

STATEMENT OF THE CASE AND FACTS

The OAJ adopts and incorporates the statement of the case and facts offered in the merit brief of Plaintiff-Appellees Jim David Jr., Administrator of the Estate of James David, Sr. and Karen David ("the David Plaintiffs").

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ARGUMENT

This Court has accepted a single proposition of law for consideration, which is as follows:

> **PROPOSITION OF LAW: THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, WHICH IS PREMISED ONLY UPON NEGLIGENT CONDUCT BY DEFINITION, IS SUBJECT TO DISMISSAL UNDER R.C. 2744.03 WHEN IT IS ASSERTED AGAINST AN EMPLOYEE OF A POLITICAL SUBDIVISION, EVEN WHEN THERE ARE ALLEGATIONS OF "WANTON OR RECKLESS" CONDUCT. (R.C. 2744.03(A)(6)(b) APPLIED)**

I. Introduction

The Matter Defendants' proposition of law is fatally flawed because it assumes that there is nothing more to Negligent Infliction of Emotional Distress ("NIED") than the words that comprise the tort's name. To the contrary, the General Assembly did not seek to modify or abrogate common law concepts of the duty of care through passage of the political subdivision employee immunity statute, R.C. 2744.03(A)(6). By leaving words such as "reckless" and "wanton" undefined in the statute, the General Assembly imported the common law understanding of these words into the Revised Code. Importantly, there are two common law concepts of negligence; one is the common name for a tort of misfeasance and the other describes a degree of culpability belonging on a spectrum along with recklessness, wantonness, malice, and bad faith.

By adopting an immunity regime premised upon what can only be the degree of culpability of a political subdivision employee's "acts or omissions," the General Assembly narrowed the proper focus of a court's immunity analysis to the facts alleged or proven by a plaintiff rather than the legal form of a plaintiff's theory of liability. *R.C. 2744.03(A)(6)(a) and (b).* For that reason, political subdivision immunity must not extend to employees in lawsuits like this one, where the David Plaintiffs alleged, and the

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parties do not dispute at this phase, that the Matter Defendants' conduct was reckless. Because the Matter Defendants, OACTA, and OML have offered only an illusory alternative construction of R.C. 2744.03(A)(6)—one that is at odds with the plain language of the statute—this Court should reject the proposition of law and affirm the Court of Appeals.

II. The Matter Defendants' Contorted Understanding of the Statute

The Matter Defendants neatly summarized their argument in this appeal:

> The Legislature has expressly shielded employees of political subdivisions from claims that can only be rooted in negligence. Ohio courts and federal courts interpreting Ohio law have held that the NIED tort is necessarily grounded in negligence and is inconsistent as a matter of law with R.C. 2744.03(A)(6)(b), which requires a higher level of culpability in order to remove the immunity of political subdivision employee
> s. A NIED claim can never be based on the high level of culpability (e.g., reckless, intentional, etc.) because it is a negligent-based claim. Allegations of recklessness have no relevance to a litigant's claim for NIED. (Emphasis added.)

Brief of Defendant-Appellants Jeffrey Matter and Erik Lawson filed May 11, 2018 ("Matter Defendants' Brief"), p. 1. Amici Curiae OACTA and OML have offered a similar take on the statute:

> While the Complaint admittedly contains an allegation of recklessness in its negligent infliction of emotional distress claim, that allegation is insufficient to withstand the requirements of R.C. 2744.03(A)(6)(b). The very definitions of negligence, recklessness, and intentionally for the purposes of emotional distress claims, are mutually exclusive and are not synonymous, interchangeable, or overlapping. (Emphasis added.)

Brief of Amici Curiae Ohio Association Of Civil Trial Attorneys and Ohio Municipal League filed May 11, 2018 ("OACTA and OML Amicus Brief"), p. 5. These views of the political subdivision employee immunity statute are mistaken, particularly the idea that negligence, recklessness, and greater degrees of culpability do not ever overlap.

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According to Defendants and their loyal *amici*, a tortfeasor can avoid an NIED claim by escalating the misconduct to a level that surpasses mere negligence. This cannot be the law in a rational society.

III. The Plain Language of the Political Subdivision Employee Immunity Statute

This entire dispute revolves around the meaning of one provision of the political subdivision employee immunity statute, R.C. 2744.03(A)(6)(b). When considering a statute, this Court must " 'ascertain and give effect to the legislature's intent,' as expressed in the plain meaning of the statutory language." *State v. Pountney*, 152 Ohio St.3d 474, 2018-Ohio-22, 97 N.E.3d 478, ¶ 20, quoting *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512 ¶ 9; *see also State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 12, quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus (" 'The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.' "). If the language of a statute "is not ambiguous," then the Court "need not interpret it" but "must simply apply it." *Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471 at ¶ 13; *see also Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 18-19; *State v. Gordon*, __ Ohio St.3d __, 2018-Ohio-1975, __ N.E.3d __, ¶ 8. Importantly, "R.C. 1.42 guides" this Court's "analysis, providing that '[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.' " *Pelletier v. Campbell*, __ Ohio St.3d __, 2018-Ohio-2121, __ N.E.3d __, ¶ 14.

The relevant portion of the political subdivision employee immunity statute is clear:

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> (A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:
>
> * * *
>
> (6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:
>
> * * *
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. (Emphasis added.)

R.C. 2744.03(A)(6)(b).

Read plainly, whether or not this statute strips a political subdivision employee of immunity from liability depends entirely upon the "manner" of their "acts or omissions." *Id.* The statute lists, but does not define what this court has called the "degrees of culpability" of recklessness, wantonness, malicious purpose, and bad faith. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 3. When considering the meaning of each of the foregoing degrees of culpability in the context of the statute's regulation of common law tort liability, this Court has already relied heavily upon "the historical development of these terms in our jurisprudence." *Anderson* at ¶ 31.

Notably, this statue does not say, as the Matter Defendants, OACTA, and OML appear to argue, that political subdivision employees are immune from suit under any tort theory that requires proof of merely negligent conduct regardless of the alleged or actual manner of an employee's acts or omissions. In light of the Matter Defendants' proposition of law, it would be helpful to consider the difference between NIED, which developed

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from older torts, and the spectrum of degrees of culpability—from negligence to bad faith—that evolved over the same period.

IV. The Rise of the Misfeasance Tort and Negligent Infliction of Emotional Distress

The tort that we now call negligence did not spring forth fully formed from the knees of the plaintiffs' bar:

> The writs which were available for remedies that were purely tortious in character were two—that for the action of trespass, and that for the action of trespass on the case. * * * Trespass on the case, or the action on the case, as it came to be called, developed some time later, as a supplement to the parent action of trespass, designed to afford a remedy for obviously wrongful conduct resulting in injuries which were not forcible or not direct.

Prosser, *The Law of Torts*, Section 7, 28-29 (3rd Ed.1964); *see also* Addison, Smith & Keep, *Law of Torts*, Section 3, 72 (7th Ed.1893), quoting Willes, C.J., *Winsmore v. Greenbank*, Willes, 577 ("The maxim of the law, '*ubi jus, ibi remedium*,' has at all times been considered so valuable, that it gave occasion to the first invention of that form of action called an action on the case, where the novelty of the complaint is no objection to the action, provided an injury cognizable by law is shown to have been inflicted on the plaintiff * * * for 'this form of action was introduced for the reason that the law would never suffer a wrong and a damage without a remedy' "); *Case v. Mark*, 2 Ohio 169 (1825). "[F]rom the beginning" the action on the case "required proof of either a wrongful intent or negligence" and "there could ordinarily be no liability unless actual damage was proved." Prosser at 29. As time went on, "the action on the case produced a large, undigested group of situations in which negligence was the essence of the tort." *Id.*, Section 28 at 142.

By the time of the industrial revolution, the tort now known as negligence began to coalesce:

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> About the year 1825, negligence began to be recognized as a separate and independent basis of tort liability. * * * It undoubtedly was greatly encouraged by the disintegration of the old forms of action, and the disappearance of the distinction between direct and indirect injuries, found in trespass and case. The cause of action which at last emerged from this process of reshuffling took on, in general, the aspects of the action on the case, largely because the facts upon which the initial decisions were based fitted that action.

Id. at 143; *compare Mark*, 2 Ohio 169 *with Kerwhaker v. Cleveland, Columbus, and Cincinnati R.R. Co.*, 3 Ohio St. 172 (1854). In Ohio, this Court described what became the modern elements of the tort as early as the 1850s. *E.g., Kerwhaker,* 3 Ohio St. at 173, 188-196 (In an appeal from a defense verdict in an action for trespass on the case, the Ohio Supreme court identified the concepts of duty of ordinary care, "neglect of ordinary care," proximate and remote causation, and damages.).

The common law did not originally recognize the right to recover for "mere mental pain and anxiety" caused by the negligent conduct of another because the courts found these injuries to be "too vague for legal redress where no injury is done to person, property, health, or reputation." *Morton v. W.U. Tel. Co.*, 53 Ohio St. 431, 432, 41 N.E. 689 (1895). There were also concerns that injuries "caused solely by fright, alarm or fear, and thereby producing nervous excitement and distress" would "naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation." *Huffman v. Toledo & Ohio Cent. Ry. Co.*, 7 Ohio N.P. 67, 9 Ohio Dec. 748, 748-749, 1900 WL 1209 (C.P.1900). But by the modern era, it became apparent that these were baseless concerns:

> It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation," and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds. "And it is no objection to say, that it will occasion multiplicity of actions; for if men will

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> multiply injuries, actions must be multiplied; for every man that is injured ought to have his recompense." So far as distinguishing true claims from false ones is concerned, what is required is rather a careful scrutiny of the evidence supporting the claim; and the elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of the law.

Prosser, Section 11 at 43, quoting *Ashby v. White*, 2 Ld.Raym. 938, 955, 92 Eng.Rep. 126 (1703) (Holt, C.J.). For reasons essentially identical to those identified by William Lloyd Prosser in the foregoing passage, this Court expressly rejected its 19th and 20th century authorities that had held "a contemporaneous physical injury is a necessary condition precedent to liability for the negligent infliction of serious emotional distress." *Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 132-133, 447 N.E.2d 109 (1983). This Court did not recognize or create some new, independent tort that had never existed before. Rather, by rejecting a rule that had prevented recovery for injuries that were purely mental or emotional *under traditional principles of negligence*, this Court allowed the pre-existing tort, which we colloquially call negligence, to expand into the arena of NIED.

V. The Common Law Spectrum of Degrees of Culpability

It is important for resolution of this appeal that the cause of action and the manner of conduct that we call negligence are not one and the same:

> Negligence, as we shall see, is simply one kind of conduct. But a cause of action founded upon negligence, from which liability will follow, requires more than conduct.

Prosser, Section 30 at 146. One commentator has explained:

> Negligence is not a form of action nor a cause of action, although there is an action for harm caused by negligent conduct. The word includes all situations in which the defendant by word or act creates a likelihood of harm either physical or otherwise for which the law will give redress if such harm is suffered. It is not, as has been claimed by some, a separate tort. In fact it is conduct which may or may not result in a tort. One may be negligent although he does no harm.

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Warren Abner Seavey, *Cogitations on Torts*, 24 (1954). As the tort developed, so did an array of "degrees of culpability." *Anderson*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266 at ¶ 3. The culpability of an actor's wrongful conduct falls on a spectrum "between intent to do harm * * * and the mere unreasonable risk of harm to another involved in ordinary negligence[.]" Prosser, Section 34 at 187-188. Prosser observed that "the words 'wilful,' 'wanton,' or 'reckless' " fall on this spectrum within "a penumbra of what has been called 'quasi intent.' " *Id.* at 188, quoting Elliot, *Degrees of Negligence*, 6 So.Cal.L.Rev. 91, 143 (1932). Willfulness, wantonness, and recklessness,

> have been grouped together as an aggravated form of negligence, <u>differing in quality rather than in degree from ordinary lack of care</u>. These terms * * * apply to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended. Thus it is held to justify an award of punitive damages, and may justify a broader duty, and more extended liability for consequences[.] (Emphasis added.)

Id. at 188. The difference "in quality" between mere negligence and the higher degrees of culpability is that an "act of an unreasonable character" that would sufficiently establish negligent conduct is done "in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Id. Accord Anderson* at ¶ 34 ("Reckless conduct is characterized by the <u>conscious disregard</u> of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances <u>and is substantially greater than negligent conduct</u>." (Emphasis added.)).

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When this Court decided *Anderson v. Massillon*, the question arose whether these degrees of culpability overlapped. The dissenting opinion recognized that although the stages of tortious wrongdoing are "described as being on a continuum," there was a

concern that "employees would have immunity for their willful acts, because the word 'willful' is not included as an exception to immunity along with 'wanton' or 'reckless.' " *Id.* at ¶ 42-43 (Lanzinger, J. dissenting). The majority rejected this concern precisely because "intentional conduct would suffice to prove recklessness and * * * reckless conduct would suffice to prove negligence" *Id.* at ¶ 35, citing Dobbs, *The Law of Torts*, Section 26 and 27 (2000). Indeed, the tort known as negligence is often based upon conduct rising to a higher degree of culpability. *E.g., Sicard v. Univ. of Dayton*, 104 Ohio App.3d 27, 660 N.E.2d 1241 (2nd Dist.1995)

VI. Proper Resolution of the Instant Matter

This Court should reject the proposition of law offered by the Matter Defendants and *Amici Curiae* OACTA and OML and affirm the decision of the Sixth District Court of Appeals. The Matter Defendants have asked this court to hold that an allegation of more seriously culpable conduct—conduct that is reckless—cannot establish the element of negligence in the NIED tort. *Matter Defendants' Brief, p. 1.* In a similar vein, *Amici Curiae* OACTA and OML have suggested that the various degrees of culpability are not "overlapping." *OACTA and OML Amicus Brief, p. 5.* If this court were to accept this specious logic, it would be one small step along a path that would return our civil justice system to the thankfully forgotten era of strict legal formalism:

> In the early English law, remedies for wrong were dependent upon the issuance of writs to bring the defendant into court. No one could bring an action in the King's common law courts without the King's writ. The number of such writs available was very limited, and <u>their forms were strictly prescribed; and unless the plaintiff's cause of action could be fitted into the form of some recognized writ, he was without a remedy.</u> The result was a highly formal and artificial system of procedure, which governed and controlled the law as to the substance of wrongs which might be remedied. (Emphasis added.)

Prosser, Section 7 at 28.

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The statute plainly says nothing about "claims that can only be rooted in negligence." *Compare Matter Defendants' Brief, p. 1. with R.C. 2744.03(A)(6)(b).* Rather, the statute conditions immunity on the "manner" of a political subdivision employee's "acts or omissions." *R.C. 2744.03(A)(6)(b).* Reading the statute properly within the context of "the historical development of * * * our jurisprudence," *Anderson* at ¶ 31, there can be no doubt that the "manner" of an individual's conduct refers to its degree of culpability rather than the way it fits within any given theory of tort recovery. *R.C. 2744.03(A)(6)(b).* In light of the way that the tort for NIED developed within the common law of negligence, there can be no doubt that conduct rising to the level of recklessness is sufficient *both* to deny immunity to a political subdivision employee under R.C. 2744.03(A)(6)(b) at the pleadings phase *and* to state a claim alleging a violation of the duty of reasonable care.

Finally, this Court should not be concerned that mere allegations of recklessness will permanently strip the employees of political subdivisions of their statutory immunity. The Plaintiffs must still establish a higher degree of culpability than mere negligence in order to prevail. It should not be forgotten that this matter arose on appeal from an order denying the Matter Defendants' motion for partial judgment on the pleadings. *David v. Matter*, 2017-Ohio-7351, 96 N.E.3d 1012 ¶ 1 (6th Dist.2017). They are still entitled to move for summary judgment if discovery in this matter shows that the claims of reckless conduct are unfounded as a matter of law. And the Matter Defendants can always argue to a jury that there can be no recovery for only negligent acts or omissions. *R.C. 2744.03(A)(6)(b).*

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CONCLUSION

For the foregoing reasons, this Court should reject the proposition of law offered by the Matter Defendants and *Amici Curiae* OACTA and OML.

Respectfully Submitted,

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I certify that a copy of the foregoing **Brief** has been sent e-mail on this 2nd day of July 2018 to:

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