

[Cite as *Burr v. Ohio State Hwy. Patrol*, 2012-Ohio-4906.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alejandro Alvaro Burr,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-26
Ohio State Highway Patrol,	:	(Ct. of Cl. No. 2009-04688)
Defendant-Appellee.	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on October 23, 2012

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*David E. Koerner, Ron Graham*, for appellant.

*Michael DeWine*, Attorney General, *Peter E. DeMarco*, and *James P. Dinsmore*, for appellee.

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APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶ 1} Plaintiff-appellant, Alejandro Alvaro Burr ("Burr"), appeals the judgment of the Court of Claims of Ohio in favor of defendant-appellee, the Ohio State Highway Patrol ("OSHP"). For the following reasons, we affirm.

**I. BACKGROUND**

{¶ 2} Burr, a New York resident, filed this action for negligence and negligent training/supervision against OSHP in the Court of Claims on May 6, 2009. Burr's complaint also named Sgt. Ronald Bornino and Sgt. K.P. Palmer as defendants, but the Court of Claims dismissed those parties via a Pre-Screening Entry. Burr's claims stem

from OSHP's conduct upon responding to a one-vehicle automobile accident involving Burr that occurred shortly after 2:00 a.m. on July 11, 2008. The Court of Claims bifurcated the issues of liability and damages, and the case proceeded to trial on liability. Three witnesses testified at trial—Burr, Sgt. Bornino, and Timothy Longo, an expert witness for OSHP.

{¶ 3} Burr's trial testimony explained the relevant background leading up to the events at issue here. On the evening of July 9, 2008, Burr was at his friend's apartment in Dansville, New York, when he heard voices, telling him to go to California. Other people in the apartment were smoking marijuana that night, but Burr could not remember whether he smoked any. Burr went to bed at approximately 3:00 a.m. on July 10, 2008, and he slept for about one hour. When he awoke, Burr decided to drive to California. One reason he left for California was his devastation after receiving a telephone call from the local police department, warning him to stay away from a woman, Lindsay, in whom he was romantically interested. Burr did not tell anyone he was hearing voices "because [he] didn't think anything was wrong." (Tr. 20.) Burr did not tell his family that he was leaving for California.

{¶ 4} On route toward California, Burr stopped at a Salvation Army store in Buffalo, New York, where he purchased some clothing, and at a Quizno's restaurant. Burr also stopped at a motel and obtained a room, but stated, "I don't remember very much of it." (Tr. 21.) Continuing west, Burr claims that a police officer stopped him for speeding in Cleveland, Ohio. Although he claims he had been traveling over 100 miles per hour, Burr did not receive a speeding ticket.

{¶ 5} Burr testified that, in Ohio, he "turned around a couple of times trying to decide if I should go to California or go back home, and I decided I was going to go back home." (Tr. 22.) The main reason for his decision was to correct the situation with Lindsay. By the early hours of July 11, 2008, Burr had been up for over a day and a half, with only a couple hours of sleep. Burr admitted that he was very tired and was falling asleep at the wheel "a little bit." (Tr. 35.) In fact, he testified that he briefly fell asleep, scraping a guardrail on the left side of the road, and that woke him up. Burr claims that he then heard a voice telling him to let go of the steering wheel and pray; when he did

so, he hit a guardrail "pretty hard," causing the air bag to deploy. (Tr. 23.) The impact destroyed Burr's vehicle, but Burr was able to get out and walk along the road until Sgt. Bornino arrived at the scene.

{¶ 6} Sgt. Bornino testified that he responded to a report of a one-vehicle crash on State Route 11, just north of Interstate 90, shortly after 2:00 a.m. on July 11, 2008. When he approached the scene, he noticed "no evasive action, no skidmarks of any kind, no yaw marks indicating that swerving action took place." (Tr. 64.) As a result, he assumed that the driver had fallen asleep at the wheel. Sgt. Bornino did not observe any visible injuries on Burr, who told Sgt. Bornino he was not hurt.

{¶ 7} Burr was unable to remember much of his interaction with Sgt. Bornino. He could not remember everything he told Sgt. Bornino, but stated that he told Sgt. Bornino that he "had come to the realization in my mind that I was Jesus Christ." (Tr. 23.) Sgt. Bornino did not recall Burr making that statement. When asked what else he told Sgt. Bornino, Burr could not remember, but claimed that he said "[c]razy things" that "seemed totally normal" at the time because he thought he was fine. (Tr. 24.) Sgt. Bornino testified that Burr mentioned fighting or arguing with a girlfriend and that he seemed upset about that. Burr refused to write a statement, and Sgt. Bornino testified that Burr was not forthcoming with information. Burr told Sgt. Bornino that he did not have any family or friends he wanted called. According to Sgt. Bornino, Burr did not want to accompany the tow-truck driver with his vehicle, and he refused any offer of help.

{¶ 8} In the course of investigating the accident, Sgt. Bornino completed a crash report, attached to which is Sgt. Bornino's written record of Burr's oral statement. According to Sgt. Bornino, Burr stated that he intentionally let go of the steering wheel and closed his eyes to pray. When asked why he did not pull over to pray and whether he let go of the steering wheel on purpose, Burr responded, "I had to let go. \* \* \* I had to answer him." As a contributing factor to the accident, Sgt. Bornino marked option 13 on the crash report, which states, "OPERATING VEHICLE IN ERRATIC, RECKLESS, CARELESS, NEGLIGENT OR AGGRESSIVE MANNER." Sgt. Bornino did not mark option 18, which states, "FATIGUE/ASLEEP." Sgt. Bornino described Burr's condition

by marking option 3, which states, "EMOTIONAL." Attached to the crash report is an OH-2 form, which states that Burr "made several irrational comments regarding religion, suicide and seeking help from others," but Sgt. Bornino testified that another officer, Sgt. Palmer, who signed the OH-2 form, added that statement to the report. Sgt. Bornino did not issue Burr a citation.

{¶ 9} Sgt. Bornino did not believe Burr posed a risk of harm to himself or to others and did not believe Burr's responses to his questions, especially Burr's claim that he intentionally released the steering wheel to pray. In order to get Burr off the road, Sgt. Bornino transported him to a Travel America service plaza, where Burr could make his own arrangements. Sgt. Bornino had previously dropped individuals off at service plazas or truck stops after automobile accidents, and there is no evidence that any of those individuals suffered harm as a result of that discretionary decision. Sgt. Bornino described the Travel America as a "safe location." (Tr. 60.) He told Burr that there were telephones inside and that he might be able to solicit a ride back to New York with a truck driver. Sgt. Bornino also instructed Burr not to walk back onto the interstate, and Burr undisputedly understood Sgt. Bornino's admonishment.

{¶ 10} Burr walked into the Travel America, got a glass of water, and unsuccessfully searched for a truck driver to take him back to New York. Burr then decided, despite Sgt. Bornino's warning, to walk onto Interstate 90 in hopes of running into Sgt. Bornino again. While walking along the interstate, Burr was struck by a semi and sustained severe injuries. Burr does not remember anything between walking on the interstate and waking up in the hospital.

{¶ 11} The Court of Claims of Ohio issued a Decision and Judgment Entry in favor of OSHP on December 5, 2011. The court found that OSHP did not breach a duty to Burr. The court further found that Burr's decision to leave the Travel America and walk onto Interstate 90 was the sole proximate cause of his injuries. Finally, the court found that Burr's negligent training/supervision claim failed because he did not show that OSHP employees were incompetent or that OSHP had actual or constructive knowledge of their incompetence. Burr filed a timely notice of appeal.

## II. ASSIGNMENTS OF ERROR

{¶ 12} Burr presents the following assignments of error:

[I.] The court of claims erred to the prejudice of Appellant Burr by finding that [OSHP] did not breach the duty of reasonable care and protection.

[II.] The court of claims erred to the prejudice of Appellant Burr by finding that Appellant Burr was not a risk of harm to himself or others.

[III.] The court of claims erred to the prejudice of Appellant Burr by admitting into evidence an expert opinion based upon facts not in evidence.

OSHP asserts the following as a cross-assignment of error:

[OSHP] is immune from liability pursuant to the public duty statute, R.C. 2743.02(A)(3).

## III. DISCUSSION

{¶ 13} Although Burr's complaint contained claims for both negligence and negligent training/supervision, none of Burr's assignments of error address his negligent training/supervision claim. Moreover, appellant does not identify any error in the trial court's determination that the evidence did not establish essential elements of that claim. Accordingly, we address only the trial court's judgment in favor of OSHP on Burr's negligence claim.

{¶ 14} To prevail on his negligence claim, Burr was required to prove that OSHP owed him a duty of care, that OSHP breached that duty, and that Burr was injured as a proximate result of OSHP's breach. *See Adkins v. Ohio State Hwy. Patrol*, 10th Dist. No. 10AP-1158, 2011-Ohio-4002, ¶ 14, citing *Mayle v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶ 16. The trial court concluded that Burr failed to establish either a breach of duty by OSHP or that such a breach proximately caused his injuries.

{¶ 15} We first discuss an argument that OSHP raises in its appellate brief, but which does not fall squarely within any of Burr's stated assignments of error. Specifically, OSHP argues that Burr has failed to raise a required assignment of error

regarding the trial court's holding as to proximate cause. The trial court expressly concluded that the sole proximate cause of Burr's injuries was his decision to walk onto the interstate, where he was struck and injured. The court found that Sgt. Bornino expressly instructed Burr not to walk on the interstate and that Burr understood, but consciously disregarded, that instruction. Accordingly, the court found that Burr "failed to exercise due care for his safety and that his own actions of leaving the truck stop and walking as a pedestrian on I-90 were the direct and proximate cause of his injuries." (Decision at 6.)

{¶ 16} None of Burr's assignments of error challenge the trial court's finding that his own actions were the sole proximate cause of his injuries. Burr's first and second assignments of error concern the elements of duty and breach, and Burr's third assignment of error concerns an evidentiary question. At most, Burr states in the conclusion to his appellate brief that, "[s]ince the court of claims' findings on proximate cause \* \* \* are necessarily based on the erroneous finding that [OSHP] did not breach its duty of reasonable ca[r]e and protection, [that] finding should also be reversed." The questions of duty, breach, and proximate cause, however, are distinct, and there is no indication that the trial court's finding regarding proximate cause is, in any way, related to or dependent upon its finding regarding the other elements of Burr's negligence claim.

{¶ 17} In a direct appeal, an appellate court's review is limited to the assignments of error, the trial court's record, and, unless waived, oral argument. App.R. 12(A)(1)(b). We agree with OSHP that Burr did not raise the trial court's holding regarding proximate cause in his assignments of error or in his statement of the issues presented on appeal. Accordingly, Burr may not challenge that holding. Thus, even were we to agree with Burr's arguments that OSHP breached a duty of care owed to Burr, the trial court's holding that Burr failed to establish that OSHP's actions were the proximate cause of his injuries would preclude reversal.

{¶ 18} Even in the event we have mischaracterized Burr's brief as not challenging the trial court's finding regarding proximate cause, we would nevertheless conclude that the trial court did not err by finding that OSHP did not breach a duty of care to Burr.

Burr's first and second assignments of error contest the trial court's related findings that OSHP did not breach its duty of care and that Burr was not a risk to himself. The trial court specifically found that Burr "did not meet his burden by the preponderance of the evidence to show that [OSHP] knew or should have known that [he] was mentally deficient." (Decision at 6.) Because the first and second assignments of error are interrelated, we will address them together.

{¶ 19} In the trial court, and again in its cross-assignment of error, OSHP has argued that it is entitled to immunity for Burr's claims pursuant to R.C. 2743.02(A)(3). Under R.C. 2743.02(A)(3)(a), the state is generally immune from liability regarding the performance or non-performance of a public duty, which includes "any statutory, regulatory, or assumed duty concerning any action or omission of the state involving \* \* \* law enforcement, or emergency response activity." R.C. 2743.01(E)(1)(a). R.C. 2743.02(A)(3)(a) represents an exception to the state's waiver of sovereign immunity, as set forth in R.C. 2743.02(A)(1). *See Shelton v. Ohio State Univ. Med. Ctr.*, S.D. Ohio No. 2:06-cv-0878 (Mar. 30, 2007).

{¶ 20} The immunity afforded by R.C. 2743.02(A)(3)(a) "does not apply to any action of the state under circumstances in which a special relationship can be established between the state and an injured party." R.C. 2743.02(A)(3)(b). *See also* R.C. 2743.01(E)(2) (excluding from the definition of "public duty" any action of the state under circumstances in which the state and an injured party have a special relationship). Thus, under R.C. 2743.02(A)(3)(b), the state can be held liable for its performance or non-performance of a public duty, which is otherwise exempted from the state's waiver of sovereign immunity, when it stands in a special relationship with the injured party. *Shelton*. R.C. 2743.02(A)(3)(b) defines a "special relationship" as requiring the following elements:

- (i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;
- (ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

(iii) Some form of direct contact between the state's agents and the injured party;

(iv) The injured party's justifiable reliance on the state's affirmative undertaking.

OSHP argues that it is immune because Sgt. Bornino was engaged in law enforcement and emergency response activities, which constitute public duties, and because there was no special relationship between Sgt. Bornino and Burr.

{¶ 21} The trial court agreed that Sgt. Bornino was performing a public duty when he responded to Burr's collision. Nevertheless, the trial court found a special relationship between OSHP and Burr, thus precluding immunity under R.C. 2743.02(A)(3)(a). That finding is the basis for OSHP's cross-assignment of error. For purposes of Burr's appeal, however, we will assume, without deciding, the existence of a special relationship between OSHP and Burr.

{¶ 22} Where an appellant challenges a civil judgment as being against the manifest weight of the evidence, the appellate court's function is limited to examining the record to determine if there is any competent, credible evidence to support the judgment. *Osgood v. Dzikowski*, 10th Dist. No. 08AP-105, 2008-Ohio-5065, ¶ 15, citing *Lee v. Mendel*, 10th Dist. No. 98AP-1404 (Aug. 24, 1999). "'Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed \* \* \* as being against the manifest weight of the evidence.'" *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984), quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978).

{¶ 23} In a manifest-weight analysis, we must presume that the trial court's findings of fact are correct. *Osgood* at ¶ 16, citing *Eagle Land Title Agency, Inc. v. Affiliated Mtge. Co.*, 10th Dist. No. 95APG12-1617 (June 27, 1996), citing *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 355 (1993). "This presumption arises because the trial judge had an opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 24, quoting *Seasons Coal* at 80. A reviewing court may not reverse a judgment simply

because it holds a different opinion concerning the credibility of the witnesses and evidence. *Seasons Coal* at 81. If the evidence is susceptible to more than one interpretation, an appellate court must give it the interpretation consistent with the trial court's judgment. *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 584 (1995).

{¶ 24} Generally, OSHP owes a duty of ordinary care to drivers and passengers encountered within the scope of OSHP's official duties. *See, e.g., Legg v. Ohio State Hwy. Patrol*, 66 Ohio Misc.2d 118, 122 (Ct. of Cl.1993). Additionally, a law enforcement officer "owes a duty to those in his custody to keep them safe and protect them from harm" until they are released from custody. *Clemets v. Heston*, 20 Ohio App.3d 132, 136 (6th Dist.1985). "The requisite standard of care is held to be that which is reasonable and ordinary for the health, care and well-being of the prisoner." *Id.* The officer, however, "is not obligated to [affirmatively] act until he knows or should know that the arrestee-prisoner is endangered, sick, injured or mentally disturbed." *Id.*, citing Restatement of the Law 2d, Torts, Section 314A, Comments b, e, and f (1965). An officer has no duty to prevent that which he could not reasonably foresee. *Clemets* at 138.

{¶ 25} This court addressed a scenario analogous to this case in *Hartman v. State Hwy. Patrol*, 10th Dist. No. 91AP-721 (Dec. 19, 1991). There, OSHP officers arrested a driver for driving under the influence of alcohol. The officers took Hartman, an intoxicated passenger in the car, to the patrol station until arrangements could be made for someone to pick him up. Although intoxicated, Hartman was cooperative and coherently responded to all questions and instructions, but he denied that anyone was available to pick him up. The officers understood that the local jail would not accept a person solely on account of intoxication unless the person was violent, and Hartman was not. The officers, therefore, suggested taking Hartman to a motel for the night, a practice OSHP had utilized numerous times, and Hartman agreed. An officer drove Hartman to a motel. Hartman thanked the officer and walked toward the motel entrance. Unbeknownst to the officers, Hartman did not check into the motel, and, later that night, Hartman was struck and killed by a vehicle on Interstate 75 while standing in the passing lane. The administratrix of Hartman's estate sued and alleged that OSHP's agents were negligent in their dealings with Hartman.

{¶ 26} On appeal from the trial court's judgment for OSHP, the premise of the appellant's argument was that the officers should have known that Hartman was mentally deficient. This court disagreed, finding, "[t]he evidence simply would not support a finding that the OSHP should have known that Hartman was mentally deficient," despite his intoxication. *Id.* This court concluded that the trial court did not err by determining that OSHP breached no duty to Hartman by releasing him from custody and agreed with the trial court that OSHP acted reasonably when it took Hartman to a motel. Coupled with the absence of evidence indicating that Hartman suffered from a mental infirmity, this court noted evidence that OSHP had previously taken intoxicated individuals to a motel, as well as the absence of evidence that any of those individuals had been harmed by OSHP's discretionary decision. We stated, "OSHP cannot be held liable to have known what it could not possibly have known." *Id.*

{¶ 27} Here, the parties seem to agree that Sgt. Bornino was under no affirmative obligation to act unless and until he knew or should have known that Burr was mentally deficient and that he posed a risk of harm to himself and to others. Competent, credible evidence supports the trial court's finding that Sgt. Bornino did not know, and had no reason to know, that Burr was mentally deficient or that he posed a risk to himself or to others.

{¶ 28} Longo testified about OSHP's policy for handling the mentally ill and stated that the policy requires an officer responding to a scene to assess the facts and credibility in order to determine whether a person is mentally ill, as defined in the policy. The officer has discretion to take a mentally ill person into custody. Specifically, the policy states that an officer may take a person into custody against the person's will if the person represents a substantial risk of physical harm to himself or to others if allowed to remain at liberty. Longo testified that an officer has discretion in making those determinations. Burr argues that, unlike in *Hartman*, the record supports a finding that OSHP should have known that Burr was mentally deficient and posed a risk to himself, based on his statements to Sgt. Bornino and his actions at the accident scene.

{¶ 29} Sgt. Bornino acknowledged his authority to take into custody a person he believed to be a physical risk to himself or to others, but testified that he did not believe

that Burr posed such a risk. Essentially, Sgt. Bornino testified that he did not view Burr's statement that he intentionally let go of the steering wheel to pray as a sign of risk because he did not believe the statement. Although Sgt. Bornino acknowledged that Burr was emotional, he attributed that to a problem with Burr's girlfriend. Sgt. Bornino testified that he took Burr to a safe location, where he had safely deposited people in the past.

{¶ 30} The trial court reasoned as follows:

Bornino \* \* \* stated that he did not think [Burr] was a risk based upon the fact that [Burr] stated that he was praying and purposely crashed his vehicle. Instead, Bornino testified that he did not find credibility in [Burr's] statements inasmuch as he believed that [Burr] was attempting to avoid a traffic citation.

(Decision at 5.) The trial court also cited Longo's testimony that OSHP's policy grants an officer discretion to assess a person's credibility, to discount statements the officer does not believe, and to determine whether a person is mentally ill. Longo opined that an officer is in compliance with OSHP's policy if the officer discounts irrational statements by a person because the officer does not believe them. The court found that Sgt. Bornino acted within his discretion by disbelieving and discounting Burr's statements and, accordingly, held that Burr did not meet his burden of showing that OSHP knew or should have known that Burr was mentally deficient and that OSHP breached its duty of care to Burr.

{¶ 31} Burr contends that the Court of Claims had to ignore overwhelming evidence in order to conclude that Sgt. Bornino should not have known that Burr was mentally deficient. Specifically, Burr argues that the evidence demonstrates that Sgt. Bornino believed Burr's statements when he left Burr at the Travel America and that Sgt. Bornino's contrary trial testimony is unworthy of belief. In support of his argument, Burr points to the crash report, which contains no indication that Sgt. Bornino doubted Burr's statements or that Sgt. Bornino believed that Burr fell asleep at the wheel. Moreover, Burr argues that Sgt. Bornino's testimony that he believed Burr was lying or evading questions to avoid a traffic citation is called into doubt by Sgt.

Bornino's decision not to cite Burr. Burr also points to mention of suicide in the crash report.

{¶ 32} Burr essentially argues that the trial court should not have believed Sgt. Bornino's trial testimony in light of the crash report completed contemporaneously with Sgt. Bornino's investigation. The crash report itself, however, does not demonstrate the unreliability of Sgt. Bornino's trial testimony; Sgt. Bornino explained that he wrote down the statement Burr offered. Burr makes much of Sgt. Bornino's characterization of the contributing factors in the crash report and contends that Sgt. Bornino's identification of reckless operation as a contributing factor is contrary to his testimony that he did not believe that Burr intentionally let go of the steering wheel. We disagree. Contrary to Burr's assertion, Sgt. Bornino did not specify that Burr was reckless. Rather, the contributing factor he identified was "*erratic, reckless, careless, negligent or aggressive*" operation. (Emphasis added.) Disbelief of Burr's statement is not inconsistent with, at least, erratic, careless or negligent operation by Burr. Finally, with respect to the comment about suicide, Sgt. Bornino testified that he did not write that comment. Moreover, Burr testified that he was not suicidal at the time of the accident and did not recall suggesting to Sgt. Bornino that he was suicidal.

{¶ 33} On a manifest-weight review, this court may not reverse the trial court's judgment simply because it would have weighed the credibility of the witnesses differently. *Wilson* at ¶ 24. Under the civil manifest-weight standard, a reviewing court must also presume that the trial court's factual findings are correct. *Id.*, citing *Seasons Coal* at 80. Here, the trial court found Sgt. Bornino's testimony credible, and, based on that testimony, found that Sgt. Bornino did not believe Burr's statement. The trial court also found that Bornino did not believe that Burr was mentally impaired or represented a risk of physical harm to himself or to others.

{¶ 34} The record contains competent, credible evidence supporting the trial court's contrary decision. At the time of the accident, Burr was admittedly upset that he had been instructed to stay away from a woman in whom he was romantically interested, and he was conflicted about whether to continue on to California or to return to New York to try to resolve the situation. Burr did not tell anyone that he had been

hearing voices for two days. Burr was also undisputedly exhausted. He had slept only a couple hours in the previous two days and admitted that he was falling asleep at the wheel, and had briefly fallen asleep and scraped the left-side guardrail immediately prior to the collision that disabled his vehicle. In addition, Sgt. Bornino testified that the absence of skid marks or other evidence of evasive action supported his theory that Burr fell asleep at the wheel. Based on that evidence, coupled with Sgt. Bornino's disbelief of Burr's statement that he intentionally took his hands off the wheel to pray, the trial court could conclude that Sgt. Bornino reasonably believed that Burr posed no risk of physical harm to himself or to others. For these reasons, we overrule Burr's first and second assignments of error.

{¶ 35} In his third and final assignment of error, Burr asserts that the trial court erred by permitting Longo to offer expert testimony in response to a hypothetical question that included facts not in evidence. We disagree.

{¶ 36} The contents of a hypothetical question posed to an expert witness must fairly reflect the facts established by the evidence and upon which the witness is prepared to give an opinion. *Price v. Daugherty*, 5 Ohio App.3d 157, 158-59 (2d Dist.1982), citing *Surman v. Ohio & Pennsylvania Oil & Gasoline Co.*, 116 Ohio App. 453 (8th Dist.1962), paragraph four of the syllabus. "If there is no evidence to support an assumed fact \* \* \*, the trial judge should intervene and sustain an objection to the use of a hypothetical question containing such fact." *Price* at 160.

{¶ 37} Burr contends that OSHP's counsel asked Longo to assume that Burr fell asleep at the wheel, which Burr argues was not established by the evidence. Burr's counsel objected to the hypothetical on that basis, and the trial court initially sustained the objection and ordered OSHP's counsel to restate the hypothetical to include only matters in evidence. OSHP's counsel then prefaced his restated question as follows: "I want you to assume for the purposes of this hypothetical that when he got to the scene \* \* \* *Sergeant Bornino* assessed the situation and he *believed* that the person who was involved in the accident fell asleep." (Emphasis added.) (Tr. 84.) When Burr's counsel again objected, the trial court overruled the objection, stating that the question was limited to facts in evidence. We agree. Whether or not Burr actually fell asleep, Sgt.

Bornino expressly testified that he assumed and believed that Burr had fallen asleep at the time of his collision. This is all the hypothetical asked Longo to assume; it did not ask him to assume that Burr actually fell asleep. Because the hypothetical asked Longo to assume a fact in evidence, we overrule Burr's third assignment of error.

{¶ 38} Finally, we turn to OSHP's cross-assignment of error, by which it argues that it is immune from liability for Burr's injuries pursuant to R.C. 2743.02(A)(3). Burr argues that we should disregard the cross-assignment of error because OSHP did not file a notice of cross-appeal. A cross-appeal, however, is not required where a party intends to defend an appealed judgment on a ground other than that relied upon by the trial court, but where the person does not seek to change the judgment. App.R. 3(C)(2). Cross-assignments of error may be asserted for the purpose of preserving the relief granted, but for reasons not advanced by the trial court. *Hirshell v. Fertgus*, 5th Dist. No. 2011 CA 00199, 2012-Ohio-1705, ¶ 32. Here, OSHP is simply defending the trial court's judgment in OSHP's favor on grounds of immunity, in addition to the trial court's rationale that Burr failed to prove his claims. Thus, the absence of a cross-appeal does not limit OSHP's right to assert immunity pursuant to a cross-assignment of error. Nevertheless, as we have overruled each of Burr's assignments of error, we need not address OSHP's cross-assignment of error regarding immunity because it is now moot.

#### **IV. CONCLUSION**

{¶ 39} Having overruled each of Burr's assignments of error, and rendered OSHP's cross-assignment of error moot, we affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

KLATT and SADLER, JJ., concur.

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