[Cite as *Bush v. Ashland Cty.*, 2010-Ohio-1732.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ALLEN BUSH, Adm., Etc.	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-25
COUNTY OF ASHLAND, et al.	:	
	:	
	:	
Defendant-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland County Court of Common Pleas Case No. 2007-CIV-160
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	April 19, 2010

APPEARANCES:

For Plaintiff-Appellant:

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Delaney, J.

{¶1} Plaintiff-Appellant, Allen Bush, appeals the judgment of the Ashland County Common Pleas Court, granting summary judgment in favor of Defendants-Appellees, the County of Ashland, the Muskingum Watershed Conservancy District (MWCD), Deputy Ben Kennell, and Park Ranger Jeff Keller.

{¶2} The trial court found that Appellant failed to establish a genuine issue as to any material fact which would result in judgment in his favor on claims that Ashland County and Officers Kennell and Keller breached a duty to protect Appellant's deceased grandson, D.B., from the acts of a juvenile, S.S, which resulted in the death of D.B.

{¶3} The facts underlying the present action are as follows:

{¶4} On August 22, 2005, Ashland County Sheriff's Deputy Ben Kennell was dispatched to 979 Ashland County Road 3006 on a report of a possible residential break in at the home of Jennifer Heimbuch-Slater (Heimbuch). Heimbuch resided there with her son, S.S.

{¶5} Deputy Kennell arrived at the residence at approximately 6:30 p.m. and met with Heimbuch and her son, who were together in front of the house. Park Ranger Jeff Keller, from the MWCD, arrived at the scene and acted as a back-up officer to Deputy Kennell.

{¶6} The officers observed the outside of the residence and saw that one of the side doors to the residence was partially open. They went into the home to investigate the possible break in.

{¶7} Both officers checked each room of the house together. Inside one of the bedrooms, Ranger Keller found a shotgun lying on the floor. Upon further investigation,

the officers discovered that the gun was loaded. The officers further scanned the room and observed several knives, a sword, a baggie of a leafy substance, and several liquor bottles with a yellow substance in them. Further investigation determined that the leafy substance was not marijuana, but was in fact an herb that S.S. used to "relax" in the evening, and that the liquid in the liquor bottles was urine. These items were all contained within the bedroom of S.S., Heimbuch's twelve-year old son.

{¶8} After determining that no intruders were present in the home, the officers went back outside to discuss what they had discovered with Heimbuch. Deputy Kennell asked Heimbuch about the leafy substance first, and she stated that it was a natural herb that her son had ordered off of the internet with her permission. Debuty Kennell also questioned Heimbuch about the shotgun found in S.S.'s room. Heimbuch stated that the shotgun was used by her son for hunting. According to the officers, Heimbuch was shocked that the gun was loaded.

{¶9} Deputy Kennell informed Heimbuch that the ammunition for the shotgun should be secured separately from the gun, preferably under lock and key. Heimbuch advised that she kept the ammunition in her bedroom, separate from the gun. In the presence of the officers, she scolded S.S. for having the loaded shotgun in his bedroom. She also told the officers that she would secure the shotgun ammunition and that she was going to address the concerns about the gun and the knives in S.S.'s room. The officers then gave the shotgun to Heimbuch, having taken it out of S.S.'s room.

{¶10} Deputy Kennell additionally spoke with S.S. at the scene and asked him why he had a shotgun on the floor of his room and why there were knives on the bed.

S.S. replied that he had the weapons because he got scared at night when he would hear noises outside the bedroom window. S.S. also stated that he urinated in the liquor bottles because he was scared to leave his room and go to the bathroom in the middle of the night.

{¶11} When the officers left the residence, both the shotgun and the ammunition were in the possession of Heimbuch, not S.S.

{¶12} Two weeks later, on September 3, 2005, the Ashland County Sheriff's office was dispatched to the Heimbuch residence on report of a shooting. Deputies found the decedent, D.B., fatally wounded, having suffered a gunshot wound to his neck. The investigation concluded that S.S. had shot D.B. with a shotgun.

{¶13} On May 16, 2007, Appellant filed a complaint in the Ashland County Court of Common Pleas, asserting various claims against the County of Ashland, Deputy Ben Kennell, Ranger Jeff Keller, and MWCD. The complaint alleged five causes of action. In Count 1, Appellant asserted: "The Decedent [D.B.]'s suffering and death was proximately caused by the negligence, recklessness and deliberate indifference of the Defendants, jointly and severally, who failed in carrying out their lawful duties, which involved detecting, monitoring, protecting, and preventing [S.S.] from having unfettered access to a shotgun under circumstances which clearly warranted such precautions." Count 1 goes on to state, "The neglect and failure of the Defendants was so severe as to indicate deliberate indifference to a fundamental duty to protect the Decedent."

{¶14} Count 2 alleged that Defendants' "negligent and/or reckless, willful and wanton actions proximately caused the suffering and death of the Decedent in that Defendants did not exercise reasonable care in carrying out their lawful duties."

{¶15} Count 3 alleged a survival action under R.C. 2305.21. Count 4 asserted a loss of consortium claim. Count 5 alleged a failure to train claim against Defendant Ashland County only. Count 6 alleged a claim under R.C. 2125.02(B)(5).

{¶16} On May 14, 2008, Appellees Ashland County and Kennell filed a Motion for Summary Judgment, pursuant to Ohio Civ. R. 56(C), stating that summary judgment is appropriate because (1) the public duty rule precludes liability against Defedants; (2) Defendants are immune from Plaintiff's claims under R.C. Chapter 2744 et. seq., and (3) Plaintiff's claims fail as a matter of law because decedent's injury was not foreseeable and Defendants are not the proximate cause of decedent's injury.

{¶17} On May 30, 2008, Appellees MWCD and Keller filed a Motion for Summary Judgment as well, claiming that no genuine issue of material fact existed and that Defendants should be entitled to judgment as a matter of law.

{¶18} Appellant responded on July 15, 2008, and cited, as support, the report of their expert witness, James Meade, who specializes in police procedures, practices, and training. Mr. Meade opined that Deputy Kennell and Officer Keller failed in the performance of their duties based on "reckless indifference to existing conditions present in the home admittedly observed by these officers that created an unreasonable risk of serious physical harm or death to others including a minor. Both Deputy Kennell and Officer Keller if, for no other reason then [sic] the fact they are certified as Ohio Peace Officers and, having completed the required Basic Peace Officer Training of the Ohio Peace Officers Training Commission, Ohio Attorney Generals Office, [sic] knew or should have known circumstances existed in their presence that require immediate policy action."

{¶19} On August 15, 2008, the trial court granted Appellees' motions and dismissed the case. In so doing, the court ruled that Defendants Ashland County and MWCD were immune from liability under the Political Subdivision Tort Liability Act.

{¶20} Regarding Deputy Kennell and Ranger Keller, the trial court ruled that the Plaintiff failed to provide sufficient evidence that the officers acted recklessly when they were dispatched to the Heimbuch residence on August 22, 2005. The court determined that the opinion of Plaintiff's expert, Mr. Meade, which concluded that the officers acted recklessly was insufficient to create a material question of fact. Accordingly, the court found that "absent any objective evidence that Defendants perversely and deliberately ignored a known risk," the Plaintiff failed to meet their burden and did not provide sufficient evidence of recklessness to overcome their burden on summary judgment.

{¶21} Appellant now raises one Assignment of Error:

{¶22} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS BECAUSE THE FACTUAL UNDERPINNINGS OF THE CASE REMAIN CONTESTED AND A FACT FINDER COULD FIND FOR EITHER PARTY DEPENDING ON WHICH VERSION OF THE FACTS IT ADOPTED.

I.

{¶23} In his sole assignment of error, Appellant argues that the trial court erred in granting Appellees' motion for summary judgment.

{¶24} When reviewing the granting of a motion for summary judgment, an appellate court uses a de novo standard of review. *LaSalle Bank NA v. Tirado*, 5th Dist. No. 2009-CA-22, 2009-Ohio-2589, ¶14.

{¶25} Civil Rule 56(C) states in part:

{¶26} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

{¶27} Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶28} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence that demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶29} Appellees moved for summary judgment, arguing that they owed no duty to Appellant or the Decedent, and that they are immune from liability under R.C. 2744. Appellees also invoked the public duty rule, as set forth in *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468.

{¶30} Recently, the Ohio Supreme Court held that the public duty rule, as set forth in *Sawicki*, does not apply to cases which arose after the passage of Ohio's political subdivision immunity statutes, R.C. 2744.01 et seq. *Estate of Graves v. Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, 922 N.E.2d 201. [1] In so doing, the Court stated that the public duty rule is incongruous with R.C. 2744.03(a)(6)(B), and accordingly, the rule does not shield an employee who is alleged to have acted recklessly or with wanton disregard. As such, the public duty rule is no longer a viable defense for Appellees in the case at bar.

{¶31} Nonetheless, we find that the trial court was correct in granting summary judgment, as Plaintiff failed to establish a duty owed by Defendants to the Plaintiff or the decedent. As the Supreme Court stated in *Graves*, repudiation of the public duty rule "'does not automatically open the floodgates to excessive governmental liability.' The absence of the public-duty rule will not automatically result in the creation of new duties and new causes of action. Id. Claimants who seek recovery in actions such as the present one based on purely statutory violations must still establish that the statute in question provides for a private right of action.

{¶32} "By way of example, in the present case, the estate must demonstrate that recovery is permissible against the officers for violating either R.C. 4507.38 or R.C. 4511.195. In other words, even though the public-duty rule does not repudiate the existence of a duty, the estate nevertheless has the burden of establishing that the officers owed Graves an actionable duty under R.C. 4507.38 and/or R.C. 4511.195. If a claimant cannot establish the existence of a duty, the political subdivision's employee is

[1] This Court permitted the parties to file supplemental briefs in light of *Graves* which was decided shortly after oral argument was held in this case.

insulated from liability even in the face of allegations of wanton and reckless conduct. We believe that the public-policy objectives in adopting the public-duty rule remain safeguarded in the wake of this court's ruling." *Graves*, supra, at ¶¶24-25.

{¶33} Under Ohio law, there is no duty to "control the conduct of another person so as to prevent him from causing physical harm to another unless a special relation exists between the actor and that person which imposes a duty upon the actor to control the person's conduct." *Littleton v. Good Samaritan Hospital & Health Ctr*. (1988), 39 Ohio St.3d 86, 92 529 N.E.2d 449. A special relation exists when one person takes charge of another whom he knows or should know is likely to cause bodily harm to others if not controlled. Id. In the absence of this special relationship, a defendant cannot be held liable for failing to exercise control over the actions of a third party so as to protect others from harm.

{¶34} We do not find any evidence that was presented that a special relationship was forged between Deputy Kennell or Ranger Keller and S.S. A law enforcement officer does not "take charge" of another person unless the person is in custody. See *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 485 N.E.2d 287 (finding that once a suspect was released, any special relationship between the officer and suspect ended); see also *Leake v. Cain* (Colo. 1986), 720 P.2d 152 (holding that duty of police officers to a person does not extend past release from custody).

{¶35} Moreover, courts have determined that a special relationship establishing a legal duty to control cannot be established where an officer fails to take control of a third person absent a custodial situation at the time of the complained about conduct. See *Mills v. City of Roanoke* (2007) 518 F. Supp.2d 815 (holding that no duty owed to

estate of shooting victim by police officer who failed to arrest suspect for firearm possession two months prior to shooting); see also *Dore v. City of Fairbanks* (Alaska 2001), 31 P.3d 788 (finding no duty in tort to control suspect who killed childrens' mother and himself in a murder-suicide).

{¶36} "In our society it is foreseeable that crimes may occur and that the criminals perpetrating them may cause harm. Thus, in a general sense, it is foreseeable that anyone whose conduct may in any way facilitate the criminal in committing the crime has played some part in the resulting harm. But mere 'facilitation' of an unintended adverse result, where intervening intentional criminality of another person is the harm-producing force, does not cause the harm so as to support liability for it." *McAlpine v. Multnomah County* (Or. 1994), 131 Or.App. 136, 883 P.2d 869. Moreover, "[a] public official cannot be held civilly liable for violating a duty owed to the public at large because it is not in society's best interest to subject public officials to potential liability for every action undertaken." *Burdette v. Marks* (Va.1992), 244 Va. 309, 312, 421 S.E.2d 419.

{¶37} As such, we find that a law enforcement officer does not owe a general duty to protect an individual from the crimes of a third party absent a custodial situation wherein the officer takes charge of the party through seizure or arrest. In the present case, the officers did not take S.S. into custody, as he had not committed any crime; therefore no special relationship can be established that would impose a duty on Deputy Kennell or Ranger Keller to protect D.B. from the potential future actions of S.S.

{¶38} Absent the establishment of a duty, Plaintiff's claims must fail. The trial court properly granted summary judgment.

{¶39} The judgment of the Ashland County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

[Cite as *Bush v. Ashland Cty.*, 2010-Ohio-1732.]

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ALLEN BUSH, Adm., Etc.	:	
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Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
COUNTY OF ASHLAND, et. al.,	:	
	:	
Defendant-Appellees	:	Case No. 09-CA-25
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland County Court of Common Pleas is affirmed. Costs assessed to Appellant

_____
HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. WILLIAM B. HOFFMAN