

In the Supreme Court of Ohio

ROBERT PARMERTOR, et al.,)	APPEAL NO. 2019-0410
)	
Plaintiffs-Appellants,)	
)	
-vs.-)	On Appeal from the Lake County Court
)	of Appeals, Eleventh Appellate District
CHARDON LOCAL SCHOOLS, et al.,)	
)	Court of Appeals Case No. 2018-L-03
Defendants-Appellees.)	
)	

**DEFENDANTS-APPELLEES JOSEPH BERGANT, II'S, DANA STEARNS', ANDY
FETCHIK'S, DREW TRIMBLE'S, AND MICHAEL SEDLAK'S
MEMORANDUM IN OPPOSITION TO JURISDICTION**

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I. EXPLANATION OF WHY APPELLANTS' PROFFERED PROPOSITIONS OF LAW PRESENT NO QUESTIONS OF PUBLIC OR GREAT GENERAL INTEREST.

On the morning of February 27, 2012, Thomas M. Lane, III (“TJ Lane”) entered Chardon High School and tragically shot six fellow students. TJ Lane alone bears the sole responsibility for his heinous actions. Nevertheless, the Plaintiffs-Appellants filed suit against Defendants-Appellees Joseph Bergant, II, Dana Stearns, Andy Fetchik, Drew Trimble, and Michael Sedlak (collectively, “the Chardon School Employees”).

This Court previously determined that the case presented no issue of public or great general interest. *See Parmertor v. Chardon Loc. Schs.*, 146 Ohio St. 3d 1470, 2016-Ohio-5108, 54 N.E3d 1269 (2016). The Court should do so again and decline to exercise jurisdiction over this appeal. In determining that the Chardon School Employees were entitled to the statutory immunity afforded to them under the Ohio Political Subdivision Tort Liability Act, R.C. 2744.01, *et seq.*, both lower courts expressly followed well-settled legal precedent and appropriately applied the established law to the highly individualized, specific facts as presented in the evidentiary record.

The Appellants originally alleged that the Chardon School Employees had been specifically warned of the dangers of at-risk students and the shortcomings in security protocols. (*See, e.g.* Pl.’s Compl. ¶ 47, T.d. 2.) As the Appellate Court previously recognized, these were “serious and sweeping allegations of misconduct on the part of the school Administrators[.]” *Parmertor v. Chardon Loc. Schs.*, 2016-Ohio-761, ¶ 51 (11th Dist.). Although the Appellate Court afforded the Appellants broad latitude to pursue discovery to substantiate these allegations, discovery simply did not bear the allegations out. Instead, the Appellants modified their theory of liability to posit that the Chardon School Employees were responsible for the deaths and serious injury of their students because Chardon High School did not have a School Resource

Officer (“SRO”) physically present on campus at the time of the shooting.

The parties exchanged hundreds of pages of documents and took dozens of hours of testimony over the course of nearly 20 depositions of school administrators, principals, other educators, a counselor, a student, a community member, family members, and law enforcement officers. Even then, the Appellants’ revised theory failed to find any evidentiary support for the claim that any one or more of the Chardon School Employees engaged in any conduct approaching the level of malicious, bad faith, wanton, or reckless conduct necessary to abrogate the statutory immunity to which the Chardon School Employees are entitled.

With respect to the Appellants’ First Proposition of Law, this case cannot present an issue of public or great general interest because the lower courts never addressed the issue. Indeed, it was the Chardon School Employees – not the Appellants – who originally posited that, in addition to their statutory immunity, they were similarly entitled to summary judgment because they owed the Appellants no legal duty to guard against the unforeseeable criminal acts of a third party. In the proceedings below, the Appellants vociferously derided the Chardon School Employees’ arguments as “simply baffling” and called upon both lower courts to “reject the invitation to predicate the decision upon those [decisions] confined to claims of negligence and other irrelevant torts.” (Pl.s’ Opp’n Br. 13, 17, T.d. 141; Pl.s’ App. Br. 26, 31.)

Yet now the Appellants seek to make the legal question of duty the hallmark of their First Proposition of Law. The lower courts’ decision not to pass upon the legal question of duty is what makes exercise of jurisdiction over this appeal inappropriate. The Trial Court and Appellate Court both found that the Chardon School Employees were entitled to statutory immunity because the specific evidentiary record “upon which [the Appellants] rely simply does not create a genuine issue of material fact concerning whether the School Employees acted in bad faith or engaged in conduct that was malicious, wanton, or reckless.” *Parmertor v. Chardon*

Loc. Schs., 2019-Ohio-328, ¶ 61 (11th Dist.). Because statutory immunity imposed an absolute bar to the Appellants’ claims, the lower courts had no need to address other issues, including whether the Appellants’ claims failed because they could not establish a legal duty or proximate cause. *Id.* at ¶ 63; App. R. 12(A)(1)(c). This Court declines to address issues that are moot, or that propose abstract or hypothetical questions. *See, e.g., Fortner v. Thomas*, 22 Ohio St. 2d 13, 14, 257 N.E.2d 371 (1970). Even if the Court was inclined to review and issue a pronouncement on the question of the legal duty of a public servant in a tort action, the instant appeal is neither the proper, nor the best, vehicle by which the Court could reach that issue on the merits.¹

With respect to the Appellants’ Second Proposition of Law, this case cannot present an issue of public or great general interest because the Appellants premise their argument on a misguided and erroneous interpretation of the particularized factual posture of the case. In their Second Proposition of Law, the Appellants seek to assign as error the Trial Court’s discretionary decision to reject the speculative and factually unsubstantiated opinions of the Appellants’ purported expert. The Appellate Court found no abuse of discretion on the part of the Trial Court in this regard, upholding the Trial Court’s rejection of the expert opinion as “completely speculative.” *Parmertor*, 2019-Ohio-328, ¶ 32.

The Trial Court correctly discharged its gate-keeping function to foreclose speculative and unreliable expert testimony, and the Appellate Court correctly upheld this decision as within the Trial Court’s sound discretion. Moreover, adoption of the Appellants’ Second Proposition of

¹ Another discretionary appeal currently before this Court stems from the denial of summary judgment to school officials arising from a case involving a student suicide. *See Baab v. Medina City Schs. Bd. of Educ.*, S. Ct. App. No. 2019-0465. That appeal has properly preserved and squarely presents the issue of legal duty and its interplay with the statutory immunity analysis, should the Court be inclined to address the issue. The Appellants’ propositions of law in the instant matter, however, present vastly different, fact-sensitive legal and evidentiary issues not before the Court in *Baab*. As a result, the Court need not accept the Appellants’ propositions of law for review simply because the Court accepts *Baab*.

Law would create a legal sea change, allowing for the use of expert opinion under any circumstance without regard to whether such opinion is actually admissible. This would eliminate the time-honored role of trial courts to serve as gate-keepers, and instead allow for unfettered and unregulated espousal of unqualified, unreliable, and unsubstantiated opinions. The Court should decline the Appellants' invitation to adopt such an evidentiary scheme.

The Appellants' Second Proposition of Law suffers from an even more fundamental logical flaw, as it presupposes that the Chardon School Employees did, in fact, rely upon expert testimony on the ultimate issue of whether the Chardon School Employees engaged in malicious, bad faith, wanton, or reckless misconduct. The undisputed record establishes that this was not the case. To be sure, the Chardon School Employees engaged Steven Kaufer, a security expert, to conduct an in-depth analysis of the security protocols and procedures in place at Chardon High School at the time of the shooting. But in their motion for summary judgment, the Chardon School Employees did not rely upon his findings on the ultimate issue of whether their conduct rose to the level of malicious, bad faith, wanton, or reckless conduct.

Instead, the Chardon School Employees invoked Mr. Kaufer's expert conclusions only for three discrete issues: (1) a factual recitation of the chronology of the shooting and its duration, (2) an historical overview of police response to Chardon High School, and (3) an analysis of a federal law enforcement study of nationwide school shootings showing injuries or deaths in 100% of cases despite the presence of law enforcement on campus. (Def.s' Mot. Summ. J., 7, 13, 23, T.d. 122.) The Chardon School Employees decidedly did not rely on Mr. Kaufer's conclusion on the ultimate issue of alleged culpability as a measure of entitlement to statutory immunity, belying the entire premise of the Appellants' Second Proposition of Law.

There can be no dispute that there are no constitutional provisions or rights implicated in this matter. The Appellants cite no conflicts between appellate courts on the disposition of this

matter in the courts below, nor are there any. Instead, the Appellants' sole refuge is a novel argument regarding legal duty and the contention that the Trial Court abused its discretion in not accepting the speculative and factually unsubstantiated opinion testimony of the Appellants' purported expert. The Appellants' propositions of law present no issues properly preserved and presented for this Court's review. Moreover, the specific facts presented make the case and its issues of interest only to the parties involved. The case presents no issue of public or great general interest and no substantial constitutional question. Accordingly, the Chardon School Employees respectfully request that the Court decline to exercise its discretionary jurisdiction.

II. COUNTER STATEMENT OF THE FACTS AND THE CASE

On February 27, 2012, TJ Lane entered Chardon High School and reported to the cafeteria to await transfer to the Lake Academy where he attended classes. After the bell rang and students began to clear out, he reached into his backpack where he had concealed a handgun, and opened fire. He removed the gun and continued firing, shooting six students. The shooting in the cafeteria was over in nine seconds. (Duncan Dep. 85, T.d. 124; Kaufer Rep. 2, T.d. 122.) TJ Lane fled the building and was out of the building in no more than 22 seconds. (Duncan Dep. 85-86; Kaufer Rep. 3.) Law enforcement responded immediately, secured the school within minutes, and apprehended TJ Lane inside the hour. (Duncan Dep. 55; McKenna Dep. 10, 98, T.d. 133.) TJ Lane pled guilty to aggravated murder and other crimes, and is serving three consecutive life sentences. *State of Ohio v. Lane*, Geauga C.P. No. 12-C-000058.

The evidentiary record established that the tragic shooting was entirely unforeseeable. TJ Lane had found success at the Lake Academy, an alternative school assisting students who were not achieving academic success. (Weiss Dep. 9-10, T.d. 132; Pfeiffer Dep. 8, 33-34, 50-51, 70-71, 83, T.d. 131.) Nothing in TJ Lane's behavioral assessment raised concerns for Lake Academy staff, and no issues were ever raised with the Chardon School Employees. (Weiss

Dep. 41; Pfeiffer Dep. 27, 68, 82-83.)

Contrary to the Appellants' mischaracterization of the safety and security protocols at Chardon High School, school officials, law enforcement personnel, and community members – including the Chardon School Employees – worked hard to make and keep the school safe for students. Chardon High School had physical security systems in place for many years, including bus security cameras, a building alarm system, surveillance video systems, and audio/video controlled access systems. (Stearns Dep. 11, 17, 19, 25; T.d. 138; Fetchik Dep. 8, T.d. 125; Goergen Dep. 17, T.d. 135.)

Chardon High School did not have an SRO on campus prior to 2012. In 2006-2007, a Safety & Security Action Team, consisting of district administrators, law enforcement personnel, and community representatives, was tasked with suggesting security improvements at all schools in the district. (Duncan Dep. 46; Trimble Dep. 12-13, T.d. 136; Goergen Dep. 13.) The concept of an SRO arose as part of the committee's work, but discussions centered on researching further whether having an SRO was reasonable or necessary. (Goergen Dep. 18, 34, 49.)

The Appellants distort the testimony of school administrators, law enforcement officers, and community members regarding the potential implementation of an SRO. For instance, the claim that Drew Trimble surreptitiously deleted a recommendation for an SRO is patently false. As Ms. Trimble explained, it was the security committee's assessment that supervision of students should be a component of safety and security protocols, but that school administrators, and not necessarily an SRO, could accomplish this. (Trimble Dep. 123.) Police Chief Tim McKenna confirmed that none of the Chardon School Employees ever rejected any recommendation from law enforcement with respect to safety or security at the schools. (McKenna Dep. 197.) Indeed, Lt. Duncan similarly confirmed that the committee never made a recommendation for an SRO at Chardon High School. (Duncan Dep. 65.) Fellow committee

member Timothy Goergen likewise refuted the notion that the committee was recommending an SRO, specifically stating that he recalled “exploring the possibility...but I don’t recall it being recommended.” (Goergen Dep. 18.) Instead, he confirmed that “we weren’t talking about instituting an actual officer, we were more collecting information, with the recommendation to research it further.” (*Id.* at 22.) The committee did not endorse or reject the concept of an SRO, but instead left the matter to the Board of Education to accept or reject. (*Id.* at 45; Trimble Dep. 21, 29, 140; Duncan Dep. 90.)

Despite not having an SRO, Chardon High School administrators were already addressing safety and security issues with local law enforcement support as necessary. (Trimble Dep. 22, 34.) This included a visible presence throughout the day and monitoring students in the cafeteria before classes began. (Duncan Dep. 80; Bergant Dep. 114, T.d. 139; Trimble Dep. 68, 83; Sedlak Dep. 23, T.d. 137; McKenna Dep. 75, 188; Fetchik Dep. 47.) The Appellants criticize school officials for not identifying TJ Lane’s clothing, including a shirt bearing the word “killer,” on the morning of the shooting. But the evidentiary record establishes that school officials could not tell whether TJ Lane was wearing the shirt because, being February, he may have been wearing a coat. (Bergant Dep. 106-109; Trimble Dep. 102; Hall Dep. 30, T.d. 130.)

School personnel also partnered closely with local law enforcement. (Trimble Dep. 143-145.) Officers participated in drills and training initiatives with students and staff, and maintained a regular, visible police presence at Chardon High School. (Duncan Dep. 14-15; Trimble Dep. 38-39, 43; Stearns Dep. 41.) This included emergency response drills that went beyond state mandates. (Duncan Dep. 37-38; Fetchick Dep. 9, 36; Trimble Dep. 40-41, 63.) The Chardon School Employees also worked with law enforcement to prepare, review, implement, and operationalize the school’s safety and security plans. (Duncan Dep. 21-22, 37, 42-43; Bergant Dep. 25; Fetchik Dep. 16; Trimble Dep. 40-41, 130.) Officers were in the

building regularly, not just to respond to incidents, but also to meet students and staff and develop relationships with people in the building. (Fetchick Dep. 33; Duncan Dep. 36; Bergant Dep. 72-73; Trimble Dep. 45-46.) The Chardon Police Department had a standing policy requiring officers to be present at Chardon High School twice a day, every day that school was in session. (Duncan Dep. 93-94; McKenna Dep. 183.) These measures were designed to minimize harm from foreseeable security risks – risks that simply did not include the shooting.

The safety and security of students and staff was the top priority for the Chardon School Employees. (Bergant Dep. 75; Fetchik Dep. 35; Trimble Dep. 58; Sedlak Dep. 19.) By all accounts, they succeeded in making Chardon High School a safe high school. Law enforcement logged 500 to 600 calls for service annually, most frequently in response to trouble signals with the building alarm and for twice daily visits from officers. (McKenna Dep. 67, 70, 182-183.) There was no history of gun violence or weapon use at Chardon High School prior to the shooting. (McKenna Dep. 70; Trimble Dep. 49; Bergant Dep. 72.) Law enforcement had never been critical of safety or security at Chardon High School, including for not having an SRO stationed at the school. (Duncan Dep. 95; McKenna Dep. 181, 193-194.) Lt. Duncan’s assessment of the safety and security of the school before the shooting occurred was plain: “I wouldn’t have sent my daughter there if I didn’t think it was safe.” (Duncan Dep. 95.)

III. ARGUMENT REGARDING PROPOSITIONS OF LAW

A. Rebuttal to Appellants’ First Proposition of Law:

SCHOOL OFFICIALS OWE NO LEGAL DUTY, SPECIAL OR OTHERWISE, TO PREVENT THE UNFORESEEABLE CRIMINAL ACTS OF THIRD PARTIES.

As an initial matter, the Appellants’ First Proposition of Law – concerning whether the Chardon School Employees owed a legal duty to guard against TJ Lane’s unilateral and unforeseeable criminal action – cannot be an appropriate basis for this Court to exercise its

discretionary jurisdiction. Neither the Trial Court nor the Appellate Court passed upon this issue. Indeed, as the Appellate Court determined, “because we conclude the Chardon School Employees are entitled to statutory immunity, we need not address their argument that they owed no legal duty to Plaintiffs to prevent Lane’s criminal actions.” *Parmertor*, 2019-Ohio-328, ¶ 63.

It is well settled that, when “the party opposing [summary judgment] fails to establish by its evidence the existence of an element necessary for a prima facie case, ‘there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.’” *Beaty v. Schilling*, 1st Dist. No. C-880807, 1990 WL 14764, *2, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-28 (1986); *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996); *Jones v. Wheelersburg Loc. Sch. Dist.*, 4th Dist. No. 12CA3513, 2013-Ohio-3685, ¶ 59.

Neither the Trial Court nor the Appellate Court passed upon the duty question, and this Court does not entertain such matters in the first instance. *Lycan v. Cleveland*, 146 Ohio St. 3d 29, 2016-Ohio-422, 51 N.E.3d 593, ¶ 21 (“an appellate court limits its review to issues actually decided by the trial court in its judgment”), citing *Bowen v. Kil-Kare, Inc.*, 63 Ohio St. 3d 84, 89, 585 N.E.2d 384 (1992); *Johnston v. State*, 144 Ohio St. 3d 311, 2015-Ohio-4437, 42 N.E.3d 746, ¶ 15. For that reason alone, the Appellants’ First Proposition of Law is moot, and cannot serve as a basis for the Court’s discretionary jurisdiction.

Additionally, the Appellants’ First Proposition of Law is legally flawed. They premise the entire proposition upon an admitted expansion of this Court’s comment, in an entirely different context, that “[s]chools have an obligation to keep their students safe.” See *State v. Polk*, 150 Ohio St. 3d 29, 2017-Ohio-2735, 78 N.E.3d 834, ¶ 25. But *Polk* and the two other cases upon which the Appellants rely – *Pottawatomie Cty. v. Earls*, 536 U.S. 822 (2002) and *Doe v. Clairborne Cty.*, 103 F.3d 495 (6th Cir. 1996) – arose under legal and factual

circumstances so vastly different from this matter so as to render the Appellants' proposition meaningless.

In *Polk*, this Court was passing upon a constitutional question arising under the Fourth Amendment to the United States Constitution, regarding whether it was constitutionally permissible for school officials to search a student's unattended backpack to determine its owner. The warrantless search revealed that the backpack belonged to a suspected gang member and uncovered bullets in the backpack, leading to criminal charges against the student. In "weigh[ing] the importance of the government's interest and the efficacy of the search policy in meeting that interest against the nature of the privacy interest and the intrusiveness of the search," this Court determined that student safety was a sufficiently compelling government interest that justified a reasonable intrusion into student privacy through a warrantless search. *Polk*, 2017-Ohio-2735, ¶ 24.

The U.S. Supreme Court decision in *Earls* similarly implicates a Fourth Amendment constitutional analysis, finding that the government interest in "[s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." *Earls*, 536 U.S. at 831. The U.S. Sixth Circuit Court of Appeals decision in *Doe* is even further removed, the Appellants' selective quotation notwithstanding, in that the *Doe* case involves federal civil rights claims and other state law claims arising under Tennessee law. *Doe*, 103 F.3d 495. In that matter, the federal appellate court was not considering the question of a legal duty, but passing upon whether another state's *in loco parentis* statute and compulsory attendance laws rise to the level of a constitutional obligation so as to support a federal civil rights claim. *Id.* at 509-510.

This Court's analysis in *Polk*, the U.S. Supreme Court's analysis in *Earls*, and the Sixth Circuit's analysis in *Doe*, however, are all far – and legally untenable – cries from imposing a

legal duty, sounding in tort, upon school officials to act as insurers of the safety of students against unforeseeable harm brought about by criminals. For want of a sufficient record upon which to decide this question, as well as a legally insufficient premise for the Appellants' proposition of law, this Court should decline jurisdiction.

B. Rebuttal to Appellants' Second Proposition of Law:

IT IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT TO EXCLUDE PROFFERED EXPERT TESTIMONY THAT IS UNSUPPORTED BY RELIABLE UNDERLYING EVIDENCE, BASED ON SPECULATION, OR DOES NOT RELATE TO MATTERS BEYOND THE KNOWLEDGE OR EXPERIENCE OF LAY PERSONS. (EVID. R. 702, APPLIED.)

The Appellants ask this Court to hold that, where a party seeking summary judgment proffers an expert report on an issue, the nonmoving party “must be allowed to respond in-kind,” regardless of the merits or admissibility of the proffered expert report under Evid. R. 702. The Appellants' expert report at issue here was not a rebuttal report. The Chardon School Employees never relied on the opinions of their expert, Mr. Kaufer, as to the dispositive issue of whether the Chardon School Employees acted with the requisite “bad faith or engaged in conduct that was malicious, wanton, or reckless” so as to vitiate immunity. *Parmertor*, 2019-Ohio-328, ¶¶ 61, 63.

To the contrary, the only reference to Mr. Kaufer's analysis on summary judgment was (1) to establish a factual chronology of the shooting, (2) to provide an historical assessment of law enforcement presence at Chardon High School, and (3) to analyze federal law enforcement studies demonstrating that the absence of an SRO could not have been a proximate cause of the shooting. (Def.s' Mot. Summ. J. 7, 13, 23, T.d. 122.) In that regard, the lower courts never passed upon the question of whether TJ Lane was the sole proximate cause of the shooting. (Feb. 15, 2018 J. Entry, T.d. 151.) *See Parmertor*, 2019-Ohio-328, ¶ 63 (“As we have found no basis upon which to reverse the trial court's judgment, we decline to review the Chardon School Employees' cross assignment of error regarding Lane's actions as the sole proximate cause of

Plaintiffs' injuries and damages.”)

The Appellants' proffered expert, Mr. Baeppler, did opine on the ultimate legal issue of alleged culpability, but not in rebuttal to Mr. Kaufer's opinions. Because the Appellants premise their Second Proposition of Law on a purported entitlement to “respond in-kind,” the proposition of law is factually baseless. This is decidedly not the situation presented in the case at bar.

This Court cannot fully analyze, nor can the parties properly brief, a hypothetical situation that never actually occurred in the record below. This Court does not pass on moot questions or address hypothetical scenarios which will not affect the final judgment. *Fortner*, 22 Ohio St. 2d at 14. For this reason alone, the Court should reject the Appellants' Second Proposition of Law, as it raises an issue of interest only to the parties in this litigation, rather than a question of public or great general interest.

The Appellants' second proposition is also directly contrary to settled law and the standard set forth in Evid. R. 702. The Appellants ask this Court to hold that they “must be allowed” to submit an expert report of their choosing in rebuttal to any motion relying on an expert report. That has never been, and should not be, the law. Rather, the settled law is that a trial court exercises its discretion in determining the admissibility of each expert report submitted independently and on the merits of that report, regardless of whether the other party has submitted an expert report. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, ¶ 16; *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶ 9.²

The test for admissibility of expert testimony is set forth in Evid. R. 702, which provides that a witness may testify as an expert if:

² “‘Abuse of discretion’ suggests unreasonableness, arbitrariness, or unconscionability.” *Valentine*, at ¶ 9. Notably absent from the Appellants' analysis is that the question of admissibility of their expert report is an evidentiary question reviewed only for abuse of discretion. *Id.*; *see also Terry*, 2007-Ohio-5023.

- (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons * * *;
- (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
- (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.

Evid. R. 702. That determination is discretionary and necessarily implicates inquiry into the specific facts in the record. It does not lend itself to a blanket rule of law. Rather, the settled law is that “even a qualified expert is capable of rendering scientifically unreliable testimony, it is imperative for a trial court, as gatekeeper, to examine the principles and methodology that underlie an expert’s opinion.” *Valentine*, at ¶ 17. “It is that determination that ensures that the testimony will be helpful to the trier of fact.” *Id.*; *State v. Davis*, 116 Ohio St. 3d 404, 2008-Ohio-2, ¶ 139.

Further, as this Court previously correctly held, “[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Valentine*, at ¶ 18. Both courts below concluded that: (1) “[t]he conclusions in Baeppler’s report relating to proximate cause, deterrence, and prevention are purely speculative” and (2) “the ultimate question of whether the [Chardon School Employees’] conduct was malicious, wanton, reckless, or in bad faith does not require the application of expert knowledge[.]” *Parmertor*, 2019-Ohio-328, ¶¶ 32-36. Those conclusions were highly sensitive to the individual evidentiary record and based on the unique facts of this case, such as “where the SRO would have been stationed at the time of the shooting; whether the SRO would have seen Lane and what was printed on his sweatshirt; and whether an SRO could have done anything during the 6 seconds of shooting in the cafeteria.” *Id.* at ¶ 36. Thus, both courts below correctly found that, even if Mr. Baeppler is

a qualified expert,³ his opinions were not reliable because they are too speculative.

None of the cases upon which the Appellants rely hold that a court must accept an expert report simply because another party has submitted an expert report. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153-54 (1999); *Werts v. Goodyear Tire & Rubber Co.*, 8th Dist. No. 91403, 2009-Ohio-2581, ¶¶ 5-7, 14, 33; *Frederick v. Vinton Cty. Bd. of Educ.*, 4th Dist. No. 03CA579, 2004-Ohio-550, ¶ 28. Rather, the Appellants rely on irrelevant decisions such as *Lambert v. Shearer*, 84 Ohio App.3d 266, 276 (10th Dist.1992), holding that the standard of care for medical professionals is beyond the knowledge of lay people, and *Mannino v. Internatl. Mfg. Co.*, 650 F.2d 846, 849 (6th Cir.1981), addressing reliance on treatises.

Ironically, the only decision to which the Appellants cite which is on point is *Donlin v. Rural Metro Ambulance, Inc.*, 11th Dist. No. 2002-T-0148, 2004-Ohio-1704, ¶¶ 26-27. But *Donlin* actually supports the position of the Chardon School Employees. As the *Donlin* court held, “the determination of whether appellee’s conduct was willful or wanton...was not of such a highly technical nature to be beyond the comprehension of an average juror” and “expert-witness testimony stating that appellee’s actions were ‘deliberate’ willful and wanton conduct is purely speculative.” *Donlin*, at ¶¶ 26-27. *Donlin* is in accord with the decisions of numerous other courts rejecting the proffered expert testimony as the basis for a factual question as to whether the conduct of public servants is of such a nature as to obviate statutory immunity, i.e., malicious, wanton, reckless, or in bad faith. See *McDonald v. Lacy*, 2018-Ohio-2753 (2d Dist.); *Hoffman v. Gallia Cty. Sheriff’s Office*, 4th Dist. No. 17CA2, 2017-Ohio-9192; *Fediaczko v. Mahoning Cty. Children Servs.*, 7th Dist. No. 11MA186, 2012-Ohio-6090; *Shalkhauser v. Medina*, 148 Ohio App. 3d 41, 772 N.E.2d 129 (9th Dist. 2002); *Hackathorn v. Preisse*, 104

³ There was doubt as to whether Mr. Baeppler even qualified as an expert because he neither identified, nor established himself as an expert on, the standard of care. *Parmertor*, 2019-Ohio-328, ¶¶ 34-35.

Ohio App. 3d 768, 663 N.E.2d 384 (9th Dist. 1995).

Ultimately, the decisions of the lower courts on this question were legally and factually correct. The Appellants have not identified any basis that would justify a finding that the Trial Court abused its discretion. As a result, none of these highly individualized issues present issues of public or great general interest. Instead, the unique issues presented in this case are of interest solely to the parties. This Court should decline jurisdiction.

IV. CONCLUSION

The February 27, 2012 shooting at Chardon High School was the tragic result of the unforeseeable criminal acts of one man: TJ Lane. The lower courts correctly applied established law to the particularized evidentiary record and appropriately determined that the Chardon School Employees were entitled to statutory immunity. The Appellants' propositions of law present issues of interest only to the parties to this litigation, raising only claimed errors in the courts below, rather than questions of public or great general interest. For these reasons, the Chardon School Employees respectfully request that the Court decline jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing **Defendants-Appellees Joseph Bergant, II's, Dana Stearns', Andy Fetchik's, Drew Trimble's, and Michael Sedlak's Memorandum in Opposition to Jurisdiction** was electronically filed with the Court on Thursday April 18, 2019. On that same day, a copy of the foregoing was also served by electronic mail and ordinary United States Mail, postage prepaid, upon the following:

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