[Cite as *Marsh v. Heartland Behavorial Health Ctr.*, 2010-Ohio-1380.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael Marsh, Administrator of the Estate of Ronald W. Marsh, deceased,	:	
Plaintiff-Appellant,	:	No. 09AP-630 (C.C. No. 2007-06705)
v.	:	(REGULAR CALENDAR)
Heartland Behavioral Health Center et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 31, 2010

Black, McCuskey, Souers & Arbaugh, Thomas W. Connors, and *Robert B. Preston, III*, for appellant.

Richard Cordray, Attorney General, *Eric A. Walker*, and *Peter E. DeMarco*, for appellees.

APPEAL from the Ohio Court of Claims.

BROWN, J.

{¶1} Plaintiff-appellant, Michael Marsh, Administrator of the Estate of Ronald W. Marsh, decedent, filed a complaint for wrongful death, negligent supervision, respondeat superior, negligent retention, and negligent hiring and training against defendants-appellees, Heartland Behavioral Health Center ("HBHC") and the Ohio Department of Mental Health. The trial was bifurcated and only the issue of appellees'

liability was determined. The negligent hiring claim was dismissed at trial. (Tr. 128.) The Ohio Court of Claims entered judgment in favor of appellees, finding that appellant failed to prove that the actions of Officers Frankland and Newkirk were reckless and found that Marsh's reckless driving severed the chain of legal causation. Appellant filed a notice of appeal and raises the following four assignments of error:

> Assignment of Error No. 1
>
> The trial court erred in applying the law to the facts in determining that the appellees' officers were not reckless.
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> Assignment of Error No. 2
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> In the event this court determines that the trial court did apply the law correctly, the trial court's determination that the appellees' officers were not reckless is against the manifest weight of the evidence.
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> Assignment of Error No. 3
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> The trial court erred by applying the incorrect standard of law in determining that Marsh's flight broke the chain of legal causation.
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> Assignment of Error No. 4
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> In the event that this court determines that the trial court did apply the law correctly, the trial court's determination that Marsh's flight broke the chain of legal causation is against the manifest weight of the evidence.

{¶2} Appellees filed a cross-assignment of error, as follows:

> The trial court erred as a matter of law by not holding that the doctrine of primary assumption of risk applied to an unlicensed, intoxicated motorcyclist fleeing from police at extraordinarily high speeds.

{¶3} The decedent, Ronald Marsh, and his friends, Kyle Heidt and Rockford Estep, were at the Stadium Bar in Massillon, Ohio on August 10, 2005. Heidt testified that he and Marsh were at the Stadium from approximately 10:00 p.m. until the bar

closed at midnight. Heidt deposition, at 24-25. They played pool and drank two Budweiser Light beers that were approximately 18 ounces each. Heidt deposition, at 25-29. When the bar closed, Heidt went home and Marsh called him at approximately 12:30-12:45 a.m. and told him he was at the Village bar. Heidt deposition, at 37. Estep stated that, when he drove by a third bar, Bender's, at approximately 1:30 or 2:00 a.m. that morning, he recognized Marsh's motorcycle parked outside. Estep deposition, at 25.

{¶4} Christina Albrecht testified that she and Devon Cairns were friends and roommates in August 2005. On the evening of August 10, 2005, they went to BW3's in Massillon to have dinner and meet their friend Joshua Harter. Albrecht left at approximately 11:30 p.m., and Cairns retrieved her white purse out of Albrecht's car and told Albrecht that Harter would give her a ride home. Albrecht witnessed Cairns get into Harter's car. Albrecht deposition, at 27.

{¶5} Harter testified that he was a friend of Cairns. He does not remember the details of the evening because he had been drinking heavily. He was sure that he and Cairns were at Bender's bar. Marsh called and asked to borrow money so Harter and Cairns walked to the Village bar to meet Marsh. Harter believed it was the first time Cairns and Marsh had met. Marsh offered to give Cairns a ride home on his motorcycle and Harter saw them leave. He specifically remembered Cairns asking where she could put her purse. He called Cairns' cell phone several times to make sure she made it home without a problem. When he did not receive an answer, he called Albrecht and then went to their apartment. Both of them were concerned when Cairns' white purse was in the apartment, yet they could not reach her on her cell phone.

{¶6} At approximately 2:33 a.m., on August 11, 2005, Massillon Police Officer Brian Muntean observed a bright green Kawasaki sport motorcycle speed left of center past his cruiser in the opposite direction. Officer Muntean testified that the motorcycle was clearly in his lane. Muntean deposition, at 12-13; 22-23. Officer Muntean turned his cruiser around, activated his lights and siren, and followed the motorcycle, but he could barely catch him. Muntean deposition, at 27. At one point he was able to get close enough to see a license plate number, probably within 75-100 feet, and at another point he attempted to block the road with his cruiser, but the motorcycle operator was able to get around the cruiser through approximately a three-foot space because the cruiser did not block the entire road. Other officers also joined in the pursuit. At 2:40 a.m., Officer Muntean ended the pursuit because he knew he would not catch the motorcycle. Muntean deposition, at 33. After the pursuit ended, he and other officers continued to drive through the city to look for the motorcycle. Muntean deposition, at 69-70. The dispatcher broadcast Officer Muntean's description of the operator as a white male, 5'9, blond hair, crew cut, and not wearing a shirt. Muntean deposition, at 45-46; Defendant's Exhibit N. At 2:46 a.m., the dispatcher broadcast that a female passenger was on the motorcycle but no description was provided of the female. Two officers believed the motorcycle operator could have been Marsh and went to his house to wait in the driveway to see if he would return. Peel deposition, at 10; Greenfield deposition, at 16. Marsh had some incidents with the police a few weeks prior to this incident, and police were familiar with his motorcycle. Muntean deposition, at 15-16; Peel deposition, at 14; Greenfield deposition, at 11; Slutz deposition, at 15. The officers were not able to positively identify the operator of the motorcycle during the chase.

{¶7} Officer Frankland was working the 11:00 p.m. to 7:00 a.m. shift at HBHC and Officer Newkirk was working the 3:00 p.m. to 11:00 p.m. shift, but worked overtime. They heard a police chase broadcast on the radio involving a green Kawasaki motorcycle near the hospital. HBHC had a written policy against pursuit outside the HBHC grounds or in the community. Both officers were aware of the policy. (Tr. 33-35; 59-61.) The officers left HBHC property, without notifying their dispatcher, for the purpose of refueling their patrol vehicle, but Officer Frankland admitted his true intent was to assist the police if possible and Officer Newkirk assumed Officer Frankland was going to assist the Massillon police when he headed to the cruiser. (Tr. 35; 68.)

{¶8} The officers proceeded to the Citgo gas station at the intersection of State Route 21 and Navarre Road. While there, Officer Newkirk observed a green Kawasaki motorcycle across the street at a Speedway gas station. Officer Frankland testified that he drove the cruiser across the street to the Speedway gas station with the intention to positively identify the license plate number, but as he approached, the operator of the motorcycle saw them. The two individuals jumped on the motorcycle and accelerated east onto Navarre Road.

{¶9} The motorcycle proceeded on Navarre Road while Officers Frankland and Newkirk followed in their marked patrol car with lights and siren activated. Officer Newkirk quickly realized that the motorcycle was out of range and told Officer Frankland to let him go. (Tr. 44.) In fact, he told him three times. The Officers lost sight of the motorcycle, but continued to follow thinking it might stop or crash. Approximately 1.6 miles from the gas station, the motorcycle did crash due to the operator failing to negotiate a curve in the road, resulting in the death of both riders.

{¶10} Anthony Germano lives approximately 1.6 miles from the intersection of State Route 21 and Navarre Road. He heard a motorcycle and a siren. He went to the window to look out and heard a thump. He told his wife to call 911. Ten to fifteen seconds later, he saw a police cruiser pass his house heading east on Navarre Road traveling between 45-60 m.p.h. The paramedics arrived 3-5 minutes later. Germano estimated the motorcycle was traveling at a high rate of speed because it tore a gate off of his fence and threw it approximately 100 feet. Then the motorcycle hit a parked car on his property and moved it almost 20 feet. Germano deposition, at 40.

{¶11} Neither Officers Frankland nor Newkirk realized they passed the accident scene because they had lost sight of the motorcycle. At approximately 2:53 a.m., Officer Frankland called the Massillon police dispatcher to notify her he believed he had seen the operator of the motorcycle that had been involved in the earlier pursuit with the Massillon police.

{¶12} After the crash was reported, Massillon police officers went to the crash site and realized that Marsh's license plate was one digit different from the license plate that Officer Muntean had reported chasing. Massillon police officers were helpful in identifying Marsh from previous booking photos and his tattoos. Peel deposition, at 45.

{¶13} Albrecht testified that Harter had told her that evening more than once that Marsh and Cairns had been running from the police. Albrecht deposition, at 46-47. Marsh's cell phone records indicate a phone call to Harter for approximately five minutes on August 11, 2005 at 2:44 a.m. Harter videotape deposition, Sept. 15, 2008, at 12. Harter testified that he was very drunk that night and if the phone records reflected a phone conversation, he most likely talked to Marsh, but does not remember. Harter deposition, at 19.

{¶14} Later, at the hospital, it was determined that Marsh had a blood alcohol level of 153. mg/dl. The coroner listed one of the causes of death as "acute alcohol intoxication."

{¶15} Appellees argue no duty was owed to Marsh because Marsh had assumed the risk of harm by engaging in an activity that created an obvious and extremely high likelihood of injury. Appellees argue that Marsh's actions were the sole proximate cause of his death and the death of his passenger.

{¶16} Appellant argues that the defense of primary assumption of risk is not available to appellees under the facts of this case because appellees' agents owed Marsh a duty of care to refrain from initiating an unnecessary pursuit, despite Marsh's intoxication, because their behavior rose to a level of willful and wanton misconduct.

{¶17} By the first and second assignments of error, appellant contends that the Court of Claims erred in applying the law to the facts in determining that appellees were not reckless and that finding is against the manifest weight of the evidence. Appellant argues that the Court of Claims erred in finding that the police officers were not reckless.

{¶18} Our standard of review involves questions of mixed law and fact. When an appellate court is presented with legal questions, the standard of review to be applied is de novo. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829. Deference is given to the Court of Claims' findings of fact as long as they are supported by competent, credible evidence.

{¶19} Appellant argues that the officers had a duty as recognized in *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, pursuant to R.C. 2744.02, to refrain from engaging in the wanton and willful misconduct that caused the decedents to sustain

their fatal injuries. R.C. 2744.02(A)(1) grants political subdivisions immunity from liability for injuries caused by acts or omissions of its employees in connection with governmental or proprietary actions. However, R.C. 2744.02(B) provides exceptions to immunity. R.C. 2744.02(B)(1) allows subdivisions to be held 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." The negligent-operation exception, in turn, is subject to a full defense to liability where a member of the police department was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct. See R.C. 2744.02(B)(1)(a). This incident does not constitute an emergency call, but appellant is seeking to establish willful or wanton misconduct to avoid the effect of the contributory negligence doctrine.

{¶20} In *York* at 144, the court recognized that willful and wanton misconduct was not protected conduct by stating:

> In the case at bar, the appellee specifically alleged that the state highway patrolmen pursued the decedent in what amounted to a wanton and willful manner, thereby causing the decedent to sustain fatal injuries. Since R.C. 2744.02 provides no protection for wanton and willful misconduct, the State Highway Patrol will be liable if the appellee can establish this claim at trial.

{¶21} The Court of Claims found that the officers' conduct in this case was not willful and wanton, but negligent. However, the court found that their conduct was not a substantial factor in bringing about the death of Marsh and Cairns. It was Marsh's decision to continue to operate his motorcycle in a dangerous manner while under the influence of alcohol that proximately caused his death. Additionally, the court found that, even if the officers' conduct was a proximate cause of Marsh's and Cairns' death,

Marsh's contributory negligence was clearly greater than that of the officers. Consequently, the court concluded that appellant's recovery would have been barred under Ohio's comparative negligence statute.

{¶22} "Wanton misconduct" has been defined as "the failure to exercise any care toward one to whom a duty of care is owed when the failure occurs under circumstances for which the probability of harm is great and when the probability of harm is known to the tortfeasor." *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 515. " '[W]illful misconduct' involves a more positive mental state prompting the injurious act than wanton misconduct, but the intention relates to the misconduct, not the result." *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, ¶29. That court further defined "willful misconduct" as " 'an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing some wrongful acts with knowledge or appreciation of the likelihood of resulting injury.' " Id. at ¶30, quoting *Tighe v. Diamond* (1948), 149 Ohio St. 520, 527.

{¶23} The Supreme Court of Ohio has adopted the definition of reckless misconduct set forth in Restatement (Second) of Torts (1965) 587, Section 500, which states that an actor's conduct is reckless if the following occurs:

> "[R]eckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."

Brockman at 516, quoting Restatement.

{¶24} Comment f to Section 500 of the Restatement compares recklessness with intentional misconduct by providing that, while an actor must intend a reckless act, he need not intend the harm that results. Thus, in *Brockman*, the court concluded that "reckless misconduct" as defined by Section 500 of the Restatement can be used interchangeably with "willful misconduct." And, for purposes of immunity, pursuant to R.C. Chapter 2744, "wanton or reckless misconduct" may be viewed as the equivalent of "willful or wanton misconduct." *Whitfield*. The question of whether conduct is reckless or merely negligent is a matter to be determined by the trier of fact. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368.

{¶25} The Court of Claims did determine that the conduct of Officers Frankland and Newkirk was negligent, weighing the utility of the conduct against the foreseeable risk of harm. *Benlehr v. Shell Oil Co.* (1978), 62 Ohio App.2d 1, 9. The Court of Claims found that, given that Marsh had been identified by the Massillon police, the utility of the officers' conduct was, at best, minimal. The officers had no reason to believe that Marsh was intoxicated at the time. However, there was a foreseeable risk of flight and, therefore, an unreasonable risk of harm. Thus, the Court of Claims determined that the utility of the officers' conduct was outweighed by the foreseeable risks and they acted negligently.

{¶26} However, the Court of Claims did not find that the officers' conduct was so egregious as to be considered reckless, wanton or willful. The Court of Claims found that, even if the incident were characterized as a pursuit, the evidence supports the conclusion that the HBHC patrol car never reached a speed of more than 60 m.p.h. and the pursuit was abandoned shortly after it began. Also, since the motorcycle was stationary when Officer Frankland first made contact, and neither Marsh nor Cairns was

seated, there was less expectation of flight. Thus, the court concluded that Officer Frankland's decision to make contact with Marsh and to follow the motorcycle for a short distance was not reasonable under the circumstances, but the evidence does not establish a greater culpability than negligence.

{¶27} The Court of Claims also found that, given the testimony of Officers Frankland, Newkirk, and the accident reconstruction expert, that the conduct of Officers Frankland and Newkirk was not a substantial factor in the death of Marsh and Cairns. Quickly after the motorcycle accelerated, the HBHC vehicle was out of sight with no chance of catching the motorcycle. According to the expert, the HBHC vehicle was too far behind the motorcycle to generate a flight response in Marsh.

{¶28} The expert opined that Marsh's excessive speed, estimated at 82-92 m.p.h. when attempting to negotiate the curve, and the poor lean angle through the curve, exacerbated by the presence of a passenger on the motorcycle, was the cause of the fatal crash. The Court of Claims found that Marsh was reckless and his recklessness broke the chain of legal causation. Indeed, the Court of Claims concluded that, even though the HBHC patrol car may have initially caused Marsh to take flight, it was Marsh's decision to continue to operate his motorcycle in a dangerous manner while under the influence of alcohol which caused his and Cairns' death.

{¶29} The Court of Claims' final conclusion was that, even if the negligence of Officers Frankland and Newkirk was a proximate cause of Marsh's death, and if Marsh was merely negligent, Marsh's contributory negligence was clearly greater than that of the officers. Thus, any recovery would be barred under Ohio's comparative negligence statute.

{¶30} Appellant contends that, although the Court of Claims quoted the correct standard of law to define recklessness, it did not apply that law to the facts of this case and find that Officers Frankland and Newkirk acted recklessly. As defined previously, one acts " 'recklessly' if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." Restatement (Second) of Torts (1965) 587, Section 500. In *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 100, the Supreme Court of Ohio approved the Restatement comment contrasting negligence and recklessness, as follows:

> "*g*. *Negligence and recklessness contrasted*. Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind."

{¶31} Appellant has termed this definition such that if the risk subsequently outweighs the utility of conduct, as opposed to negligence, where it only needs to

marginally outweigh the utility of conduct, then the action is reckless. Appellant argues that, since the Court of Claims found there was, at best, a minimal utility to the officers' conduct, it must be found reckless because the Massillon police were waiting for Marsh at his home, there was a reasonable risk of flight, and an unreasonable risk of harm.

{¶32} Appellees contend that the Court of Claims considered whether the officers' actions were a substantial factor in causing Marsh's and Cairns' death. The Court of Claims considered the risk of the officers' actions causing potential harm to Marsh because it considered the risk of causing harm and found that it was low. The expert testified that the incident was not a pursuit. (Tr. 266.) Given the officers' testimony regarding their mental state and the vehicles involved, the officers were too far behind the motorcycle for the incident to be consistent with a pursuit rather than a following.[1] (Tr. 267.) The Court of Claims also determined that, even if it were classified as a pursuit, the officers and the expert testified that the police vehicle did not travel faster than 60 m.p.h. and the pursuit was abandoned shortly after it began. Also, since the motorcycle was in a stationary position and neither Marsh nor Cairns was seated when Officer Frankland first made contact, there was a somewhat less expectation of flight. Thus, the Court of Claims concluded that, even though Officer Frankland's decision to make contact with Marsh and follow him for a short distance was not reasonable, the evidence did not establish a greater level of culpability than negligence.

[1] The Court of Claims erred in its decision by stating that the officers were more than 90 seconds behind Marsh when he crashed. The expert testimony was that the patrol car would take approximately 94.13 seconds to travel the 1.6 miles and was approximately 36 seconds behind the motorcycle or 3,166 feet. (Tr. 262-64.) Regardless of the error, all of the testimony indicates that the officers were too far behind the motorcycle to apprehend as the Court of Claims correctly found.

{¶33} Given the definition in the Restatement contrasting reckless and negligent behavior, the Court of Claims did not err in applying the law to the facts in finding that the officers did not act recklessly. The Restatement defines "reckless misconduct" as requiring a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with the knowledge of facts which would disclose this danger to any reasonable man. It differs from negligence in that the actor must recognize that his conduct involves a risk substantially greater in amount and this difference of degree is so marked as to amount substantially to a difference in kind. These officers did not know at the time that Marsh was intoxicated. While there was a risk of flight, since Marsh had been running from the Massillon police, once Marsh left the gas station there was no possibility that Officers Frankland and Newkirk were going to catch the motorcycle and, in fact, within seconds, the motorcycle was out of sight. The expert testified that the incident was not a pursuit, but merely a following because the patrol car was never close enough to the motorcycle to stimulate a "flight response" from Marsh. The officers abandoned the pursuit shortly after it began. We find that the Court of Claims did not err in applying the law to the facts in finding that the officers did not act recklessly.

{¶34} Appellees also contend that the Court of Claims' finding that the officers did not act recklessly is against the manifest weight of the evidence. Judgments which are supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Therefore, the Court of Claims did not err in finding that the officers acted

negligently, rather than recklessly, and the judgment is not against the manifest weight of the evidence.

{¶35} Appellant argues that there are several factors contributing to the officers' reckless behavior. One factor is that the officers acknowledged they knew they did not have jurisdiction to pursue Marsh when not on HBHC property, and they were violating internal policy prohibiting any pursuit off the property. A violation of an internal policy does not establish the standard of care. *Vince v. Canton* (Apr. 13, 1998), 5th Dist. No. 1997CA00299.

{¶36} Appellant argues continually that the Massillon police knew the identity of Marsh and were waiting for him at his home. However, all the Massillon police officers testified that they did not know the identity of the motorcycle operator at the time of the chase. They guessed that it might be Marsh and went to his residence to wait for him, but they did not identify him until after the crash, at the hospital, using previous booking photos and his tattoos.

{¶37} Appellant argues the fact that Officer Frankland knowingly violated speed limitations without authority is a factor contributing to reckless behavior. Appellant contends that the expert testified that the officers were traveling between 83-85 m.p.h. However, that testimony was a hypothetical as posed by appellant's counsel. (Tr. 304-05.) The expert's testimony, based on the other testimony and physical evidence, was actually that the patrol car probably traveled at the highest speed of 60 m.p.h., and could not catch the motorcycle unless the motorcycle operator wanted him to do so. The expert testified that the officers did not deviate from accepted policies and procedures and were operating within current standards. (Tr. 272.) The expert testified that Officer Frankland did not operate the vehicle, even at a speed as fast as 60 m.p.h.,

in an unsafe or unreasonable condition nor did it constitute a danger to the other drivers on the road. (Tr. 323.)

{¶38} Appellant argues that Officer Frankland understood that one of the risks involved in this pursuit was that Marsh could wreck his motorcycle at a high rate of speed and that this makes his behavior reckless. Officer Frankland testified that he had some training in the police academy regarding the pursuit of motor vehicles and he was aware of the risks involved in high speed chases, including the risk of accident. (Tr. 78.) Officer Frankland also testified that he never believed he could catch the motorcycle because it was accelerating "exponentially" as compared to the cruiser. (Tr. 187.) He left his overhead lights and siren on because he felt that the motorcycle was a public safety hazard, after he observed the motorcycle operator fail to yield to two cars as he pulled onto Navarre Road out of the gas station. (Tr. 188.) He stated he continued to follow the motorcycle because it was possible he would stop or crash. (Tr. 96.) The possibility of an event occurring is not enough of a factor to convert the behavior from negligence to reckless. There must be a "serious danger involved" and "such a quantum of risk as is necessary to make it a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind." Restatement. These factors that appellant argues convert the behavior to reckless were considered by the Court of Claims and rejected and found to be negligent behavior. As discussed, we find the judgments supported by competent, credible evidence going to all the essential elements and not against the manifest weight of the evidence. Appellant's first and second assignments of error are overruled.

{¶39} By the third assignment of error appellant contends that the Court of Claims erred in applying the law to the facts in determining that Marsh's flight broke the

chain of legal causation, and, by the fourth assignment of error, appellant contends that this determination is against the manifest weight of the evidence. As already stated, judgments which are supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co.*, syllabus.

{¶40} "Proximate causation" is described as "some reasonable connection between the act or omission of the defendant and the damage the plaintiff has suffered." Prosser, Law of Torts (5 ed.1984) 263, Section 41. The reasonable connection may be broken by an intervening act. In *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 73 Ohio St.3d 609, 1995-Ohio-285, the Supreme Court of Ohio explained the affirmative defense of intervening cause. The connection between the defendant's act or omission and the damage or injury occasioned by the plaintiff may be broken by an intervening event. *R.H. Macy & Co. v. Otis Elevator Co.* (1990), 51 Ohio St.3d 108.

{¶41} In *Mudrich v. Standard Oil Co.*, *Inc*. (1950), 153 Ohio St. 31, 39, the court stated:

> Whether an intervening act breaks the causal connection between negligence and injury depends upon whether that intervening cause was reasonably foreseeable by the one who was guilty of the negligence. If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to some one.

{¶42} Therefore, an intervening cause which is sufficient to break the chain of causation between a negligent act and injury must not have been foreseeable by the one who was guilty of the negligence. The test used to determine foreseeability of the

intervening cause to the original negligent actor is "whether the original and successive acts may be joined together as a whole, linking each of the actors as to the liability, or whether there is a new and independent act or cause which intervenes and thereby absolves the original negligent actor." *Cascone v. Herb Kay Co.* (1983), 6 Ohio St.3d 155, 160. The term "independent" means the "absence of any connection or relationship of cause and effect between the original and subsequent act of negligence." *Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 269, 1993-Ohio-12. The term "new" means that the second act could not reasonably have been foreseen. *Queen City*. If the intervening act is not foreseeable, the causal link is broken and appellees are relieved of liability. There may be more than one proximate cause of an injury. *Taylor v. Webster* (1967), 12 Ohio St.2d 53, 57. Generally, where there are facts that could lead reasonable minds to different conclusions regarding whether the intervening cause broke the causal link, the question is one for the trier of fact. *Cascone*.

{¶43} In this case, appellant contends that the Court of Claims failed to correctly apply the law in finding that Marsh's operation of his motorcycle broke the chain of legal causation. Appellant argues that the Court of Claims failed to review the legal issues regarding intervening and superseding causation and that, since the Court of Claims found that Marsh's flight was foreseeable, it cannot serve as an intervening act which breaks the chain of causation.

{¶44} Appellant fails to recognize that the Court of Claims determined that it was Marsh's decision to continue to operate his motorcycle in a dangerous manner while under the influence of alcohol that was the proximate cause of his death. The court found that Officer Frankland following Marsh was not a substantial factor in causing Marsh's accident. At the time of the incident, it was not foreseeable that Marsh was

intoxicated and would operate his motorcycle along a curve in the road between 82-92 m.p.h. with a passenger on the back of the motorcycle. The Court of Claims stated that Marsh was reckless and that such recklessness broke the chain of legal causation. The lack of definitions of these terms in the decision does not indicate that the Court of Claims failed to apply the law to the facts. These findings clearly indicate that the Court of Claims did apply the law to these facts.

{¶45} Appellant also contends that the Court of Claims' application of the law to these facts was against the manifest weight of the evidence. Appellant argues that Marsh's flight was reasonably foreseeable and, thus, the issue is whether there is competent, credible evidence to show that Marsh's accident occurred when he was no longer in flight and appellant contends that there is no such evidence. Appellant argues that there is no evidence showing that the chain of causation was broken after Officers Frankland and Newkirk caused Marsh's flight because the flight and crash were one continuous event.

{¶46} The evidence supports the Court of Claims' finding that the officers' conduct was not a substantial factor in Marsh's accident. The testimony of Officers Frankland and Newkirk, along with the expert, established that, shortly after Marsh turned onto Navarre Road, he accelerated so quickly that the patrol vehicle was out of sight with no chance of overtaking the motorcycle. According to the expert, the patrol vehicle was too far behind the motorcycle to generate a flight response in Marsh. Thus, the Court of Claims determined with competent, credible evidence supporting the decision that, even though the approaching HBHC patrol car may have caused Marsh to initially take flight, it was Marsh's decision to continue to operate his motorcycle in a dangerous manner while under the influence of alcohol that proximately caused his

death. The fact that Marsh may take flight may have been foreseeable, but the fact that he was under the influence of alcohol and would continue to operate his motorcycle in a reckless manner was not foreseeable. The finding that Marsh's reckless action broke the chain of legal causation such that his actions proximately caused his death was not a finding that was against the manifest weight of the evidence. Appellant's third and fourth assignments of error are overruled.

{¶47} Appellees filed a cross-assignment of error contending that the Court of Claims erred as a matter of law by not holding that the doctrine of primary assumption of risk applied to an unlicensed, intoxicated motorcyclist fleeing from police at extraordinarily high speeds. The cross-assignment of error need only be considered when necessary to prevent a reversal of the judgment under review. *Parton v. Weilnau* (1959), 169 Ohio St. 145, paragraph seven of the syllabus. Here, we are not reversing the judgment so we need not consider appellees' cross-assignment of error.

{¶48} For the foregoing reasons, appellant's four assignments of error are overruled, appellees' cross-assignment of error is moot, and the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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