

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**GRACE BURLINGAME,** :  
 :  
 **Plaintiff-Appellee** :  
**vs.** :  
 :  
 **ESTATE OF DALE BURLINGAME,** :  
 **et al.,** :  
 :  
 **Defendants-Appellees** :  
 :  
 **and** :  
 :  
 **JAMES R. COOMBS, II., ET AL.** :  
 :  
 **Defendants-Appellants** :

Case No. 11-0742  
**On Appeal from the Fifth District  
Court of Appeals, Stark County, Ohio**  
  
**Court of Appeals  
Case No. 2010-CA-00124 and  
Case No. 2010-CA-00130**

---

**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF AMICUS CURIAE  
THE OHIO MUNICIPAL LEAGUE**

---

**STEPHEN L. BYRON (#0055657) (COUNSEL OF RECORD)**  
**REBECCA K. SCHALTENBRAND (#0064817)**  
**Schottenstein Zox & Dunn Co., LPA**  
**4230 State Route 306, Suite 240**  
**Willoughby, OH 44094**  
**Phone: (440) 951-2303**  
**Fax: (216) 621-5341**  
**E-mail: sbyron@szd.com**

**FILED**  
**MAY 05 2011**  
**CLERK OF COURT**  
**SUPREME COURT OF OHIO**

**JOHN GOTHERMAN (#0000504)**  
**Ohio Municipal League**  
**175 S. Third Street, #510**  
**Columbus, OH 43215-7100**  
**Phone: 614) 221-4349**  
**Fax: (614) 221-4390**  
**E-mail: jgotherman@columbus.rr.com**

**STEPHEN J. SMITH (#0001344)**  
**Schottenstein Zox & Dunn Co., LPA**  
**250 West Street**  
**Columbus, OH 43215**  
**Phone: (614) 462-2800**  
**Fax: (614) 462-5135**  
**E-mail: ssmith@szd.com**

**COUNSEL FOR AMICUS CURIAE  
THE OHIO MUNICIPAL LEAGUE**

**ELIZABETH A. BURICK (#0012565)**  
Elizabeth Burick Co., L.P.A.  
1428 Market Avenue, North  
Canton, OH 44714  
Phone: (330) 456-3200  
Fax: (330) 456-7888  
E-mail: elizabethburick@yahoo.com

**COUNSEL FOR PLAINTIFF- APPELLEE**  
**JAMES BURLINGAME, ADMINISTRATOR OF ESTATE**  
**OF GRACE BURLINGAME, DECEASED**

**THOMAS J. LOMBARDI (#0031189)**  
4518 Fulton Drive, NW  
Canton, OH 44735  
Phone: (330) 492-8717  
Fax: (330) 252-5523  
E-mail: tlombardi@bdblawn.com

**COUNSEL FOR APPELLEE**  
**EVA FINLEY, ADMINISTRATOR**

**ORVILLE L. REED, III (#0023522)**  
Buckingham, Doolittle & Burroughs, LLP  
3800 Embassy Parkway, Suite 300  
Akron, OH 44333  
Phone: (330) 258-6523  
Fax: (330) 252-5523  
E-mail: oreed@bdblawn.com

**COUNSEL FOR APPELLEE**  
**EVA FINLEY, ADMINISTRATOR**

**KRISTIN BATES AYLWARD (#0030824)**  
**KEVIN R. L'HOMMEDIU (#0066815)**  
Canton City Hall  
Law Department  
218 Cleveland Avenue, SW  
Cleveland, OH 44702  
Phone: (330) 489 3251  
Fax: (330) 489-3374  
E-mail: kristen.aylward@cantonohio.gov  
kevin.lhommediu@cantonohio.gov

**COUNSEL FOR DEFENDANT-APPELLANTS**  
**CANTON CITY FIRE DEPARTMENT, CANTON CITY HALL**  
**AND JAMES R. COMBS**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>TABLE OF AUTHORITIES .....</b>	<b>iv</b>
<b>INTRODUCTION.....</b>	<b>1</b>
<b>STATEMENT OF AMICUS INTEREST .....</b>	<b>2</b>
<b>STATEMENT OF THE CASE AND FACTS.....</b>	<b>2</b>
<b>ARGUMENT.....</b>	<b>3</b>
<b><u>Proposition of Law No. 1: The alleged violation of an internal departmental policy or procedure is irrelevant to the “wanton or reckless conduct exceptions” to R.C. Chapter 2744 political subdivision and employee tort immunity, set forth in R.C. 2744.02(B)(1)(b) and R.C. 2744.03(A)(6)(b), and, therefore, is not to be considered in determining whether to grant a political subdivision summary judgment. ....</u></b>	<b>3</b>
<b>CONCLUSION .....</b>	<b>5</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>6</b>

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>Cases</u></b>	
<i>Grace Burlingame v. Estate of Dale Burlingame, et al</i> , 2011-Ohio-1325 .....	1, 2, 4, 5
<i>Elsass v. Crockett</i> , 2005-Ohio-2142 .....	1
<i>Fabrey v. McDonald Village Police Dept.</i> (1994), 70 Ohio St.3d 351, 639 N.E.2d 31.....	3
<i>O’Toole v. Denihan</i> (2008), 188 Ohio St.3d 374, 2008-Ohio-2574 .....	3, 4
<i>Rodgers v. DeRue</i> (1991), 75 Ohio App.3d 200, 598 N.E.2d 1312.....	2
<i>Sampson v. Cuyahoga Metropolitan Housing Authority</i> , 2010-Ohio-3415 .....	1
<i>Shalkhauser v. City of Medina</i> , 148 Ohio App.3d 41, 2002-Ohio-222 .....	1
<b><u>Statutes</u></b>	
R.C. 2744.02(B)(1)(b).....	3
R.C. 2744.03(A)(6)(b) .....	3
R.C. Chapter 2744.....	1, 3

## INTRODUCTION

### THIS CASE INVOLVES A MATTER OF PUBLIC AND GREAT GENERAL INTEREST

The Ohio Municipal League (“League”), as amicus curiae on behalf of the City of Canton (“City”), urges this Court to accept jurisdiction over this case in order to reverse the decision of the Fifth District Court of Appeals in *Grace Burlingame v. Estate of Dale Burlingame, et al*, 2011-Ohio-1325. This Court has an opportunity to clarify that an internal regulation of a political subdivision is irrelevant in the analysis determining whether or not an employee of a political subdivision acted in a wanton or reckless manner and, therefore, whether the employee and the political subdivision are entitled to the immunity provisions granted by the General Assembly in R.C. Chapter 2744.

The Fifth District, in *Burlingame*, held that violation of departmental policy “may be a factor for the jury to consider in determining whether the conduct of the defendants rose to the level of wanton or reckless.” *Burlingame* at ¶ 41. According to the Fifth District, the City and its employee, James R. Coombs, II (“Coombs”), the driver of a City fire truck, are not entitled to summary judgment and political subdivision immunity from liability arising out of an accident between the City’s fire truck and the vehicle in which Appellees’ decedent was riding.

This erroneous decision conflicts with decisions from the Ninth District and the Eleventh District. The Ninth District, in *Elsass v. Crockett*, 2005-Ohio-2142, held that an argument that a police officer violated certain “police department procedures at the time of the accident does not create a genuine issue of material fact for the jury.” *Elsass* at ¶ 25. *Elsass* cited a previous decision of the Ninth District: *Shalkhauser v. City of Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, holding that a violation of an internal departmental procedure is irrelevant to the issue of

whether the conduct of a political subdivision employee constituted willful or wanton misconduct. *Shalkhauser* at ¶ 41.

The Eleventh District, in *Rodgers v. DeRue* (1991), 75 Ohio App.3d 200, 598 N.E.2d 1312, a decision also cited by the Ninth District in *Elsass*, reviewed the circumstances surrounding a high-speed police chase and held that whether an officer violated some internal departmental procedure is irrelevant and, therefore, “there is no material issue of fact regarding whether Officer Ferrell’s conduct constituted ‘willful or wanton misconduct’ under the totality of the circumstances.” *Rogers* at 205.

It is clear that the Fifth District’s decision in *Burlingame* conflicts with the decisions of the Ninth District and the Eleventh District. The Fifth District cited the decisions of the Ninth District and Eleventh District and, while noting the conflict, stated “we do not agree.” *Burlingame* at ¶ 41.

The League respectfully requests that this Court exercise jurisdiction over this case. This case contains conflict between districts and a matter of great public and general interest; it is, therefore, worthy of the time and attention of this Court. The League urges this Court to accept jurisdiction over this case.

#### **STATEMENT OF AMICUS INTEREST**

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. The League and its members have an interest in the proper application of political subdivision immunity as intended by the Ohio General Assembly and in ensuring that it is not usurped by an internal department policy or procedure.

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

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Memorandum in Support of Jurisdiction of the City.

## ARGUMENT

**Proposition of Law No. 1: The alleged violation of an internal departmental policy or procedure is irrelevant to the “wanton or reckless conduct exceptions” to R.C. Chapter 2744 political subdivision and employee tort immunity, set forth in R.C. 2744.02(B)(1)(b) and R.C. 2744.03(A)(6)(b), and, therefore, is not to be considered in determining whether to grant a political subdivision summary judgment.**

### Immunities

R.C. 2744.02(B)(1) provides a full defense to a political subdivision whose automobile is involved in an accident when: “[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. 2744.03(A)(6)(b) provides that an employee of a political subdivision is immune from liability unless “[t]he employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.”

Under the circumstances in this case, neither the City of Canton nor its employees will be liable for the damages caused by the auto accident with Appellees’ decedent unless the operator of the fire engine was acting with malicious purpose, in bad faith or in a wanton, reckless or willful manner.

### “Wanton or Reckless Manner”

In *O’Toole v. Denihan* (2008), 188 Ohio St.3d 374, 2008-Ohio-2574, this Court defined recklessness as requiring “something more than mere negligence” and, quoting *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31, concluded “the actor must be conscious that his conduct will in all probability result in injury.” *O’Toole* at ¶ 74. (Emphasis added).

Violation of a departmental policy or procedure does not guarantee that injury will occur. Departmental policies and procedures may be adopted for a variety of different reasons, including administrative convenience and fiscal integrity, and therefore, are not always for safety or security reasons. Violation of a policy or procedure adopted primarily for a safety or security reason, however, does not always result in injury. The circumstances of public safety work are not so simple that one can state that a violation of departmental policy or procedure by an employee will, in all probability, result in injury and, therefore, necessitate a determination that reckless conduct occurred. The Fifth District's decision, as a practical matter, concludes that Coombs' alleged departmental policy violation and split-second decisions were made knowing that his conduct would result in injury and death to the Appellants.

There is no such evidence. The trial court, after review of the evidence before it, including testimony regarding firefighter training when responding to emergency calls, concluded that "Coombs' actions were negligent at best, and did not rise to the level of malicious purpose, bad faith or in a wanton and reckless manner." *Burlingame* at ¶15.

The death of Appellees' decedent is tragic. As this court has noted, however, "tragedy does not mean that the burden for showing recklessness is any different" and the law must be applied "without consideration of emotional ramifications and without the benefit of 20-20 hindsight." *O'Toole* at ¶ 76.

The trial court correctly determined that any alleged violation of departmental policy or procedure by Coombs "did not strip Coombs of immunity because a city regulation cannot override the state statute granting immunity." *Burlingame* at ¶ 41. This Court has noted that "the standard for showing recklessness is high." *O'Toole* at ¶ 75. The Fifth District significantly lowers the standard by concluding that violation of a department policy may be a factor for a jury

to consider in determining whether the conduct of an employee is wanton or reckless. *Burlingame* at ¶ 41.

The Ninth and Eleventh Districts, in considering arguments that an alleged violation of departmental policies and procedures is a relevant factor for consideration in the reckless conduct analysis, have correctly interpreted and applied this Court's definition of recklessness and concluded that the alleged violation is irrelevant.

The Fifth District's decision in *Burlingame* creates a conflict with decisions of the Ninth District and the Eleventh District, and this Court should resolve the conflict by accepting jurisdiction in order to consider the question of whether violation of an internal department policy or procedure is relevant in the wanton or reckless conduct analysis.

**CONCLUSION**

This case presents a matter of great public and general interest to all political subdivisions, at all levels of government, throughout Ohio. The exercise of jurisdiction over this case is warranted and respectfully requested.

Respectfully submitted,



---

Stephen J. Smith (#0001344)  
[ssmith@szd.com](mailto:ssmith@szd.com)  
Schottenstein Zox & Dunn Co., LPA  
240 West Street  
Columbus, OH 43215  
Phone: (614) 462-2700  
Fax: (614) 462-5135

*Counsel for Amicus Curiae  
The Ohio Municipal League*

**CERTIFICATE OF SERVICE**

A copy of the foregoing *Memorandum in Support of Jurisdiction of Amicus Curiae the Ohio Municipal League* has been sent via regular U.S. mail, postage pre-paid this 5<sup>th</sup> day of May, 2011 to:

Elizabeth A. Burick  
Elizabeth Burick Co., L.P.A.  
1428 Market Avenue, North  
Canton, OH 44714

Thomas J. Lombardi  
4518 Fulton Drive, NW  
Canton, OH 44735

Orville L. Reed, III  
Buckingham, Doolittle & Burroughs, LLP  
3800 Embassy Parkway, Suite 300  
Akron, OH 44333

Kristin Bates Aylward  
Kevin R. L'Hommedieu  
Canton City Hall  
Law Department  
218 Cleveland Avenue, SW  
Canton, OH 44702



Stephen J. Smith (#0001344)