

ORIGINAL

IN THE SUPREME COURT OF OHIO

CYNTHIA ANDERSON, Administratrix of )  
the Estates of Ronald E. Anderson and )  
Javarre J. Tate, deceased, )  
 )  
Plaintiff-Appellee, )  
 )  
vs. )  
 )  
CITY OF MASSILLON, et al., )  
 )  
Defendants-Appellants. )

11-0743

On Appeal from the Stark  
County Court of Appeals,  
Fifth Appellate District

Court of Appeals  
Case No. 2010 CA 00196

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF DEFENDANTS-APPELLANTS  
THE CITY OF MASSILLON, SUSAN J. TOLES AND RICK H. ANNEN

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FILED  
MAY 04 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

FILED  
MAY 04 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST AND INVOLVES A  
SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents a very clear and distinct issue involving the citizens of the State of Ohio, political subdivisions and their employees, and whether a court can strip immunity from an emergency responder for responding to an emergency with the speed and urgency required and expected by the public. When a firefighter operates a fire engine on an emergency run in a manner which is neither malicious nor reckless, as in the case at issue, the political subdivision and its employees are entitled to immunity. The fact that an employee drove through an intersection and did not see an approaching vehicle, despite taking all precautions to do so, is not a perverse disregard of a known risk. It is hard to imagine a public issue greater than that affecting the reliability of emergency response municipal employees and the standards to which they, and the political subdivision for which they work, are held while serving the public in an attempt to keep citizens safe from harm.

Pursuant to the Political Subdivision Tort Liability Act, Chapter 2744 of the Ohio Revised Code, municipal employees are personally immune from liability unless their conduct is "with malicious purpose, in bad faith, or in a wanton or reckless manner." Although this Court has determined that in order to have a finding of recklessness under Chapter 2744, there must be a finding of "perverse disregard for safety," See O'Toole v. Denihan, 118 Ohio St.3d 374, 2008 Ohio 2574, this Court has not directed the lower courts how to apply this standard to emergency response cases. This gap in the law has created inappropriate and inconsistent applications of the law.

In Gladon v. Greater Cleveland Regional Transit Authority, 75 Ohio St.3d 312, 319, 1996 Ohio 137, this Court defined the term "willful misconduct" as "the intent, purpose, or design to

injure.” Previously, this Court stated that “willful misconduct” “implies 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 wrongful acts with knowledge or appreciation of the likelihood of resulting injury.” Tighe v. Diamond (1948), 149 Ohio St. 520, 527. Unlike the more modern definition of “willful misconduct,” Tighe, this Court’s definition expressly excludes intent to injure. Id. As this Court did not overrule or address Tighe or Gladon, the controlling precedent includes two inconsistent definitions of willful misconduct.

“Wanton conduct” is the complete failure to exercise any care whatsoever, and “comprehends an entire absence of all care for the safety of others and an indifference to consequences.” Id. at 526; Fabrey v. McDonald Village Police Dept. (1994), 70 Ohio St.3d 351, 356. Further, this Court held that a party’s conduct is in reckless disregard of the safety of others if the person intentionally knows 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.” O’Toole, 118 Ohio St.3d at 386. In the context of immunity, reckless conduct was previously viewed as interchangeable with wanton conduct. See McGuire v. Lovell, 85 Ohio St.3d 1216, 1999 Ohio 296, J. Moyer, dissenting. This does not diminish the level of misconduct required to meet either standard. Id. Both standards refer to conduct that causes risk “substantially greater than that which is necessary to make [the] conduct negligent.” Id., citing Thompson v. McNeill (1990), 53 Ohio St.3d 102, 104-105 and Fabrey, 70 Ohio St.3d at 356. However, as this Court most recently revisited the “reckless” standard under Chapter 2744, the standards should be distinguished, and the heightened O’Toole standard for “recklessness” should be specifically applied to emergency responders.

In applying these standards to a situation in which an emergency responder is called for help, it is inconceivable that these public servants may be held liable when using the appropriate precautions to travel quickly but safely to the emergency. This Court has repeatedly held that negligence is insufficient to strip a public employee of immunity. The General Assembly has fixed the applicable immunities, and it is the role of the courts to enforce those immunities under clear and predictable standards. It is not prudent policy in the state of Ohio to demand swift response to emergencies, but then expose to potential civil liability one whose swiftness may result in an accident. This Court should take the opportunity to clarify that municipal employees are entitled to a presumption of immunity from liability, and to clearly define what constitutes reckless, willful or wanton misconduct in the context of emergency response.

#### **STATEMENT OF THE CASE AND FACTS**

This case originated in the Stark County Court of Common Pleas with the filing of a complaint on September 22, 2009, by the appellee, Cynthia Anderson, Administratrix of the Estates of Ronald E. Anderson and Javarre J. Tate. Both of the decedents died on May 6, 2008 at approximately 8:35a.m. when Mr. Anderson, operating a van, pulled into the path of a fire engine operated by Susan Toles of the Massillon Fire Department. Importantly, at the time of the crash, the fire engine was responding to an emergency call, and had its lights and sirens operating. The undisputed evidence is that Mr. Anderson failed to yield to the clear presence of the fire engine. The appellee Anderson filed this action against the City of Massillon, Susan Toles, and Captain Richard Annen, alleging wrongful deaths of her husband and grandson.

Just prior to the accident, Ronald Anderson was operating his vehicle northbound on Johnson Street, SE in Massillon, Ohio. His grandson, Javarre Tate, was a passenger in the car. At the same

time, Susan Toles, an 18-year veteran of the Massillon Fire Department, was operating a fire engine, Engine 211, which was responding to an emergency call. Toles was driving eastbound on Walnut Street, SE, in Massillon. At the intersection of Johnson and Walnut Streets, there is a three way stop sign and a red flashing traffic light. Captain Richard Annen, a 28-year veteran of the City of Massillon Fire Department, was seated in the front passenger seat directly next to Susan Toles.

The claims before the lower courts were that Engine 211 was operating in excess of the speed limit as it was responding to the emergency call, and the appellants were using precautions as they did so, including a combination of the lights, wail siren and air horn. As Toles operated Engine 211 on Walnut Street through the intersection, Ronald Anderson proceeded to drive Northbound on Johnson Street into the path of the oncoming Engine 211. Appellant Toles took evasive action by steering the engine left of center to try and proceed around Anderson's van, but was unable to avoid the collision.

The appellee Anderson alleges that appellants' conduct in this matter was reckless, willful, and wanton. Appellants moved for summary judgment based upon the Political Subdivision Tort Liability Act, which provides appellants with immunity from civil liability while responding to an emergency. The trial court granted appellants' motion (Appendix "C"), acknowledging that no genuine issues of material fact existed, and appellants were entitled to summary judgment as neither Susan Toles nor Richard Annen acted with a malicious purpose, in bad faith, or in a wanton or reckless manner.

The Fifth District Court of Appeals reversed and remanded the case on March 21, 2011, determining that reasonable minds could find appellants' actions in this case were reckless. (Appendix "A").

**ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Appellants' Proposition of Law No. I:**

A MEMBER OF A MUNICIPAL FIRE DEPARTMENT OPERATING A FIRE TRUCK IN RESPONSE TO AN EMERGENCY CALL IS ENTITLED TO THE PRESUMPTION OF IMMUNITY FROM LIABILITY, AND THE HIGH STANDARD FOR DEMONSTRATING RECKLESSNESS UNDER R.C. §2744.03(A)(6)(b) IS NOT SATISFIED BY EVIDENCE THAT THE FIRE TRUCK ENTERS AN INTERSECTION AT A RATE OF SPEED IN EXCESS OF THE SPEED LIMIT.

In its decision reversing the entry of summary judgment in this case, the appellate court stated:

As Ladder Truck 211 proceeded to the fire, a combination of the lights, wail siren and the air horn were engaged. (Toles depo. at 103). Additionally, Capt. Annen, who was seated in the passenger seat next to Toles, sounded the air horn at intersections. Id.

...

The facts in the case sub judice are that at approximately 8:30 a.m. on May 6, 2008, Firefighter Toles was traveling approximately 52 mph down walnut Street while operating Ladder Truck 211 and did not stop as she crossed through the intersection with Johnson Street . . . .

...

In this case, [Anderson] claims that a large tree, a utility pole, a fence and bushes at or near the intersection created obstructions which required Firefighter Toles to bring the vehicle to a complete stop . . . .

Upon review, we find that at the summary judgment stage, we must assume such facts in favor of [Anderson]. Viewing the facts in this case in a light most favorable to [Anderson], specifically the high rate of speed at which [Firefighter] was traveling in conjunction with the claimed obstructions in the intersection which would interfere with a clear view of the whole intersection, we find reasonable minds could find that Appellees [appellants herein] actions in this case were reckless.

(Opinion, ¶¶ 15, 61, 72, 73). Based strictly upon these determinations drawn from the record, the court of appeals denied the appellants of the immunities to which they are entitled by operation of law. However, the mere fact that a fire truck enters an intersection at a rate of speed in excess of the posted speed limit for the roadway involved cannot satisfy the high standard for reckless conduct applicable to the immunity exception found at R.C. §2744.03(A)(6)(b). While the court of appeals cited to this Court's O'Toole decision (Opinion, ¶¶ 52, 71), the lower court quite clearly stopped short of applying the rule of law announced in O'Toole to the material facts involved in this case.

Liability of an employee of a political subdivision requires analysis under the Political Subdivision Tort Liability Act. R.C. §2744.03(A)(6) sets forth the circumstances under which an employee of a political subdivision is immune from civil liability, which provides, in part, that the employees are personally immune from liability unless their conduct is "with malicious purpose, in bad faith, or in a wanton or reckless manner." See Lambert v. Clancy, 125 Ohio St.3d 231, 2010 Ohio 1483, ¶8. It is obvious from the reading of this code section that, for the initial stage of analysis and application, the general assembly created the presumption that the employee of a political subdivision is entitled to immunity for acts or omissions within the scope of the employee's duties or employment. Zieber v. Heffelfinger (Mar. 17, 2009), Richland App. No. 08 CA 0042, 2009 Ohio 1227, ¶44 ("R.C. 2744.03[A][6] operates as a presumption of immunity."). This presumption is not to be discarded lightly but, instead, the standard for the exception found at R.C. §2744.03(A)(6)(b) is recognized as a high burden on one seeking to remove the immunity.

This Court in O'Toole, *supra*, reviewed the concepts developed to describe degrees of conduct and reduced the analysis of all of these principles to the general description of "reckless conduct." O'Toole, 118 Ohio St.3d at 386. This Court specifically referred to its prior decision in

Thompson, supra, stating that a party's conduct is in reckless disregard of the safety of others if the person intentionally knows 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." Id. at 104-105; O'Toole, supra, 386. This Court went further and stated "distilled to its essence, in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk." O'Toole, supra. (Emphasis added).

The court of appeals based its decision upon its reliance on Anderson's allegations that the view of the subject intersection was obstructed by a tree, utility pole, fence, bushes and a house close to the street. However, despite the court's holding that a question of fact exists on the issue, appellate courts, including the Fifth District, have held that the operation of an emergency vehicle on an emergency run at a speed in excess of the posted limit does not equate to recklessness. See Marchant v. Gouge, Richland County App. No. 2009 CA 1043, 2010 Ohio 4542; Hewitt v. City of Columbus, Franklin App. No. 08AP-1087, 2009-Ohio-4486; Elsass v. Crockett, Summit App. No. 22282, 2005 Ohio 2142. The purported reliance upon an intersection obstruction, as an additional factor, does not legitimately alter the outcome called for in this case – the recognition of appellant Toles' (and appellant Annen's) immunity from liability.

Toles, while operating Engine 211, proceeded according to all applicable precautions for an emergency run. Appellants were entitled to exceed the posted speed limit while on an emergency run, therefore, the claim of excessive speed is irrelevant. Appellants had lights and siren operating throughout the emergency run and the firefighters kept looking for other traffic. The weather was sunny and dry, there was no opposing traffic and the route was familiar. Merely exceeding the

posted speed limit is not enough to create a question of fact on recklessness. There was nothing to indicate an unnecessary risk of physical harm under the circumstances. There certainly is nothing in this record to indicate a perverse disregard of a known risk.

In addition, the conduct of these firefighters was consistent with the Ohio statutory law regarding the operation of emergency vehicles during an emergency call. Engine 211 was en route to a fire, on an emergency call utilizing its lights, sirens, and air horns. The firefighters involved used their judgment, experience, and discretion to determine how to fulfill the dual responsibility of arriving at the fire as quickly as possible to save potential lives and property, while at the same time, maintaining due regard for the safety of citizens that may be encountered en route to the fire. Again, there was no evidence of a "perverse disregard of a known risk." In contrast, the evidence reveals that Ms. Toles and Captain Annen were scanning the subject intersection upon their approach, and determined that there was no traffic in the intersection. More importantly, even if Ms. Toles would have observed the Anderson van approaching the stop sign, she would have been entitled to assume, based upon the applicable law, that Mr. Anderson would at a minimum stop at the stop sign, observe her presence, and simply obey the law. Given her position in the road at the time the Anderson van suddenly entered the intersection, had Mr. Anderson hesitated even slightly, or simply paused at the intersection to more fully observe the approach of the fire truck, there would have been no collision. The fire truck would have cleared the intersection well before Mr. Anderson could have penetrated the west bound lane left of center.

As this Court recognized in O'Toole:

Distilled to its essence, and in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk.

...

**[T]he standard for showing recklessness is high, so summary judgment can be appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity. (Emphasis added).**

2008-Ohio-2574, ¶¶ 73, 75. Summary judgment was appropriate in this case, and the trial court's decision to the effect should have been affirmed. The operation of a fire truck, on an emergency run – with lights, siren and horn activated – does not demonstrate a disposition to perversity.

Otherwise, in its opinion, the court of appeals misplaced reliance upon alleged violations of Massillon Fire Department policies. (Opinion, ¶¶ 58, 67-70). In Elsass v. Crockett (May 4, 2005), Summit App. No. 22282, 2005 Ohio 2142, ¶ 25, the appellate court held that “a violation of an internal departmental policy is not relevant to the issue of whether the officer's conduct constituted reckless behavior.” The policies had no bearing in this case because of the absence of evidence establishing that Toles or Annen acted with a perverse disregard of the risks involved in operating a fire engine on an emergency run. See, O'Toole, supra at ¶ 92. “Without evidence of an accompanying knowledge that the violations “will in all probability result in injury,” evidence that policies have been violated demonstrate negligence at best.” Id., citing Fabrey, infra.

Applying these concepts, there is no evidence of a perverse disregard for the safety of Massillon citizens. Instead, these firefighters were trying to accomplish their mission to protect people and property from the hazards associated with fires, which effort would be hindered pursuant to the ruling of the Fifth District Court of Appeals.

**Appellants' Proposition of Law No. II.**

THE GENERAL ASSEMBLY DID NOT INCLUDE “RECKLESS” CONDUCT IN R.C. §2744.02(B)(1)(b) AND, THUS, ABSENT EVIDENCE DEMONSTRATING A QUESTION OF FACT AS TO “WILLFUL OR WANTON MISCONDUCT,” A

POLITICAL SUBDIVISION IS ENTITLED TO IMMUNITY FROM LIABILITY FOR AN ACCIDENT INVOLVING A FIRE DEPARTMENT VEHICLE WHILE ON AN EMERGENCY RUN.

It is not disputed that the City of Massillon is a political subdivision pursuant to R.C. §2744.01(F), which is immune from liability pursuant to R.C. §2744.02(A)(1). Further, it is undisputed that providing fire services is a governmental function pursuant to R.C. §2744.01(C)(2)(a). Although R.C. §2744.02(B)(1) states that there is no immunity when death is caused by the negligent operation of any motor vehicle by employees who are engaged within the scope of their employment and authority, a full defense applies where a member of a municipal corporation's fire department is operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm "and the operation of the vehicle did not constitute willful or wanton misconduct." R.C. §2744.02(B)(1)(b). Once it is established that the vehicle was being operated on an emergency call, the burden shifts to the plaintiff to establish that the alleged activity was willful or wanton. Even if Engine 22 was operated in a negligent manner, appellants are entitled to the defense of immunity, as a matter of law.

Importantly, the only conclusion reached by the court of appeals as to the conduct of the firefighter who was operating the fire truck involved in this case was that from the factor of speed, while proceeding into the intersection in question alleged to have had various obstructions, "reasonable minds could find that Appellees [operator's] actions in this case were reckless." (Opinion, ¶ 73). The court proceeded to reverse the entry of summary judgment outright, as to all involved defending parties, Massillon, Toles and Annen. However, the appellate court did not identify any evidence from the record that would support any reasonable conclusion that the

operation of the fire truck was somehow “willful or wanton.” Consequently, the court of appeals should have affirmed summary judgment as to the appellant Massillon. The determination under the “reckless” standard has no bearing under R.C. §2744.02(B)(1)(b), since the General Assembly did not include reckless conduct as part of exception from the “full defense to . . . liability” found therein.

The Fifth District Court of Appeals erred in reversing the trial court’s summary judgment ruling because the appellee failed to establish any issue of fact regarding alleged willful or wanton misconduct by Ms. Toles, which could then extend to the City of Massillon. The court of appeals specifically found that allegations of “the high rate of speed at which [Toles] was traveling in conjunction with the claimed obstructions in the intersection which would interfere with a clear view of the whole intersection” prevented summary judgment as reasonable minds could reportedly find appellant’s actions in the case were somehow “reckless.”

In its judgment granting the appellants’ motion for summary judgment, the trial court recognized appellant Massillon’s “full defense” to liability, under R.C. §2744.02(B)(1)(b). (Appendix “C,” p. 22). In doing so, the trial court properly recognized the heightened standards for willful or wanton misconduct, since those are the degrees of conduct used in the applicable statute. (*Id.*, pp. 23-24). The trial court determined, from the record, “there has been no evidence provided which demonstrates any willful or wanton misconduct by the Defendants on May 6, 2008, including, but not limited to the operation of Engine 211.” (*Id.*, p. 24). There is no reference in the appellate court’s opinion in this case suggesting that, from the evidence in the record, reasonable minds could conclude that the operation of Engine 211 could be found to constitute willful or wanton misconduct. Consequently, the court of appeals should not have interchangeably used the word “reckless,” drawn

from R.C. §2744.03(A)(6)(b) in order to reverse the summary judgment rendered in favor of the appellant Massillon.

The terms “willful,” “wanton” and “reckless” are defined differently, and they should be applied only to the extent their individual meanings are satisfied. To the extent the terms are meant to convey a continuum, from negligence to intentional (willful) conduct, the terms should not be viewed as interchangeable. In Whitfield v. City of Dayton, 167 Ohio App. 3d 172, 2006 Ohio 2917, the terms used in R.C. §§ 2744.02(B)(1)(b) and .03(A)(6)(b) were viewed as functional equivalents. (Opinion, ¶ 46). If that is correct, then the Court’s decision in O’Toole (rendered after the appellate court decision in Whitfield) would need to be revisited and clarified, with recklessness defined as an even higher standard than stated in O’Toole. If they are functional equivalents, with reckless conduct being the same as willful, then reckless conduct must require evidence of deliberate purpose and knowledge that injury would result from the subject actions.

In Fabrey v. McDonald Village Police Dept., 70 Ohio St. 351, 356, 1994 Ohio 368, the Court recognized that R.C. §2744.03(A)(6) “by its very terms applies only to individual employees and not to political subdivisions.” The separate standards used in the statutes should not, in application, effectively be merged.

In a case involving similar facts, decided the same day as this appeal, the court of appeals recognized that the “spectrum of intent stretches from negligence, through reckless, to intentional, and there are no bright lines.” Burlingame v. Estate of Burlingame (March 21, 2011), Stark App. Nos. 2010 CA 00124, 130, 2011 Ohio 1325, ¶ 51. No matter how “fine the line” between negligence, recklessness, and willful or wanton conduct may be, the distinctions must be recognized as a matter of law and applied accordingly by the courts.

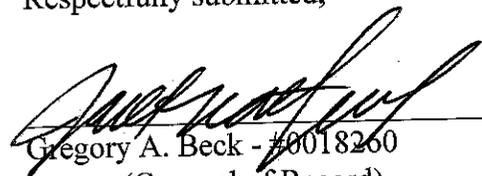
This Court should accept review in this case, if for no other reason, than to establish that the proper application of the exception stated in R.C. §2744.02(B)(1)(b) is limited to cases involving “willful or wanton misconduct.” The General Assembly distinguished R.C. §2744.02(B)(1)(b) from R.C. §2744.03(A)(6)(b), but the court of appeals (and others) has effectively combined the separate standards.

**CONCLUSION**

For the reasons set forth above, this case involves matters of public and great general interest, and involves a substantial constitutional question.

**WHEREFORE**, appellants, The City of Massillon, Ohio, Susan J. Toles and Rick H. Annen, respectfully request that this Court grant jurisdiction and allow this case for full consideration on the merits.

Respectfully submitted,



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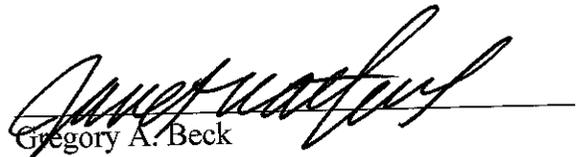
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**PROOF OF SERVICE**

Copies of the foregoing memorandum in support of jurisdiction were served by ordinary U.S. mail this 4TH day of May, 2011, to:

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FIFTH APPELLATE DISTRICT

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Estate of RONALD E. ANDERSON  
and JAVARRE J. TATE

JUDGES:  
Hon. W. Scott Gwin, P. J.  
Hon. William B. Hoffman, J.  
Hon. John W. Wise, J.

Plaintiff-Appellant

Case No. 2010 CA 00196

-vs-

CITY OF MASSILLON, et al.

OPINION

Defendants-Appellees

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common  
Pleas, Case No. 2009 CV 03641

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

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"A"

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NANCY S. REINBOLD, CLERK  
By *[Signature]* Deputy  
Date *3-21-2011*

Wise, J.

{¶1} Appellant Cynthia Anderson, Administratrix of the Estates of Ronald E. Anderson and Javarre J. Tate, appeals the trial court's July 15, 2010, Judgment Entry granting Appellees' Motion for summary Judgment.

{¶2} Appellees are the City of Massillon, Susan Toles and Rick Annen.

**STATEMENT OF THE FACTS AND CASE**

{¶3} This case concerns Ohio's statute on sovereign immunity for municipalities and their employees; specifically, whether a municipality and a member of the city's fire department have immunity when the employee causes an accident when responding to an emergency.

{¶4} On the morning of May 6, 2008, an accident occurred at the intersection of Johnson Street and Walnut Street, when the vehicle being operated by Ronald Anderson collided with Massillon City Fire Aerial Ladder Truck 211, resulting in the death of Ronald Anderson and his grandson Javarre Tate.

{¶5} On that morning, the following events transpired:

{¶6} At 8:30:32 a.m., Massillon resident Tammy Lockey called 911 to report a car fire she observed out her window. The call was received by the RED Center, the central dispatch for Massillon and other political subdivisions. Dispatcher Lynne Martin Joiner received the call. (Joiner depo. at 9). Ms. Joiner routed the call to Thomas Thornberry, the fire dispatcher, and he consulted his computer to dispatch the first available fire engine in Massillon. (Joiner depo. at 7). Thornberry, a 26-year veteran dispatcher, inquired of dispatcher Joiner whether the fire was near a house.

{¶7} At 8:31:40, a tone was sounded in Station 1 of the Massillon Fire Dept. for Engine 214 to respond to the car fire. Pursuant to department policy, a single fire engine, such as Engine 214, and a separate truck would respond to car fires. (Burgasser depo. at 16). However, also pursuant to policy, the dispatcher is required to inquire if the car fire is near a building or structure in order to determine which vehicles to dispatch. (Thornberry depo. at 12). Based on this policy, dispatcher Joiner called 911 caller Tammy Lockey back and inquired as to whether the fire was near a house. Joiner interpreted the information she received as indicating the car fire was near a house, and she relayed this information to Thornberry. (Joiner depo. at 7). Based on this new information, Thornberry then toned Station 1 at 8:33:03 and dispatched the second engine, Engine 211, a 75 foot aerial ladder truck. (Thornberry depo. p. 14).

{¶8} At 8:33:43 engine 214 left Station 1, operated by Firefighter Greenwood, commanded by Capt. Smith. Engine 214 proceeded down Erie Street to Walnut Street toward the dispatched location.

{¶9} At 8:34:25, Ladder Truck 211 left Station 1, operated by Firefighter Susan Toles and commanded by Capt. Rich Annen. (Toles depo. at 131). Ladder Truck 211 began to follow the same route as Engine 214 toward the fire. (Toles depo. at 141).

{¶10} A school bus yielded to Engine 214 at Third Street, then traveled down Walnut and through the subject intersection before Ladder Truck 211 appeared. The bus then pulled over east of the intersection as Ladder Truck 211 approached.

{¶11} At the same time as Ladder Truck 211 was travelling eastbound on Walnut Street, SE, Ronald Anderson was travelling northbound on Johnson Street, SE, in Massillon, with his grandson Javarre Tate as a passenger in his vehicle.

{¶12} Walnut Street is a two-lane road in a residential area. The intersection of Walnut and Johnson is a three-way stop, with a red flashing light for all traffic. A large tree was located on the corner of Walnut and Johnson, which, along with a utility pole, a fence, bushes and a house close to the street, Appellant claims obstructed a clear view of the intersection.

{¶13} The posted speed limit in this area is 25 miles per hour.

{¶14} Toles stated that she exceeded the speed limit, but described the emergency run as a "normal call, a normal run." (Toles depo. at 143).

{¶15} As Ladder Truck 211 proceeded to the fire, a combination of the lights, wail siren and the air horn were engaged. (Toles depo. at 103). Additionally, Capt. Annen, who was seated in the passenger seat next to Toles, sounded the air horn at intersections. Id.

{¶16} Toles stated that she could clearly see the intersection of Johnson and Walnut as she approached. (Toles depo. at 149). Capt. Annen stated that, although there is a tree at that intersection, one can see through the branches to the intersection. (Annen depo. at 82-84).

{¶17} Toles recalled that when she saw the school bus pulled over on Walnut Street in her lane of travel east of the intersection, she slowed down in order to make sure there were no children on the street and that the school bus stop sign was not out. (Toles depo. at 150). Toles stated that after she determined that the school bus was yielding, she moved left of center because of the presence of a parked car and the bus. Toles stated that she scanned the entire intersection to make sure the intersection was clear and determined that there was no one in the intersection". (Toles depo. at 155).

{¶18} According to Toles, as she approached the intersection, she saw the Anderson van “shoot out in front” of Ladder Truck 211. She stated that she began to move “immediate[ly] left even more, to try to avoid his vehicle and get around.” (Toles depo., at 156). Just prior to the moment she saw the van pull out in front of Ladder Truck 211, Toles stated that she heard Capt. Annen say “he’s not stopping”. Id. Toles recalled seeing the Anderson van go “completely through the stop sign right in front” of Ladder Truck 211. Id. Toles stated that she never saw the Anderson vehicle stopped at the stop sign. Id. Ladder Truck 211 collided with Anderson’s vehicle, resulting in the death of both Ronald Anderson and Javarre Tate.

{¶19} Eyewitnesses stated that Appellees did not slow down or stop before proceeding through intersection. (See Affidavits of Clark, Jackson, Green and Maroon attached to Plaintiff’s Motion for Partial Summary Judgment).

{¶20} Appellant Cynthia Anderson, the Administratrix of the estates of her husband, Ronald E. Anderson, and her grandson, Javarre Tate, filed a wrongful death action asserting claims against Appellees Susan Toles, Richard Annen and the City of Massillon.

{¶21} On May 19, 2010, Appellant filed a Motion for Partial Summary Judgment on the issue of liability.

{¶22} On May 19, 2010, Appellees also filed a Motion for Summary Judgment asserting the affirmative defense of sovereign immunity.

{¶23} On July 15, 2010, following the filing of response and reply briefs by the parties, the trial court granted Appellees’ Motion for Summary Judgment and denied Appellant’s Motion for Partial Summary Judgment.

{¶24} Appellant now appeals to this Court, assigning the following error for review:

**ASSIGNMENT OF ERROR**

{¶25} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS/APPELLEES."

**SUMMARY JUDGMENT**

{¶26} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. \* \* \* A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶27} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment, bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine

issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio- 207, 662 N.E.2d 264.

{¶28} It is based upon this standard that we review Appellant's assignments of error.

I.

{¶29} In her sole assignment of error, Appellant argues that the trial court erred in finding that Appellee was immune from liability under R.C. §2744.01, et seq. We agree.

{¶30} The Supreme Court of Ohio has held:

{¶31} "Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis. *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 556-557, 733 N.E.2d 1141. \* \* \* 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. *Id.* at 556-557, 733 N.E.2d 1141 \* \* \*; R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B); *Carter v. Cleveland* (1998), 82 Ohio St.3d 24, 28. \* \* \*.

{¶32} "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. *Id.* at 28. \* \* \* 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.

{¶33} "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, 790 N.E.2d 781, 2003-Ohio-3319, at ¶ 7-9. (Parallel citations omitted.)

{¶34} The three-tiered analysis of liability applicable to a political subdivision as set forth above does not apply when determining whether an employee of the political subdivision will be liable for harm caused to an individual. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 865 N.E.2d 9, 2007-Ohio-1946, at ¶ 17.

{¶35} Pursuant to R.C. §2744.03(A)(6), an employee of a political subdivision is immune from liability unless:

{¶36} "(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

{¶37} "(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

{¶38} Appellees herein claim they are entitled to immunity pursuant to R.C. §2744.02, which provides, in part:

{¶39} "(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to

person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

{¶40} "(1) Except as otherwise provided in this division, 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. The following are full defenses to that liability:

{¶41} " \* \* \*

{¶42} "(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct..."

{¶43} Here, since the deaths of Ronald Anderson and Javarre Tate were caused by a municipal employee, who is a member of a municipal fire department and who was proceeding toward a place where a fire was in progress, the question to be answered is if the record establishes an issue of fact concerning whether Firefighter Toles and/or Capt. Annen's actions constitute reckless, willful and/or wanton misconduct.

{¶44} We therefore turn to the issue of what constitutes willful, wanton and reckless conduct under R.C. §2744.

{¶45} "Wanton" conduct is the complete failure to exercise any care whatsoever. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31. Mere negligence will not be construed as wanton misconduct in the absence of

evidence establishing 'a disposition of perversity on the part of the tortfeasor', the actor must be aware that his conduct will probably result in injury. *Id.* (quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 97, 269 N.E.2d 420.)

{¶46} The "wanton or reckless misconduct" standard set forth in R.C. §2744.03(A)(6) and "willful or wanton misconduct" standard set forth in R.C. §2744.02(B)(1)(a) are functionally equivalent. *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, at ¶ 34.

{¶47} " '[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." *Id.* at ¶ 29. The *Whitfield* court 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, 37 O.O. 243, 80 N.E.2d 122. In *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 319, 662 N.E.2d 287, the Supreme Court defined the term "willful misconduct" as "the intent, purpose, or design to injure."

{¶48} The Supreme Court of Ohio has adopted the definition of reckless misconduct set forth in Restatement of the Law 2d, 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 another 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*, 78 Ohio App.3d at 516, 605 N.E.2d 445.

{¶49} In *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 100, 559 N.E.2d 699, the Supreme Court of Ohio again quoted the Restatement, contrasting intentional misconduct and recklessness and negligence and recklessness:

{¶50} "f. *Intentional misconduct and recklessness contrasted.* Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

{¶51} "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."

{¶52} In *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 73, the Supreme Court noted that in the context of R.C. §2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk. The Supreme Court reminded us not to use 20-20 hindsight in viewing a situation and not to color our decision with a consideration of any tragic results. *Id.* at ¶ 76. Our analysis must center upon the information and circumstances the actor had before him at the time he chose to act.

{¶53} The *O'Toole* court held that even violations of agency policy do not rise to the level of recklessness unless the circumstances demonstrate a perverse disregard for the risks involved. *Id.* at ¶ 92.

{¶54} "Generally, issues regarding malice, bad faith, and wanton or reckless behavior are questions presented to the jury. *Fabrey*, \* \* \*. However, summary judgment is appropriate in instances where the alleged tortfeasor's actions show 'that he did not intend to cause any harm ..., did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest purpose....' *Fox v. Daly* (Sept. 26, 1997), Trumbull App. No. 96-T-5453 [1997 WL 663670], (quoting *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772, 663 N.E.2d 384). *Henney* at paragraphs 48-50." *Doe*

*v. Jackson Local School Dist.*, Stark App.No. 2006CA00212, 2007-Ohio-3258 at ¶ 38; *Sisler v. Lancaster*, Fairfield App.No. 09-CA-47, 2010-Ohio-3039.

{¶55} Thus, when the facts presented show that reasonable minds could not conclude that the conduct at issue meets that high standard, a court may determine that such conduct is not willful, wanton, or reckless as a matter of law and such determination is made considering the totality of the circumstances. *Ybarra v. Vidra*, 6th Dist. No. WD-04-061, 2005-Ohio-2497, ¶ 10, citing *Reynolds v. Oakwood* (1987), 38 Ohio App.3d 125, 127, 528 N.E.2d 578.

{¶56} In the case at bar, the trial court analyzed the totality of the circumstances and found that there was “no evidence provided which demonstrates any willful or wanton misconduct by the [Appellees] on May 6, 2008, including, but not limited to the operation of Engine 211.” (Judgment Entry, July 15, 2010).

{¶57} Appellant argues that reasonable minds could find that under the totality of the circumstances, Appellees’ conduct was reckless, willful and/or wanton. Appellant lists the following factors in support of whether Appellees’ conduct was willful, wanton, or reckless:

{¶58} (1) The failure of Appellees to stop or slow at the stop sign; (2) The speed Appellees were traveling, which was in excess of 50 mph in a 25 mph zone; (3) Any obstructions near the intersection which affected visibility; (4) The fact that Appellees were traveling left of center; (5) Appellee’s failure to apply the brakes prior to impact with Anderson’s vehicle; (6) The fact that the aerial ladder truck Appellee was driving was the second vehicle dispatched to a minor vehicle fire; (7) Whether Appellee’s speed caused the audible siren to be ineffective; (8) whether the siren of the ladder truck was

masked by the siren from the first emergency vehicle; (9) Whether Appellee violated certain Massillon Ordinances and/or Massillon Fire Department policies.

{¶59} Initially, we will address Appellant's argument that three independent witnesses opined that the Appellees conduct in this case was "reckless." However, upon review we find that no definition of "reckless" or "recklessness" as it applies to statutory immunity cases pursuant to R.C. § 2744.03 was provided to these witnesses prior to asking them to make such a legal determination. As such, we do not find these opinions to be dispositive.

{¶60} As such, our review turns to whether reasonable minds could conclude that Appellees' conduct rose to the level of willful, wanton or reckless misconduct.

***Analysis: Totality of the Circumstances***

{¶61} The facts in the case sub judice are that at approximately 8:30 a.m. on May 6, 2008, Firefighter Toles was traveling approximately 52 mph down Walnut Street while operating Ladder Truck 211 and did not stop as she crossed through the intersection with Johnson Street and struck the vehicle in which Ronald Anderson and Javarre Tate were traveling.

{¶62} Initially we note that because Appellees were responding to an emergency call, Toles was authorized by R.C. §4511.03 to proceed through the stop sign under the following conditions:

{¶63} "The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past

such red or stop sign or signal with due regard for the safety of all persons using the street or highway." (Massillon Ordinance 331 mirrors this language).

{¶64} In this case, Appellant claims that Appellees violated the above statute in addition to a number of Massillon Fire Department policies §307.01, §307.03(D) and §307.04(C) and City of Massillon Ordinances §331.20(a) and §303.041.

{¶65} Ord. §303.041, which is modeled after R.C. 4511.45, addresses when an emergency vehicle may travel left of center and provides that operators must exercise "due regard" for all other persons on the roadway.

{¶66} In this case, we do not find the fact that Appellees were left of center contributed to the accident. This is not a situation where the accident was a head-on collision where the emergency vehicle was in the lane of travel of oncoming traffic, resulting in a collision.

{¶67} As to the Massillon Fire Department policies:

{¶68} MFD §307.01 provides that "...if another vehicle fails to yield the right of way to an emergency vehicle, the emergency vehicle operator cannot force the right of way."

{¶69} MFD Policy §307.03(D) provides that "[d]uring emergency response, the driver shall bring the vehicle to a complete stop for any of the following...blind intersections, when the driver cannot account for all lanes of traffic in an intersection, when other intersection hazards are present..."

{¶70} MFD §§307.04(C) and (D) apply to Capt. Annen's duties as the officer on board the aerial ladder truck and provide "the Officer must issue warnings about road conditions and physical hazards to the driver when necessary" and "shall assist the

driver with intersection crossing, locating the scene, backing and any other necessary safety practice.”

{¶71} As stated above, it has been held that violations of internal departmental policies are not determinative as to the issue of whether the conduct herein constituted reckless behavior unless the circumstances demonstrate a perverse disregard for the risks involved. *O’Toole*, supra.

{¶72} In this case, Appellant claims that a large tree, a utility pole, a fence and bushes at or near the intersection created obstructions which required Firefighter Toles to bring the vehicle to a complete stop arguing that she could not “account for all lanes of traffic in an intersection” and that “other intersection hazards [were] present.”

{¶73} Upon review, we find that at the summary judgment stage, we must assume such facts in favor of Appellant. Viewing the facts in this case in a light most favorable to Appellant, specifically the high rate of speed at which Appellee was traveling in conjunction with the claimed obstructions in the intersection which would interfere with a clear view of the whole intersection, we find that reasonable minds could find that Appellees actions in this case were reckless.

{¶74} This ruling should not be interpreted to mean that we find the conduct herein was, in fact, reckless. Rather, we are holding that Appellant should have an opportunity to present her case to a jury to make such a determination.

{¶75} We therefore conclude that the trial court erred in determining that the facts material to the case are not in genuine dispute, and for this reason, summary judgment was inappropriate.

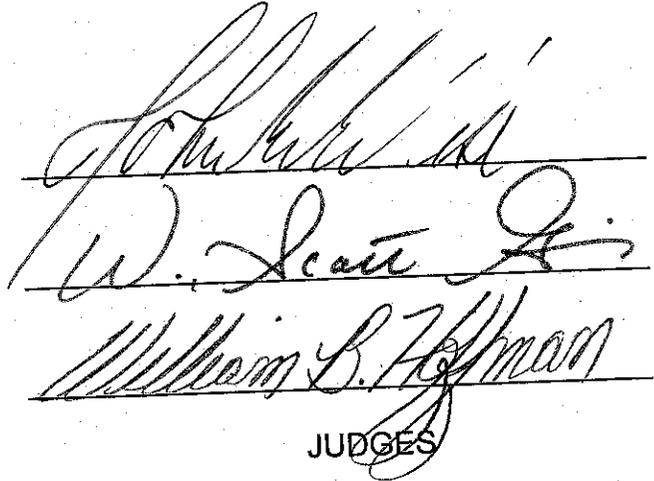
{¶76} Therefore, we sustain Appellant’s sole assignment of error.

{¶77} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is reversed and the cause remanded for further proceedings in accordance with the law and this opinion.

By: Wise, J.

Gwin, J. and

Hoffman, J. concur



Robert W. Wise  
W. Scott Gwin  
William B. Hoffman

JUDGES

JWW/d 0317

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

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NANCY S. REIBOLD  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO

CYNTHIA ANDERSON, Adm. of the  
Estate of RONALD E. ANDERSON  
and JAVARRE J. TATE

Plaintiff-Appellant

-vs-

CITY OF MASSILLON, et al.

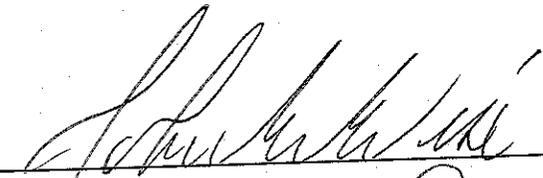
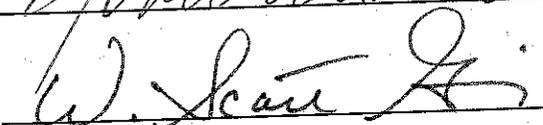
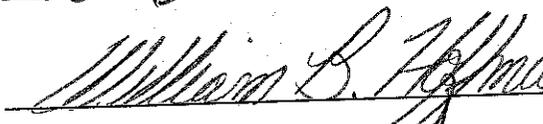
Defendants-Appellees

JUDGMENT ENTRY

Case No. 2010 CA 00196

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to Appellees.

  
\_\_\_\_\_  
  
\_\_\_\_\_  
  
\_\_\_\_\_  
JUDGES

IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO

2010 JUL 15 1:58 PM  
CLERK OF COURTS  
STARK COUNTY, OHIO

CYNTHIA ANDERSON, Administratrix )  
of the Estates of Ronald E. Anderson )  
and Javarre J. Tate, Deceased, )

Plaintiff, )

vs. )

THE CITY OF MASSILLON, et al., )

Defendants. )

CASE NO. 2009CV03647

JUDGE CHARLES E. BROWN, JR.

JUDGMENT ENTRY GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

This matter is before the Court on Defendants City of Massillon, Susan Toles and Rick Annen's Motion for Summary Judgment filed on May 19, 2010, Plaintiff Cynthia Anderson's, Administratrix of the Estates of Ronald E. Anderson and Javarre J. Tate, Deceased, Memorandum in Opposition to Defendants' Motion for Summary Judgment filed on June 2, 2010, and Defendants' Reply filed on June 9, 2010.

Also before the Court is Plaintiff's Motion for Partial Summary Judgment filed on May 19, 2010, Defendants' Brief Opposing Plaintiff's Motion for Partial Summary Judgment filed on June 2, 2010, and Plaintiff's Reply filed on June 9, 2010.

**Summary Judgment Standard**

Summary Judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The moving party must initially inform the trial court of the basis for its motion and identify those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex v. Catrett* (1986), 477 U.S. 317, citing with approval in *Wing v. Anchor Media Ltd. of Texas* (1991), 59

Ohio St.3d 108. See, also, *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth the specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Civ.R. 56(E).

Once the moving party has satisfied his initial burden, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party."

*Vahila* at 1171, quoting *Dresher* at 293.

#### **Statement of the Case**

Plaintiff Cynthia Anderson has filed the within action against Defendants City of Massillon, Susan Toles and Rich Annen alleging claims for the wrongful deaths of her husband, Ronald Anderson, and of her grandson, Javarre Tate.

Plaintiff argues that the Defendants conduct in this matter was reckless, willful, and wanton in that Defendants violated Ohio State Statutes and Standard Operating Procedures of the City of Massillon Fire Department.

Defendants move the Court for Summary Judgment based upon the Political Subdivision Tort Liability Act arguing that the Defendants are immune from liability.

#### **Brief Statement of Facts**

On May 6, 2008, Ronald Anderson was operating a 1996 Dodge Caravan minivan

northbound on Johnson Street, SE in Massillon. His grandson, Javarre R. Tate, was a passenger in the car. At the same time, Defendant Susan Toles, an 18-year veteran of the Massillon Fire Department, was operating a fire engine, Engine 211, which was responding to an emergency call. Susan Toles was driving eastbound on Walnut Street, SE in Massillon. Defendant Captain Richard Annen, a 28-year veteran of the City of Massillon Fire Department, was seated in the front passenger seat directly next to Susan Toles.

At the intersection of Johnson and Walnut Streets, there is a four way stop sign and a red flashing traffic light.

As Engine 211 responded to the emergency call it was using a combination of the wail siren and the air horn. As Susan Toles operated Engine 211 East on Walnut Street through the intersection, Ronald Anderson proceeded to drive Northbound on Johnson Street into the path of the oncoming Engine 211. Susan Toles steered the engine left of center to try and proceed around the minivan, but was unable to avoid hitting the minivan of Ronald Anderson.

### **Law and Analysis**

#### **A. Defendants' Motion for Summary Judgment**

##### **Political Subdivision Tort Liability Act**

##### **1. City of Massillon**

Liability of a political subdivision, pursuant to the Political Subdivision Tort Liability Act, requires a three-tiered analysis, which was set forth by the Ohio Supreme Court in *Campbell v. Burton* (2001), 92 Ohio St.3d 336. The first tier requires the Court to determine whether the Defendant is entitled to immunity pursuant to R.C. 2744.02(A)(1). If this is answered in the affirmative, the second tier requires the Court to determine whether any of the exceptions to immunity found in R.C. 2744.02(B)(1) through (5) apply. The third and final tier requires the

Court to review whether R.C. 2744.03 is applicable to provide a defense or immunity to establish nonliability.

With regard to the first tier as set forth above, the Court finds that Defendant City of Massillon is a political subdivision pursuant to R.C. §2744.01(F), which is immune from liability pursuant to R.C. §2744.02(A)(1), which states:

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

Further, providing fire services is a governmental function pursuant to R.C. §2744.01(C)(2)(a).

Defendant City of Massillon is therefore immune from liability unless one of the exceptions to immunity applies (second-tier of the analysis). The applicable exception to immunity in this case is R.C. §2744.02(B)(1). This exception states that there is no immunity when death is caused by the negligent operation of any motor vehicle by employees who are engaged within the scope of their employment and authority. This exception would normally trigger further analysis under the third tier (R.C. §2744.03) to determine whether a defense applies to establish nonliability. In the instant case, however, the third tier analysis is not necessary, as a full defense to this exception is set forth in R.C. §2744.02(B)(1)(b). A full defense applies where a member of a municipal corporation fire department is operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation did not constitute willful or wanton misconduct.

The applicable statutes as set forth above provide:

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, 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. The following are full defenses to that liability:

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

R.C. §2744.02(B)(1)(b).

The Court finds that the operation of the fire truck in the instant case was in answer to an "emergency call." Therefore, the Court finds that the city is afforded a full defense to liability pursuant to R.C. §2744.02(B)(1)(b) unless the operation of the fire truck constituted willful or wanton misconduct. Even if the fire truck was operated in a negligent manner, the city is afforded a defense to liability. As such, the burden shifts to the Plaintiff to establish that the operation of the fire truck constituted willful or wanton misconduct.

"Willful misconduct" is " '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 wrongful acts with knowledge or appreciation of the likelihood of resulting injury.' " (Citations omitted.) *Id.*, quoting *Tighe v. Diamond* (1948), 149 Ohio St. 520, 527.

"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.”

(Citations omitted.) *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 515.

Upon review of the evidence in the instant case, the Court finds that there has been no evidence provided which demonstrates any willful or wanton misconduct by the Defendants on May 6, 2008, including, but not limited to the operation of Engine 211. As such, the Court grants Defendant City of Massillon’s Motion for Summary Judgment.

## **2. Individual Liability of Susan Toles and Richard Annen**

### **a. Immunity under R.C. §2744.03(A)(6)**

Liability of an employee of a political subdivision requires analysis under the Political Subdivision Tort Liability Act. R.C. §2744.03(A)(6) sets forth the circumstances under which employees of political subdivisions are immune from civil liability. In order to defeat summary judgment on Plaintiff’s claims against Defendants Susan Toles and Richard Annen under this statute, Plaintiff must show some genuine issue of material fact as to whether the Defendants acted with “malicious purpose, in bad faith, or in a wanton or reckless manner.” The statute provides:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(6) [T]he employee is immune from liability unless one of the following applies:

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]

R.C. §2744.03(A)(6)(b).

“Malicious purpose” has been defined as the “willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through \* \* \* unlawful or unjustified” conduct. *Cook v. Hubbard Exempted Village Bd. of Edn.* (1996), 116 Ohio App.3d 564, 569.

“Bad faith” implies more than mere bad judgment or negligence. *Id.* It connotes a “dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud.” *Jackson v. McDonald* (2001), 144 Ohio App.3d 301, 309.

“Wanton” conduct is the complete failure to exercise any care whatsoever. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356. Mere negligence will not be construed as wanton misconduct in the absence of evidence establishing “ ‘a disposition to perversity on the part of the tortfeasor’ ”; the actor must be aware that his conduct will probably result in injury. *Id.*, quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 97.

Lastly, 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.” *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448 454, quoting *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105.

Generally, issues regarding malice, bad faith, and wanton or reckless behavior are questions presented to the jury. *Fabrey*, supra, 70 Ohio St.3d at 356. However, the standard for showing such conduct is high. *Id.* As a result, summary judgment is appropriate in instances where the alleged tortfeasor's actions show “ ‘that he did not intend to cause any harm \* \* \*, did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest

purpose.' " *Fox v. Daly*, 1997 WL 663670 (Ohio App. 11 Dist.), quoting *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772.

Based upon the evidence provided in the instant case, the Court finds that there has been no evidence provided that demonstrates that Defendants Susan Toles and Richard Annen acted with a malicious purpose, in bad faith, or in a wanton or reckless manner on May 6, 2008, including, but not limited to the operation of Engine 211. As such, the Court grants Defendant Susan Toles and Defendant Richard Annen's Motion for Summary Judgment.

**b. Immunity under R.C. §2744.03(A)(3) and R.C. §2744.03(A)(5)**

In addition to the immunity provided to Defendant Richard Annen under R.C. §27544.03(A)(6), the Court finds that Defendant Richard Annen is also entitled to immunity under R.C. §2744.03(A)(3) and R.C. §2744.03(A)(5) as set forth below:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(5) 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.

**B. Plaintiff's Motion for Partial Summary Judgment**

In light of the Court's granting of Defendants' Motion for Summary Judgment, Plaintiff's Motion for Partial Summary Judgment is denied.

**Conclusion**

For the reasons stated above, the Court finds that there are no genuine issues of material fact, and viewing the evidence in a light most favorable to the Plaintiff, Defendants are entitled to judgment as a matter of law. Plaintiff's Motion for Partial Summary Judgment is denied.

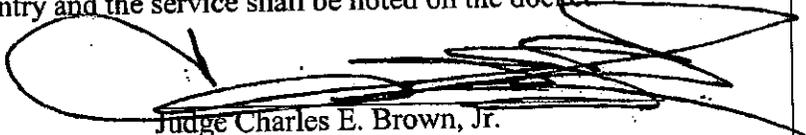
IT IS SO ORDERED.



Judge Charles E. Brown, Jr.

**NOTICE TO THE CLERK:  
FINAL APPEALABLE ORDER**

IT IS HEREBY ORDERED that notice of the foregoing Judgment Entry shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket



Judge Charles E. Brown, Jr.

Copies: Lee E. Plakas, Esq./Edmond J. Mack, Esq.  
David G. Utley, Esq.  
Gregory A. Beck, Esq./Mel L. Lute, Jr., Esq.