IN THE SUPREME COURT OF OHIO

RENEE McCONNELL, et al., Appellees, v. DONALD C. DUDLEY, JR, Defendant, & COITSVILLE POLICE DEPARTMENT & COITSVILLE TOWNSHIP BOARD OF TRUSTEES, Appellants.	Case No. 2018-0377 On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District, Case No. 17 MA 0045

MERIT BRIEF OF AMICI CURIAE CITY OF COLUMBUS, ET AL., IN SUPPORT OF APPELLANTS COITSVILLE TOWNSHIP POLICE DEPARTMENT & COITSVILLE TOWNSHIP BOARD OF TRUSTEES

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae include the Cities of Columbus, Athens, Cleveland Heights, Galion, Oakwood, Cincinnati, Urbana, Barberton, Zanesville, Akron, and Xenia, as well as the Villages of Plain City and Chagrin Falls. These thirteen political subdivisions represent a cross-section of local governments across the State of Ohio. They are joined on this brief by six organizations that represent political subdivisions and schools: the Ohio Municipal Attorneys Association; the Ohio Municipal League; the Buckeye State Sheriff's Association; the Ohio Township Association; the County Commissioners Association of Ohio; and the Ohio School Boards Association.

Collectively, these nineteen entities will be referred to as the "Amici," and they share a common concern that the Seventh District's decision pertaining to negligent hiring and supervision could eviscerate political-subdivision immunity and expose political subdivisions to a whole range of lawsuits previously precluded by the immunity statute. Such lawsuits would, of course, have a deleterious effect on the finances of these political subdivisions and would circumvent the protections afforded by Ohio's Political Subdivision Tort Liability Act, R.C. Chapter 2744, as it has been interpreted by this Court

STATEMENT OF THE FACTS

This action arises out of a traffic collision that occurred on the morning of September 18, 2013, at the intersection of McGuffey Road and Lansdowne Boulevard in Youngstown, Ohio. *McConnell v. Dudley*, 7th Dist. Mahoning No.17 MA 0045, 2018-Ohio-341, ¶¶1–2, 4; OP. (R.49, pp.1–2). A police cruiser driven by Officer Donald C. Dudley Jr. of the Coitsville Township Police Department collided with a car driven by Renee McConnell. *Id.* ¶4 (R.49, p.2). Dudley entered the intersection in pursuit of suspects who were believed to have stolen a motor vehicle earlier. *Id.* ¶¶1–4 (R.49, pp.1–2). McConnell entered the intersection on her way to work. *Id.* ¶4 (R.49, p. 2).

On September 15, 2015, Renee McConnell, her husband, and their children (the "McConnells") filed a civil action against Officer Dudley, the Coitsville Township Police Department, and the Coitsville Township Board of Trustees. COMPL. ¶¶5, 7, 9 (R.1, p.3). Collectively, Officer Dudley, the Police Department, and the Board of Trustees will be referred to as "Defendants." Nonetheless, because Officer Dudley is no longer a party to this civil action, the Police Department and the Board of Trustees will be referred to collectively as "Coitsville."

In their complaint, the McConnells asserted four separate claims for relief. First, they asserted a claim for negligence. COMPL. ¶¶41–50 (R.1, pp.5–6). With respect to that first claim, the McConnells alleged that Officer Dudley's "actions and/or inactions … were negligent" and that Coitsville was "vicariously liable" for the conduct because Officer Dudley had been acting within the course and scope of his employment. *See id.* ¶¶43–45 (R.1, pp.5–6). Second, the McConnells asserted a claim they titled "wanton." *Id.* ¶¶51–56 (R.1, p.7). With respect to their claim for wantonness, the McConnells alleged that Officer Dudley's "actions and/or inactions … were willful and/or wanton" and that Coitsville was again "vicariously liable" for the conduct because Officer Dudley had been acting within the course and scope of his employment. *Id.* ¶¶52–54 (R.1, p.7). The McConnells' third claim was titled "inadequate pursuit training/policies." *Id.* ¶¶57–60 (R.1, p.7). For that claim, they first alleged that Police Department and the Board of Trustees

> have a duty to hire qualified patrol officers, to have policies and procedure[s] in place to guide officers to carry out their duties in a proper and legal manner[,] and to train those officers on these policies and procedure[s] to help ensure that the officers carry [out] their jobs in a proper and legal manner.

Id. ¶58 (R.1, p.7). The McConnells then alleged that Coitsville had been "negligent, willful and/or wanton in [its] hiring, policies and/or training" of Officer Dudley and that Renee McConnell suffered significant loss "as a direct result of [its] inadequate hiring, policies and/or training." *Id.*

¶59 (p.7). The McConnells' final claim for relief was a loss-of-consortium claim, which is, of course, a derivative claim brought by members of Renee McConnell's immediate family. *Id.* ¶¶62–64 (R.1, p.8); *see also Fehrenbach v. O'Malley*, 113 Ohio St.3d 18, 2007-Ohio-971, 862 N.E.2d 489, ¶11.

On September 29, 2015, Defendants answered the McConnells' complaint and asserted their sovereign immunity under Ohio's Political Subdivision Tort Liability Act, R.C. Chapter 2744. ANSWER ¶¶8–9 (R.16, p.2). A year later, on September 29, 2016, Defendants moved for summary judgment. MOT. (R.28). Defendants first argued that Officer Dudley was operating a police vehicle in response to an emergency when the collision occurred. *Id.* (R.28, pp.7–10). With respect to immunity, Defendants argued: (a) there was no evidence of wanton conduct; (b) there was no evidence of willful conduct; (c) any violation of the Police Department's own pursuit policy was not determinative of wanton misconduct; and (d) R.C. Chapter 2744 did not allow for political-subdivision tort liability on claims of inadequate hiring, training, or supervision. MOT. (R.28, pp.10–14). With respect to Officer Dudley's individual immunity, Defendants argued that his actions did not rise to the level of wanton misconduct. *Id.* (R.28, pp.14–16). Finally, within a footnote, Defendants also argued that the Police Department itself was *non sui juris* and thus lacked the legal capacity to be sued. *Id.* (R.28, p.6 n.2).

On February 16, 2017, the Court of Common Pleas for Mahoning County, Ohio issued a judgment entry that denied Defendants' motion for summary judgment *in toto*. J. ENTRY (R.36). Defendants appealed the trial court's decision to the Seventh District Court of Appeals on March 13, 2017. NOTICE (R.37). In their appellate brief, Defendants raised four assignments of error. DEF. BR. (R.41, p.v). First, Defendants argued that the trial court had improperly failed to grant summary judgment to the Police Department because the department of a political subdivision is *non sui*

juris. Id. (R.41, pp.v, 8). Next, Defendants argued that the trial court erred in denying summary judgment to the Board of Trustees because the undisputed evidence established that Officer Dudley was a member of a police agency operating a motor vehicle in response to an emergency call and that his operation of the motor vehicle did not constitute willful or wanton misconduct. *Id.* (R.41, pp.v, 8–16). Third, Defendants argued that the trial court erred in denying summary judgment to Officer Dudley because the undisputed evidence established that his conduct was not wanton and because there were no allegations of malice, bad faith, or recklessness. *Id.* (R.41, pp.v, 16–20). Finally, Defendants argued that the trial court improperly failed to grant summary judgment on the McConnells' hiring, training, and supervision claims because such claims were barred, as a matter of law, by immunity under R.C. Chapter 2744. DEF. BR. (R.41, pp.v, 20–22).

On January 26, 2018, the Seventh District issued an opinion reversing the trial court's decision to deny Officer Dudley summary judgment but affirming the trial court's decision to deny summary judgment to Coitsville. *McConnell v. Dudley*, 7th Dist. Mahoning No.17 MA 0045, 2018-Ohio-341, ¶40; OP. (R.49, pp.18–19). With respect to Defendants' first assignment of error, the Seventh District concluded that Defendants waived the issue of the Police Department's capacity to be sued by failing to raise it in their answer and by raising the issue only in a footnote to their summary judgment motion. *Id.* ¶¶10–16 (R.49, pp.4–7). With respect to Defendants' third assignment of error, the Seventh District concluded that the McConnells failed to raise a claim against Officer Dudley in his individual capacity and that the trial court had consequently erred in finding genuine issues of material fact as to whether Officer Dudley himself could be liable as an individual employee. *Id.* ¶¶38–39 (R.49, pp.17–18).

Although the Seventh District combined Defendants' second and fourth assignments of error for discussion, that discussion can be broken into two easily discernible parts. *McConnell*,

2018-Ohio-341, ¶¶17–37; OP. (R.49, pp.7–17). In the first part of this discussion, the Seventh District parsed the evidence in the record and concluded that, "[i]n looking at the totality of the circumstances, a genuine issue of material fact exists regarding whether Officer Dudley's actions constituted willful and wanton misconduct." *Id.* ¶¶21–29 (R.49, pp.10–14). The court then turned to a separate discussion of the McConnells' hiring, training, and supervision claim. *Id.* ¶¶30–37 (R.49, pp.14–17). Relying on its previous decisions in *Adams v. Ward*, 7th Dist. Mahoning No.09 MA 25, 2010-Ohio-4851, and *Wagner v. Heavlin*, 136 Ohio App.3d 719, 737 N.E.2d 989 (7th Dist.2000), the Seventh District first noted that such claims—as well as claims for negligent entrustment—could indeed be pursued against a political subdivision under R.C. 2744.02(B)(1). *McConnell*, 2018-Ohio-341, ¶¶30–32; OP. (R.49, pp.14–15). The court then compared and contrasted the facts at issue in those two cases with the facts in evidence herein to conclude that a "genuine issue of material fact exists as to whether Coitsville Township through its Coitsville Police Department was negligent in training and supervising Officer Dudley." *Id.* ¶¶33–37 (R.49, pp.16–17). The Seventh District overruled Defendants' second assignment of error and their fourth assignment of error. *Id.* ¶37 (R.49, p. 17).

On February 5, 2018, Coitsville moved the Seventh District for an order certifying a conflict between its January 26, 2018 decision and decisions from the Eighth and Tenth District Courts of Appeals. MOT. (R.51) (citing and discussing *McCloud v. Nimmer*, 72 Ohio App.3d 533, 595 N.E.2d 492 (8th Dist.1991); *Hall-Pearson v. South Euclid*, 8th Dist. No.73429, 1998 Ohio App. LEXIS 4796 (Oct. 8, 1998); *DiGiorgio v. Cleveland*, 8th Dist. No.95945, 2011-Ohio-5878; *Wingfield v. Cleveland*, 8th Dist. Cuyahoga No.100589, 2014-Ohio-2772; and *Glenn v. Columbus*, 10th Dist. Franklin No.16AP-15, 2016-Ohio-7011). The McConnells opposed that motion on February 15, 2018, and Coitsville filed its reply on February 18, 2018. OPP. (R.52); REPLY (R.53).

While awaiting a decision from the Seventh District on their motion to certify a conflict, Coitsville timely appealed the Seventh District's decision to this Court on March 12, 2018. NOTICE (R.54). In its memorandum in support of jurisdiction, Coitsville asked this Court to accept two propositions of law for review. MEM. (March 12, 2018, pp.i, 7, 9). The first was that a "political subdivision is immune from liability for allegations of negligent hiring, or failure to train or supervise police officers, as such allegations do not fall under any of the exceptions found within R.C. 2744.02(B)(1) through (B)(5)." MEM. (March 12, 2018, pp.i, 7). The second proposition was that this Court's decision in *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266—in concert with R.C. 2744.02(B)(1)(a)—sets forth the legal standard to be applied when a political subdivision moves for summary judgment on the basis of immunity under R.C. 2744.02(A)(1). MEM. (March 12, 2018, pp.i, 9). On March 20, 2018, the McConnells filed a notice of cross-appeal. NOTICE (R.55). On April 11, 2018, they filed a memorandum in opposition to this Court's jurisdiction over Coitsville's propositions and in favor of the Court actually considering whether a "complaint that alleges that a political subdivision's employee acted willfully and wantonly sufficiently raises a claim" against the employee individually under R.C. 2744.03(A)(6)(b). MEM. (April 11, 2018, pp.ii, 6). Coitsville opposed this Court's exercise of jurisdiction over the McConnells' cross-appeal on May 8, 2018. MEM. (May 8, 2018).

On July 25, 2018, and before this Court decided jurisdiction in this matter, the Seventh District issued an opinion and judgment entry denying Coitsville's motion to certify a conflict. *McConnell v. Dudley*, 7th Dist. Mahoning No.17 MA 0045, 2018-Ohio-3099; OP. & J. ENTRY (R.56). In denying that motion, the Seventh District muddied the waters in this matter. On one hand, the Seventh District appears to agree there can be no independent claims for negligent hiring, training, and supervision of police officers under R.C. 2744.02(B)(1). *McConnell*, 2018-Ohio-

3099, ¶¶6–8; OP. & J. ENTRY (R.56, pp.3–5). On the other hand, the court stated that "negligent hiring and training of a police officer … could serve as evidence of wanton or willful behavior on the part of the government." *Id.* ¶8; OP. & J. ENTRY (R.56, p. 5).

Just one week thereafter, on August 1, 2018, this Court accepted Coitsville's appeal on its first proposition of law, but not on its second. ENTRY (R.57). This Court also declined to exercise jurisdiction over the McConnells' cross-appeal. *Id.* Additionally, the Seventh District's July 25, 2018 opinion and judgment, which either clarifies or modifies its January 26, 2018 opinion, also raises an additional issue that is inextricably intertwined with Coitsville's proposition of law: Whether evidence of willful or wanton hiring, training, or supervision of police officers is even relevant to any of the exceptions found within R.C. 2744.02(B)(1)–(5).

ARGUMENT

In 1985, the Ohio General Assembly enacted the Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744, as a response to the Ohio Supreme Court's judicial abolition of the common-law sovereign-immunity doctrine in *Haverlack v. Portage Homes*, 2 Ohio St.3d 26, 442 N.E.2d 749 (1982). *See Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶13; *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, ¶7. Since then, the Ohio Supreme Court has repeatedly explained how a political subdivision's tort immunity is to be examined:

> Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis…. The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function…. R.C. 2744.02(A)(1).

> The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability…. At this tier, the court may also need to determine whether specific defenses to liability for negligent operation of a motor vehicle listed in R.C. 2744.02(B)(1)(a) through (c) apply.
>
> If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability.

Colbert v. Cleveland, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶¶7–9 (case citations omitted); *see also Pelletier v. Campbell*, 2018 Ohio LEXIS 1444, 2018-Ohio-2121, ¶15 (quoting *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-8374, 75 N.E.3d 161, ¶39; *Baker v. Wayne County*, 147 Ohio St.3d 51, 2016-Ohio-1566, 60 N.E.3d 1214, ¶11; *Butler v. Jordan*, 92 Ohio St.3d 354, 357, 750 N.E.2d 554 (2001); *Greene County Agric. Soc'y v. Liming*, 89 Ohio St.3d 551, 556–57, 733 N.E.2d 1141 (2000); *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610 (1998). Although the Ohio Supreme Court, the Ohio Courts of Appeals, and the various trial courts throughout the state are undoubtedly familiar with this three-tier analysis, it is important to revisit it—and to restate it—in any case involving a state-law tort claim against a political subdivision because such claims have long been governed more by statute than by common-law tort principles. *See Butler*, 92 Ohio St. at 376 (Cook J., concurring) ("The General Assembly responded to [the judicial abolition of common-law sovereign immunity] by enacting the Political Subdivision Tort Liability Act, declaring that political subdivisions would be liable in tort **only as set forth in R.C. Chapter 2744**.") (emphasis added). That is, it must always be remembered that a political subdivision in Ohio can only be liable in tort if R.C. Chapter 2744 specifically and unequivocally permits such liability.

There is no dispute that Coitsville qualifies for the general first-tier immunity under R.C. 2744.02(A)(1). Rather, the main dispositive question in this civil action is whether Coitsville can be liable under any one of the second-tier exceptions set forth in R.C. 2744.02(B).[1] Moreover, the only second-tier exception raised by the McConnells in this case is the exception found within R.C. 2744.02(B)(1), which states in part that "political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority." Although R.C. 2744.02(B)(1)(a) provides political subdivisions with a complete defense to such liability if a "member of a … police agency was operating a motor vehicle while responding to an emergency call," that defense is unavailable to the political subdivision if the employee's operation of the motor vehicle constitutes "willful or wanton misconduct."[2]

In light of the procedural posture of this case, the applicable standards of decision and review, and the limited jurisdiction that the Ohio Supreme Court has granted over this appeal, the single, narrow, but undeniably important issue before this Court is framed as follows:

PROPOSITION OF LAW NO. I:

> **A Political Subdivision Is Immune from Liability for Allegations of Negligent Hiring, or Failure to Train or Supervise Police Officers, as Such Allegations Do Not Fall Within Any of the Exceptions Found Within R.C. 2744.02(B)(1) Through (B)(5).**

[1] This third tier of the immunity analysis becomes necessary only if one of the five second-tier immunity exceptions applies. *See Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St. 3d 455, 2009-Ohio-1250, 905 N.E.2d 606, ¶9; *Greene County*, 89 Ohio St. 3d at 557.

[2] R.C. 2744.02(B)(1)(b) and (c) provide similar defenses for political subdivisions in situations where their firefighters or emergency medical personnel are operating motor vehicles in response to emergencies.

Nonetheless, as discussed above, the Seventh District's July 25, 2018 opinion also raises an additional issue that is inextricably intertwined with the proposition of law before this Court: Whether evidence of negligent, willful, and wanton hiring, training, and/or supervision of police officers is even relevant to any of the exceptions found within R.C. 2744.02(B)(1)–(5) .

I. THE PLAIN AND UNAMBIGUOUS LANGUAGE OF R.C. 2744.02(B) DOES NOT SUPPORT CLAIMS FOR FAILING TO ADEQUATELY HIRE, TRAIN, AND/OR SUPERVISE POLICE OFFICERS.

As noted above, tort claims against political subdivisions in the State of Ohio are governed exclusively by statute, namely R.C. Chapter 2744. Thus, tort claims against political subdivisions in the State of Ohio should start with a proper examination and construction of the statute itself. "The primary rule in statutory construction is to give effect to the legislature's intention." *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶19 (quoting *Cline v. BMV*, 61 Ohio St.3d 93, 97, 573 N.E.2d 77 (1991)); *Carter v. Division of Water*, 146 Ohio St. 203, 65 N.E.2d 63 (1946), paragraph one of the syllabus. Of course, a court "best gleans" the legislature's intent "from the words the General Assembly used and the purpose it sought to accomplish." *State v. Elam*, 68 Ohio St.3d 585, 587, 629 N.E.2d 442 (1994). "When the statute's meaning is clear and unambiguous, [courts] apply the statute as written and refrain from adding or deleting words." *Dodd v. Croskey*, Sup. Ct. Case No.2013-1730, 2015-Ohio-2362, ¶24; *Bundy v. State*, 143 Ohio St.3d 237, 2015-Ohio-2138, 36 N.E.3d 158, ¶30; *Cleveland Electric Illuminating v. Cleveland*, 37 Ohio St.3d 50, 524 N.E.2d 441 (1988), paragraph three of the syllabus; *Columbus-Suburban Coach Lines v. Public Util. Comm.*, 20 Ohio St. 2d 125, 127, 254 N.E.2d 8 (1969). A "statute, free from ambiguity and doubt, is not subject to judicial modification in the guise of interpretation." *Crowl v. De Luca*, 29 Ohio St.2d 53, 58–59, 278 N.E.2d 352 (1972) (quotations omitted); *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶22.

A. The "Operation of a Motor Vehicle" Does Not Include the Hiring, Training, or Supervision of Police Officers.

Almost a decade ago, this Court thoroughly examined the phrase "operation of a motor vehicle" and concluded that the "exception to immunity in R.C. 2744.02(B)(1) for the negligent operation of a motor vehicle pertains only to negligence in driving or otherwise causing the vehicle to be moved." *Doe v. Marlington Local Schools,* 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706, ¶26. More specifically, this Court ruled that the "exception to political subdivision immunity in R.C. 2744.02(B)(1) for the 'negligent operation of a motor vehicle' does not encompass supervision of the conduct of the passengers in the vehicle." *Id.* at ¶30. Indeed, Ohio courts have regularly rejected attempts to expand the concept of "operating a motor vehicle" beyond the concept of merely driving that vehicle or causing it to be moved. *See e.g., Koeppen v. Columbus*, 10th Dist. Franklin No.15AP-56, 2015-Ohio-4463, ¶18 ("A public employee may perform acts connected to a vehicle that do not involve the driving or moving of the vehicle."); *Dub v. Beachwood*, 191 Ohio App.3d 238, 243, 2010-Ohio-5135, 945 N.E.2d 1065, ¶20 (8th Dist.) (R.C. 2744.02(B)(1) does not apply to claims that the driver of a city van negligently failed to assist an elderly plaintiff in exiting the van once the van stopped); *Miller v. Van Wert County Bd. of Mental Retardation & Developmental Disabilities*, 3rd Dist. Van Wert No.15-08-11, 2009-Ohio-5082, ¶¶3, 16–20 (The purportedly wrongful detention of a child on a school bus for five hours did not constitute the operation of a motor vehicle.); *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 48, 772 N.E.2d 129 (9th Dist.2002) ("The R.C. 2744.02(B)(1) exception to political subdivision immunity applies only where an employee negligently operates a motor vehicle; decisions concerning whether to pursue a suspect and the manner of pursuit are beyond the scope of the exception for negligent operation of a motor vehicle."); *Reck v. Dayton*, 2nd Dist. Montgomery No.CA 7085, 1981 Ohio App. LEXIS 13124, *6 (Sept. 4, 1981) ("The operation of whatever foreign equipment

may be mounted on a truck if unrelated to its movement on the highway as a vehicle of transportation," is not the as the operation of truck for purposes of an exception to political-subdivision.).

Furthermore, within the specific context of law enforcement, the Eighth District has held that the "training of police officers is a governmental function to which immunity attaches," even when such training relates to the "operation of a motor vehicle" and even when a plaintiff pursues claims under R.C. 2744.02(B)(1)(a). *Hall-Pearson v. South Euclid*, 8th Dist. Cuyahoga No.73429, 1998 Ohio App. LEXIS 4796, *5, 11 (Oct. 8, 1998) (citing *McCloud v. Nimmer*, 72 Ohio App.3d 533, 536–38, 595 N.E.2d 492 (8th Dist.1991)). In light of the foregoing, the phrase "operation of a motor vehicle" does not reasonably include the hiring, training, or supervision of police officers.

B. The Conduct at Issue in a Claim Under R.C. 2744.02(B)(1) Is the Conduct of the Employee and Not the Conduct of the Political Subdivision Itself.

Even if the phrase "operation of a motor vehicle" could be reasonably construed to include the hiring, training, or supervision of police officers, the relevant conduct at issue in a claim under R.C. 2744.02(B)(1) is the conduct of the police officer/employee and not the conduct of the political subdivision itself. The plain and unambiguous language of the statutory exception provides that "political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle **by their employees** when **the employees** are engaged within the scope of their employment and authority." *Id.* (emphasis added) . More specifically, R.C. 2744.02(B)(1)(a) only provides the political subdivision a defense to R.C. 2744.02(B)(1) liability if a "**member** of a municipal corporation police department or any other police agency **was operating a motor vehicle** while responding to an emergency call and **the operation of the vehicle** did not constitute willful or wanton misconduct." R.C. 2744.02(B)(1)(a) (emphasis added).

The second-tier statutory exceptions found in R.C. 2744.02(B)(2) and (B)(4) have a similar structure in that they focus on the conduct of employees, as opposed to the conduct of political subdivisions generally. Under the former, "political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts **by their employees** with respect to proprietary functions of the political subdivisions." R.C. 2744.02(B)(2) (emphasis added). Under the latter, "political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence **of their employees** and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, [certain] buildings…." R.C. 2744.02(B)(4) (emphasis added).

Conversely, the second-tier statutory exception found in R.C. 2744.02(B)(3) does not focus on the conduct of the employee specifically. Rather, it speaks to the negligence of the political subdivisions themselves. That is, the plain and unambiguous language of that exception provides that "political subdivisions are liable for injury, death, or loss to person or property caused by **their negligent failure** to keep public roads in repair and **other negligent failure** to remove obstructions from public roads…." *Id.* (emphasis added).

One basic canon of statutory interpretation holds that, when the legislature uses a particular word or phrase in one part of a statute and then subsequently uses a different word or phrase in another part of that very same statute, the change is both intentional and significant. "[W]here a legislative body 'includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion.'" *Okubo v. Shimizu*, 2nd Dist. Greene No.2001 CA 134, 2002-Ohio-2624, ¶28 (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)); *Duncan v. Walker*, 533 U.S. 167, 173, 121 S.Ct. 2120, 150 L.Ed.2d 251

(2001). Similarly, "canon *expressio unius est exclusio alterius* tells us that the express inclusion of one thing implies the exclusion of the other." *Myers v. Toledo,* 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶24 (citing BLACK'S LAW DICTIONARY (8th ed.2004)). Because the "legislature knows the meaning of words and chooses the specific words contained in a statute to express its intent … a court may not use words not in the statute to add to or limit the expressed legislative intent." *In re Adoption of Koszycki*, 133 Ohio App.3d 434, 437 & n.4, 728 N.E.2d 437 (10th Dist.1999) (citing *Wachendorf v. Shaver*, 149 Ohio St. 231, 236, 78 N.E.2d 370 (1948)). Accordingly, the Seventh District was not permitted to ignore R.C. 2744.02(B)(1)'s specific focus on the conduct of an individual employee or its specific exclusion of any reference to the conduct of the political subdivision itself.

C. As an Exception to a Grant of Blanket Immunity, R.C. 2744.02(B)(1) Must Be Narrowly Construed.

The political subdivision's first-tier immunity under R.C. 2744.02(A)(1) is a "general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function." *Riffle v. Physicians & Surgeons Ambulance*, 135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983, ¶15 (quoting *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶7); *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, ¶9; *Greene County Agric. Soc'y v. Liming*, 89 Ohio St.3d 551, 556–57, 733 N.E.2d 1141 (2000). The immunity is not absolute and is subject to the **exceptions** listed in R.C. 2477.02(B). *Cater v. Cleveland*, 83 Ohio St.3d 24, 27–28, 697 N.E.2d 610 (1998); *Green v. Columbus*, 10th Dist. Franklin No.15AP-602, 2016-Ohio-826, ¶17. "It is, of course, axiomatic that an exception to a rule of general application is to be narrowly construed." *In re Adoption of Sunderhaus*, 63 Ohio St.3d 127, 132 n.4, 585 N.E.2d 418 (1992) (collecting cases). Under Ohio's

Political Subdivision Tort Liability Act, immunity is the rule; immunity is not the exception. As the Second District explained almost twenty years ago:

> The General Assembly's enactment of R.C. 2744.02(A)(1) reflects a policy choice on the part of the state of Ohio to extend to its political subdivisions the full benefits of sovereign immunity from tort claims. Likewise, the exceptions to immunity in R.C. 2744.02(B) and the exceptions and defenses in R.C. 2744.03 reflect policy choices on the state's part to submit itself to judicial relief on tort claims only with respect to the particular circumstances identified therein. Because those exceptions and defenses are in derogation of a general grant of immunity, they must be construed narrowly if the balances which have been struck by the state's policy choices are to be maintained.

Doe v. Dayton City Schools, 137 Ohio App.3d 166, 169, 738 N.E.2d 390 (2nd Dist.1999); *see also Geideman v. Bay Village*, 7 Ohio St.2d 79, 80, 218 N.E.2d 621 (1966); *Wall v. Cincinnati*, 150 Ohio St. 411, 416, 83 N.E.2d 389 (1948); *Harris v. Columbus*, 10th Dist. Franklin No.15AP-792, 2016-Ohio-1036, ¶32. An expansive interpretation of R.C. 2744.02(B)(1) that looks to the conduct of the political subdivision instead of focusing on the conduct of the employees violates this canon of statutory construction, as does any interpretation of the phrase "operation of a motor vehicle" that would include the hiring, training, or supervision of the individual who operated the vehicle. In sum, no reasonably narrow construction of the plain and unambiguous language of R.C. 2744.02(B) would support claims for failing to adequately hire, train, or supervise police officers.

II. THE EXISTING CASE LAW DOES NOT SUPPORT CLAIMS FOR FAILING TO ADEQUATELY HIRE, TRAIN, AND/OR SUPERVISE POLICE OFFICERS.

The Seventh District decision in this case stands in conflict with decisions from the Eighth and Tenth Districts. First, in *Gould v. Britton*, 8th Dist. Cuyahoga No.59791, 1992 Ohio App. LEXIS 368 (Jan. 30, 1992), a plaintiff sued a police officer, the city for whom the officer worked, and the city's safety department for injuries sustained in an automobile accident with the officer.

Id. *1. At the time, the officer was responding in her police vehicle to the report of a shooting suspect's location. *Id.* * 2. Among the plaintiff's claims for relief was a claim against the city and its safety department for negligently entrusting the officer with a police vehicle. *Id.* *1. The Eighth District summarily rejected that claim, finding that the "statutory exceptions to immunity outlined in R.C. 2744.02(B) do not provide for a cause of action based upon negligent entrustment of a police automobile in the furtherance of providing police services." *Id.* *4. In doing so, the *Gould* Court rejected a 1987 decision from the Second District concluding that such claims were permissible under former R.C. 701.02. *Gould*, 1992 Ohio App. LEXIS 368, *4 (rejecting *Reynolds v. Oakwood*, 38 Ohio App.3d 125, 528 N.E.2d 578 (2nd Dist.1987)).

In *McCloud v. Nimmer*, 72 Ohio App.3d 533, 595 N.E.2d 492 (8th Dist.1991), the Eighth District had first considered the issue of a political subdivision's potential immunity for the purported failure to adequately hire, train, or supervise its police officers. In that case, a man and his wife sued a city, its mayor, its police chief, and one of its police officers for negligence arising out the officer's accidental, off-duty shooting of the man. *Id.* at 535. As part of their claims, the plaintiffs alleged that the city had negligently trained the officer, and the city asserted its immunity. *Id.* The trial court granted summary judgment to the city because it was immune under R.C. 2744.02(A)(1) and because none of the exceptions found in R.C. 2744.02(B) applied. *McCloud*, 72 Ohio App.3d at 535–36.

On appeal, the plaintiffs in *McCloud* relied exclusively on the immunity exception found in R.C. 2744.02(B)(2), which imposes liability upon political subdivisions for the "negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." *See McCloud*, 72 Ohio App.3d at 536. The plaintiffs argued that the city should be liable for the officer's conduct because the city had negligently trained the officer and because the

training of a police officer was a proprietary function. *Id* Based on R.C. 2744.01(C)(2)(a), which specifically includes the provision or non-provision of police services or protection within the definition of governmental function, the *McCloud* Court concluded that the training of police officers is indeed a governmental, not a proprietary, function of the city. 72 Ohio App.3d at 537–38. Consequently, the plaintiffs' negligent-training claim for negligence failed as a matter of law. *Id.* at 536, 538.

In *Hall-Pearson v. South Euclid*, 8th Dist. Cuyahoga No.73429, 1998 Ohio App. LEXIS 4796 (Oct. 8, 1998), the Eighth District applied *McCloud* in the context of a claim made pursuant to R.C. 2744.02(B)(1) specifically. *Hall-Pearson*, 1998 Ohio App. LEXIS 4796, *5–6. There, a police officer was responding to a dispatch regarding an armed robbery suspect fleeing on foot in the area where the officer was patrolling when his cruiser collided with the plaintiff's vehicle. *Id.* *1–2. As part of her allegations against the officer and the city for which he worked, the plaintiff alleged that the city had failed to adequately train the officer. *Id.* *1. After finding that the officer was on an emergency call and had not acted wantonly or willfully, the *Hall-Pearson* Court summarily dismissed the plaintiff's inadequate-training allegations. *Id.* *11 ("Finally, as to the city's training of [the officer], we note that in *McCloud* … this court determined that the training of police is a governmental function to which immunity attaches.").

The Eighth District did not address the issue again until *DiGiorgio v. Cleveland*, 8th Dist. Cuyahoga No.95945, 2011-Ohio-5878. There, an individual was walking through an intersection when she was struck and killed by a stolen car. *See id.* ¶¶2, 4. The car was being pursued by city police officers. *See id.* ¶5. In claims against the officers and the city, the plaintiff alleged (among other things) that the city had failed to adequately train its officers on the proper pursuit of suspects and had failed to ensure that its officers were being adequately supervised. *See id.* ¶¶10–13. In

reversing the trial court's denial of judgment on the pleadings to the city, the *DiGiorgio* Court specifically concluded that "there is no exception to immunity for the training, supervision, or discipline of police officers." *Id.* ¶17, 33. The *DiGiorgio* Court even declined to allow plaintiffs to amend their pleadings to add such a claim because such an amendment would have been futile. *See id.* ¶33.

In rejecting the failure-to-train-and-supervise allegations in *DiGiorgio*, the Eighth District examined an earlier decision from the Eleventh District that had indeed considered an alleged failure to properly train police officers to be an independent basis for liability against a political subdivision under R.C. 2744.02(B)(1). *DiGiorgio*, 2011-Ohio-5878, ¶¶28–31 (discussing *Robertson v. Roberts*, 11th Dist. Trumbull No.2003-T-0125, 2004-Ohio-7231, ¶¶32–39). Like *DiGiorgio*, the *Robertson* case also arose out a police-involved vehicular pursuit that resulted in a motor vehicle collision. *See* 2004–Ohio-7231, ¶2. Like the plaintiffs in *DiGiorgio* (and the McConnells here), the plaintiff in *Robertson* also asserted claims that a political subdivision and its police department should be held liable for "their own willful or wanton misconduct in failing to provide any training to [the involved officer] in police pursuits." *Id.* ¶12. Citing the Supreme Court's immunity decision in *Cater v. Cleveland*, 83 Ohio St.3d 24, 697 N.E.2d 610 (1998), the Eleventh District in *Robertson* erroneously concluded that political subdivisions could be liable for failing to train their employees, at least if that training was reckless, willful, or wanton. *See Robertson*, 2004-Ohio-7231, ¶34. Nonetheless, to understand the weakness of the *Robertson* analysis—and the strength of the *DiGiorgio* analysis—it is first necessary to revisit this Court's 1998 decision in *Cater*, which had nothing to do with police-involved vehicular pursuits or R.C. 2744.02(B)(1).

In *Cater*, a twelve-year-old boy nearly drowned in a city's indoor swimming pool, later developed acute bronchial pneumonia, and eventually died. *See* 83 Ohio St.3d at 24. In a lawsuit against the city, the plaintiffs claimed the city had acted negligently and/or recklessly in operating the pool. *See id.* The city asserted immunity under R.C. Chapter 2744 in two motions for summary judgment, both of which were denied. *See* 83 Ohio St.3d at 24. The case proceeded to trial, and at the close of plaintiffs' case-in-chief, the trial court granted the city's motion for a directed verdict. *See id.* at 24, 27. The appellate court affirmed. *See id.* at 27.

Before reversing the appellate courts' decision and in remanding the case for a new trial, the *Cater* Court created the well-worn three-tiered analysis for determining when a political subdivision is immune under R.C. Chapter 2744. *See* 83 Ohio St.3d at 28. The Court then concluded that the city's first-tier immunity under R.C. 2744.02(A)(1) could be subject to the second-tier immunity exception of former R.C. 2744.02(B)(3), which stated that "[p]olitical subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep … public grounds within the subdivisions … free from nuisance." *See* 83 Ohio St.3d at 30–31. The Court rejected the plaintiffs' argument for liability under the second-tier exception of R.C. 2744.02(B)(4), and the remaining second-tier exceptions of R.C. 2744.02(B)(1), (2), and (5) were not discussed. *See* 83 Ohio St.3d at 31–32.

When the plaintiffs in *Cater* tried to assert the third-tier defense of R.C. 2744.03(A)(5) as an independent basis for imposing liability upon the city, the Supreme Court quickly rejected their contention. *See Cater*, 83 Ohio St.3d at 32. That third-tier defense, in turn, states (both then and now) that:

> The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner

R.C. 2744.03(A)(5). According to the *Cater* Court, "R.C. 2744.03(A)(5) is a defense to liability; it cannot be used to establish liability," and that proposition remains good law in Ohio. *Cater*, 83 Ohio St.3d at 32; *Minaya v. NVR*, 8th Dist. Cuyahoga No.105445, 2017-Ohio-9019, ¶26; *State ex rel. Rohrs v. Germann*, 3rd Dist. Henry No.7-12-21, 2013-Ohio-2497, ¶32; *Moore v. Lake County*, 11th Dist. Lake No.2009-L-053, 2010-Ohio-825, ¶35; *Lindsey v. Summit County Children's Servs. Bd.*, 9th Dist. Summit No.24352, 2009-Ohio-2457, ¶29. Thus, this Court held that the plaintiffs in *Cater* could "only argue that the city is not entitled to the defense of R.C. 2744.03(A)(5) because the city acted in a reckless or wanton manner" and noted that the "conduct by the city regarding its lack of training on the use of 911 presents a question of fact for the jury to consider, which was improperly disposed of by granting the city's motion for directed verdict." *Cater*, 83 Ohio St.3d at 33.

The third-tier defense of R.C. 2744.03(A)(5) was not an issue before the Eleventh District in *Robertson*, and it was not an issue before the Eighth District in *DiGiorgio*. Thus, the *DiGiorgio* Court appropriately noted the Eleventh District had "misinterpreted *Cater* in *Robertson* when it considered an alleged failure to properly train police officers as an independent basis for liability in a suit against a political subdivision." *DiGiorgio*, 2011-Ohio-5878, ¶31. The *DiGiorgio* Court then summarized the relevant issue as follows:

> **In the proper case**, a municipality's failure to train, supervise, or communicate with its police officers could be evidence that the municipality acted in a reckless or wanton manner, **thereby depriving the municipality of any defense to immunity**…. Such evidence does not create independent causes of action regarding the training, supervision, or discipline of police officers, however.

DiGiorgio, 2011-Ohio-5878, ¶31 n.3 (emphasis added) (citing *Cater*, 83 Ohio St.3d at 32–33). The third-tier defense found in R.C. 2744.03(A)(5) is the only provision of R.C. Chapter 2744 in which a political subdivision's own malicious purpose, bad faith, wantonness, or recklessness is ever mentioned.[3] Consequently, the third-tier defense found in R.C. 2744.03(A)(5) is the only "defense to immunity" of which a municipality can be deprived upon a showing of its own malicious purpose, bad faith, wantonness, or recklessness. Thus, the "proper case" mentioned in *DiGiorgio* is a case in which a municipality has specifically asserted the third-tier defense found in R.C. 2744.03(A)(5).

Coitsville has not asserted that third-tier defense at any time during this civil action. Neither the McConnells nor the lower courts have ever even discussed it. Accordingly, this is **not** a "proper case" in which to decide whether Coitsville could be deprived of this particular "defense to immunity" by showing that it acted negligently, willfully, or wantonly with respect to its hiring, training, or supervision of Officer Dudley.

In *Wingfield v. Cleveland*, 8th Dist. Cuyahoga No.100589, 2014-Ohio-2772, the plaintiff alleged that, while he was exiting a restaurant, one or more mounted police officers came onto the sidewalk, negligently knocked him down, and then trampled him under the feet of the horses. *See id.* ¶3. The plaintiff attempted to invoke the R.C. 2744.02(B)(1) exception to immunity by arguing that the "driving of a horse is the equivalent of operating a motor vehicle." 2014-Ohio–2772, ¶14. Although the *Wingfield* Court rejected that argument, it also disposed of the plaintiff's additional allegations that the "city and police department had failed to properly train, supervise, and monitor

[3] R.C. 2744.03(A)(6)(b) applies only to an employee's immunity, and thus references the employee's malicious purpose, bad faith, wantonness, or recklessness. Because Officer Dudley is no longer a party to this action, no further consideration of his immunity (or lack thereof) under R.C. 2744.03(A)(6)(b) is necessary. For the reasons discussed above, R.C. 2744.02(B)(1)(a) refers only to the conduct of an individual police officer. *See* PART.I.B, *supra* at pp.13–15.

the officers and the horses." *Id.* ¶¶3, 14–16. In a footnote, the *Winfield* Court repeated *DiGiorgio*'s holding with respect to training claims:

> Although a municipality's failure to train or supervise its police officers could, in the proper case, be evidence that the municipality acted in a reckless or wanton manner, thereby depriving the municipality of a defense to an exception to immunity, such evidence does not create an independent cause of action regarding the training or supervision of police officers.

2014-Ohio-2772, ¶9 n.1.

In denying Coitsville's motion to certify a conflict in the instant proceedings, the Seventh District cited the foregoing footnote from *Wingfield* and claimed the "Eighth District held that while negligent training and hiring of an officer is not an independent claim, it can be used as evidence of willful and wanton misconduct." *McConnell v. Dudley*, 7th Dist. Mahoning No.17 MA 0045, 2018-Ohio-3099, ¶9; OP. & J. ENTRY (R.56, p.5). With all due respect to the Seventh District, *Wingfield* held nothing of the sort. In essence, the Seventh District has now misinterpreted the Eighth District's decision in *Wingfield* in much the same way that the Eleventh District had misinterpreted this Court's decision in *Cater* in its *Robertson* decision. *See DiGiorgio*, 2011-Ohio-5878, ¶31.

In *Glenn v. Columbus*, 10th Dist. Franklin No.16AP-15, 2016–Ohio–7011, the Tenth District joined the Eighth District in holding that there were no exceptions for claims of inadequate hiring, training, or supervision of emergency personnel. The matter in *Glenn* arose out of a collision between an automobile being driven by the plaintiff and a city fire truck being driven by a firefighter in response to an emergency. *Id.* ¶2. In reversing the trial court's denial of summary judgment to the city, the Tenth District in *Glenn* rejected plaintiff's argument that the city itself could be held liable under R.C. 2744.02(B)(1) because the collision at issue was purportedly a result of the "city's failure to properly train, supervise, and enforce its rules." 2016–Ohio–7011,

¶¶8, 11, 25. In doing so, the *Glenn* Court noted that "R.C. 2744.02(B) does not contain an independent exception to a political subdivision's immunity under R.C. 2744.02(A)(1) for the failure to train, supervise, or enforce its own policies." 2016–Ohio–7011, ¶11 (citing *DiGiorgio*, 2011-Ohio-5878, ¶33). Thus, according to the *Glenn* Court, the relevant focus of any dispute about a city's liability under R.C. 2744.02(B)(1) is on the nature of the employee's conduct and not upon the nature of the city's conduct. 2016–Ohio–7011, ¶11; *see also* PART.I.B, *supra* at pp.12–14.

In overruling Coitsville's second assignment of error and sustaining the McConnells' independent "inadequate pursuit training/policies" claim for relief under R.C. 2744.02(B)(1), the Seventh District below relied upon its prior decisions in *Adams v. Ward*, 7th Dist. Mahoning No.09 MA 25, 2010-Ohio-4851, and *Wagner v. Heavlin*, 136 Ohio App.3d 719, 737 N.E.2d 989 (7th Dist.2000). *See McConnell*, 2018-Ohio-341, ¶¶30–32, 37; OP. (R.49, pp.14–15, 17); COMPL. ¶¶27–60 (R.1, p.7). In *Adams*, the plaintiff was injured when an officer's car struck her car during a police chase. 2010-Ohio-4851, ¶2. As part of her complaint, the plaintiff asserted claims against the city for negligent/willful entrustment and negligence in failing to have a pursuit policy and/or failing to train the officer in that pursuit policy. *Id.* ¶3. Citing its own decision in *Wagner* and the Eighth District's decision in *Gould*, the *Adams* Court simply held that R.C. 2744.02(B)(1) "would include failure to train and entrustment claims." 2010-Ohio-4851, ¶43 (citing *Wagner*, 136 Ohio App.3d at 734–35; *Gould v. Britton*, 8th Dist. Cuyahoga No.59791, 1992 Ohio App. LEXIS 368 (Jan. 30, 1992)). Ironically, the *Gould* Court **rejected** such claims. 1992 Ohio App. LEXIS 368, *4 ("The statutory exceptions to immunity outlined in R.C. 2744.02(B) **do not** provide for a cause of action based upon negligent entrustment of a police automobile in the furtherance of providing police services.") (emphasis added). The *Wagner* Court in turn simply assumed that a "political subdivision is potentially liable for its own acts or omissions in connection with the negligent

operation of a motor vehicle by one of its employees" under R.C. 2744.02(B)(1) without ever explaining why and without engaging in any actual statutory construction. *Wagner*, 136 Ohio App.3d at 734–35, 737. Because both *Adams* and *Wagner* merely assume—without explanation—that a political subdivision can be liable under R.C. 2744.02(B)(1) for negligent hiring, training, supervision, and/or entrustment, the Seventh District's reliance upon them to simply further that unexplained assumption is logically circular and thus analytically useless.

In light of the foregoing, the case law fails to reasonably support the existence of any claims for failing to adequately hire, train, or supervise police officers.

III. EVIDENCE OF NEGLIGENT, WILLFUL, OR WANTON HIRING, TRAINING, AND/OR SUPERVISION OF POLICE OFFICERS IS NOT MATERIAL TO ANY OF THE EXCEPTIONS FOUND WITHIN R.C. 2744.02(B)(1)–(5).

In its July 25, 2018 entry and judgment denying Coitsville's motion to certify a conflict, the Seventh District claimed that its prior January 26, 2018 opinion "held that … negligent hiring and training of police officers **does not** form an independent claim but rather, could serve as evidence of wanton or willful behavior **on the part of the government**." *McConnell v. Dudley*, 7th Dist. Mahoning No.17 MA 0045, 2018-Ohio-3099, ¶8; OP. & J. ENTRY (R.56, p.5) (emphasis added). The Amici raise two objections to statements made within this sentence.

First, the Seventh District's January 26, 2018 opinion does not make the distinction claimed in its July 25, 2018 entry and judgment, and even if it did, that distinction is not supported by the record in this case. The McConnells specifically pled "inadequate pursuit training/policies" as a claim for relief that was entirely separate from—and independent of—their claims for negligence and "wanton." *Compare* COMPL. ¶¶57–60 (R.1, p.7) ("inadequate pursuit training/policies"), *with* COMPL. ¶¶41–50 (R.1, pp.5–6) (negligence); *compare* COMPL. ¶¶57–60 (R.1, p.7) ("inadequate pursuit training/policies"), *with* COMPL. ¶¶51–56 (R.1, p.7) ("wanton"). Based upon the separate allegations of that particular claim, the trial court found genuine issues of material fact as to

whether "Defendants Coitsville Township Police Department and Coitsville Township/Coitsville Township Board of Township Trustees were negligent in the hiring, training, and supervising of Officer Dudley." J. ENTRY (R.36, p.6). That finding was upheld by the Seventh District on January 26, 2018, when it held that a "genuine issue exists as to whether Coitsville Township through its Coitsville Police Department was negligent in training and supervising Officer Dudley." *McConnell v. Dudley*, 7th Dist. Mahoning No.17 MA 0045, 2018-Ohio-341, ¶37; OP. (R.49, p.17). Moreover, in doing so, the Seventh District specifically relied exclusively on two of its own prior rulings that had specifically assumed hiring, training, supervision, or entrustment could form an independent basis for political-subdivision liability under R.C. 2744.02(B)(1). *See McConnell*, 2018-Ohio-341, ¶¶30–32; OP. (R.49, pp.14–15) (citing *Adams v. Ward*, 7th Dist. Mahoning No.09 MA 25, 2010-Ohio-4851; *Wagner v. Heavlin*, 136 Ohio App.3d 719, 737 N.E.2d 989 (7th Dist.2000)). At the very least, the Seventh District's January 26, 2018 opinion and its July 25, 2018 entry and judgment have together confused Ohio's case law on the issue.

Second, the rest of this sentence in the Seventh District's July 25, 2018 decision is not a correct statement of the law. The "negligent hiring and training of police officers" **cannot** "serve as evidence of wanton or willful behavior **on the part of the government**" because the **government**'s behavior is **not** material to a claim under R.C. 2744.02(B)(1). *See McConnell*, 2018-Ohio-3099, ¶8; OP. & J. ENTRY (R.56, p.5) (emphasis added). "As the United States Supreme Court has explained, 'only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶12 (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Because the conduct at issue in a claim under R.C. 2744.02(B)(1) is the conduct of the employee and not the conduct of the political subdivision itself,

a determination of whether the political subdivision's behavior was commendable, reasonable, negligent, reckless, wanton, willful, or even intentional would not affect the outcome of the claim. *See* PART.I.B, *supra* at pp.12–14. To illustrate this point, consider the following scenarios.

First, a political subdivision's employee causes an injury through the negligent operation of a motor vehicle. That employee was not one of the types listed in R.C. 2744.02(B)(1)(a)–(c). Liability for the political subdivision would exist under R.C. 2744.02(B)(1), and the political subdivision could not avail itself of any of the defenses found in R.C. 2744.02(B)(1)(a)–(c). This is true no matter how well or how poorly the political subdivision itself acted in hiring, training, or supervising that employee. The political subdivision's own conduct does not affect the outcome of the case.

Next, a political subdivision's employee causes an injury through the negligent operation of a motor vehicle. That employee was one of the types listed in R.C. 2744.02(B)(1)(a)–(c) but was not responding to an emergency. Again, liability for the political subdivision would exist under R.C. 2744.02(B)(1), and the political subdivision could not avail itself of any of the defenses found in R.C. 2744.02(B)(1)(a)–(c). Again, this is true no matter how well or how poorly the political subdivision itself acted in hiring, training, or supervising that employee. Again, the political subdivision's own conduct does not affect the outcome of the case.

Third, a political subdivision's employee causes an injury through the negligent operation of a motor vehicle. That employee was one of the types listed in R.C. 2744.02(B)(1)(a)–(c). That employee was responding to an emergency but was also acting willfully or wantonly in the operation of the motor vehicle. Yet again, liability for the political subdivision would exist under R.C. 2744.02(B)(1), and the political subdivision could not avail itself of any of the defenses found in R.C. 2744.02(B)(1)(a)–(c). Yet again, this is true no matter how well or how poorly the political

subdivision itself acted in hiring, training, or supervising that employee. Yet again, the political subdivision's own conduct does not affect the outcome of the case.

Finally, a political subdivision's employee causes an injury through the negligent operation of a motor vehicle. That employee was one of the types listed in R.C. 2744.02(B)(1)(a)–(c). That employee was responding to an emergency and was not acting willfully or wantonly in the operation of the motor vehicle. Pursuant to the plain and unambiguous language of the statute itself, liability should not exist under R.C. 2744.02(B)(1) because the R.C. 2744.02(B)(1)(a)–(c) defenses would now be available to the political subdivision. Nonetheless, according to the Seventh District, the "negligent hiring and training of police officers … could serve as evidence of wanton or willful behavior on the part of the government" and establish liability under R.C. 2744.02(B)(1) when sufficiently culpable conduct cannot otherwise be established on the employee's part. *McConnell*, 2018-Ohio-3099, ¶8; OP. & J. ENTRY (R.56, p.5). This would indeed create a new substantive exception to political subdivision immunity that was not created by the legislature itself. Although the Seventh District now appears to agree there can be no independent claims for negligent hiring, training, and supervision of police officers under R.C. 2744.02(B)(1), its holdings still allows for such independent claims but now frame them as merely evidentiary issues.

The reasonableness or lack thereof on the part of a political subdivision in the hiring, training, or supervision of police officers is immaterial to the application of R.C. 2744.02(B)(1) because the application of that statutory immunity exception turns on the negligence, willfulness, and/or wantonness of the political subdivision's employee. It is a vicarious form of liability that does not depend upon the quality of the political subdivision's conduct. Because the political subdivision's behavior is not relevant to claims brought under R.C. 2744.02(B)(1), evidence of

negligent, willful, or wanton hiring, training, and/or supervision of police officers is immaterial to such claims as well.

CONCLUSION

For the reasons stated above, the Amici Curiae City of Columbus, et al., jointly and respectfully request that this Court reverse the Seventh District's judgment below and hold that (1) political subdivisions are immune from liability for claims of negligent hiring, training, or supervision of their police officer; and (2) evidence of a political subdivision's purported negligence, willfulness, or wantonness in the hiring, training, or supervision of its police officers is not relevant to claims under R.C. 2744.02(B)(1).

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I certify that, on September 28, 2018, copies of the foregoing were served by electronic mail to the following individual(s) and that, on September 28, 2018, copies of the foregoing were served upon these same individuals by ordinary U.S. mail, postage prepaid:

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