

CYNTHIA ANDERSON, *Administratrix*,

Case No. 11-0746

Plaintiff-Appellee

-vs.-

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

CITY OF MASSILLON, *et al.*

Defendants-Appellants

Court of Appeals
Case No. 2010 CA 00196

**MEMORANDUM IN OPPOSITION OF JURISDICTION
OF PLAINTIFF-APPELLEE CYNTHIA ANDERSON, ADMINISTRATRIX
OF THE ESTATES OF RONALD E. ANDERSON AND JAVARRE J. TATE**

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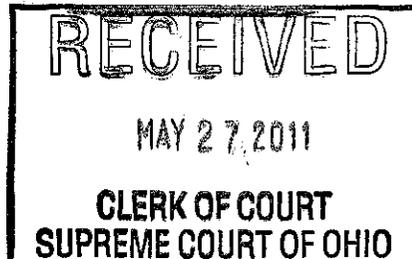
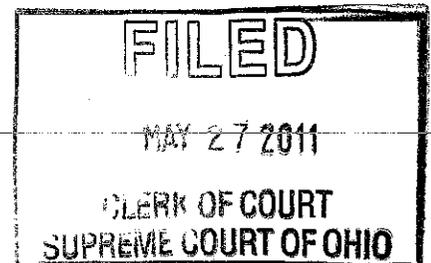


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I. QUESTION OF FACT REGARDING WHETHER APPELLANTS WERE WANTON, WILLFUL, OR RECKLESS IS NOT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST WARRANTING REVIEW BY THIS COURT.

This appeal is based on the Stark County Court of Appeals' decision that a question of fact exists regarding whether Appellants Susan Toles and Rich Annen acted in a wanton, willful, or reckless manner while (1) operating a 22.5 ton ladder fire truck at a speed of 52 m.p.h. in a 25 m.p.h. zone in a residential neighborhood, (2) into a blind intersection, (3) through a clearly marked stop sign without touching the brakes, (4) violating numerous traffic laws and departmental policies, (5) while responding to a minor vehicle fire that was only 1.7 miles from the station house. These actions caused the deaths of Ronald Anderson and Javarre Tate.

The Court of Appeals did not make any grand pronouncements of law or policy in its decision reversing the trial court. Instead, the Court of Appeals strictly followed this Court's prior decisions on this subject and determined only that, when considering all of the evidence of record, there exists a genuine issue of material fact that precludes summary judgment. Because a reasonable jury could, when drawing all inferences in favor of the Appellee Cynthia Anderson, conclude that Appellants were willful, wanton, or reckless in causing the deaths of Ronald Anderson and Javarre Tate, the Court of Appeals reversed the trial court's summary judgment and remanded the case for trial.

As this Court has recognized, "Our precedent regarding the three-tiered analysis to determine a political subdivision's immunity is well settled." *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 47 n. 2. In its 17 page opinion, the Court of Appeals' application of the three-tiered political subdivision immunity analysis was consistent with, indeed directed by, this Court's prior precedent, including application of this Court's definitions of reckless, willful, and wanton. *Anderson v. Massillon*, Stark Cty. App. No. 2010 CA 00196, 2011-Ohio-1328, ¶¶ 30-52. There is nothing in the Court of Appeals' decision that deviates from this

Court's prior decisions. Further, it is entirely consistent with decisions of other courts of appeals throughout Ohio that have addressed these issues. As such, this case does not present any unique issues that are of public or great general interest that require resolution. *See*, Ohio Const. Art. IV, § 2. Accordingly, there is no reason for this Court to review this matter.

Contrary to Appellants' assertions, the Court of Appeals did not irrevocably strip Appellants of the defense of political subdivision immunity pursuant R.C. Chapter 2744. Appellants are free to raise this defense at trial. A close examination of Appellants' Memorandum in Support of Jurisdiction reveals that Appellants simply disagree with the Court of Appeals' ruling, and are merely seeking another layer of judicial review. However, in deciding whether to certify the record, "the sole issue for determination" is "whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties." *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254, 168 N.E.2d 876, 877. This Court's "role as a court of last resort is not to serve as an additional court of appeals on review," but to clarify legal uncertainty in special cases. *State v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio-355, 902 N.E.2d 961, ¶ 31. (O'Donnell, J., dissenting). This is no such case, particularly at its current procedural stage. This Court should not grant jurisdiction, and the matter should proceed to final adjudication.

II. ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW.

Response to Appellants' Proposition of Law Number 1:

EXCESSIVE SPEED IS MERELY ONE OF MANY FACTORS THAT A JURY MAY CONSIDER WHEN EVALUATING THE "TOTALITY OF THE CIRCUMSTANCES" SURROUNDING A MEMBER OF A MUNICIPAL FIRE DEPARTMENT'S RECKLESS OR WANTON CONDUCT PURSUANT TO R.C. § 2744.03(A)(6)(b).

There can be little dispute that the Court of Appeals employed this Court's well-established three-tiered political subdivision immunity analysis when evaluating Appellants' conduct. *Anderson*, 2011-Ohio-1328 at ¶¶ 30-43 (*citing*, *Greene Cty. Agricultural Soc. v. Liming* (2000), 89

Ohio St.3d 551, 733 N.E.2d 1141, *Colbert v. Cleveland*, 99 Ohio St.3d 215, 790 N.E.2d 781, 2003-Ohio-3319, *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 865 N.E.2d 9, 2007-Ohio-1946, at ¶ 17). There likewise can be little dispute that the Court of Appeals applied this Court’s definitions of “reckless” and “wanton” conduct when determining if a question of fact exists as to whether R.C. § 2744.03(A)(6)(b) shields Appellants Annen and Toles from liability. *Id.* at ¶¶42-53 (citing, *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (defining “wanton” misconduct); *O’Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 73 (defining “reckless” misconduct); *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 100, 559 N.E.2d 699 (accord)). The issue then, as framed by Appellants, is whether excessive speed of an emergency vehicle is a factor that may be considered by the trier of fact when determining whether “reckless” or “wanton” or conduct is present. Both logic and case law confirms that it is.

When employing this Court’s political subdivision immunity analysis, lower courts uniformly recognize that whether a municipal employee engaged in “reckless” or “wanton” conduct while injuring someone when responding to an emergency is based upon the “totality of the circumstances” – not facts considered in isolation.¹ However, because the line between negligent conduct and reckless or wanton conduct can be a fine one, this Court’s precedent establishes that this determination is most often best to be made by the jury. *Fabrey*, 70 Ohio St.3d at 356 (“We agree with appellants that the issue of wanton misconduct is normally a jury question”).²

¹ See, e.g., *Moore v. Honican*, 1st Dist. No. C-100432, 2011-Ohio-2109, ¶ 19 (“the determination of whether conduct exceeds negligence and becomes wanton or willful must be based on the totality of the circumstances”); *Brockman v. Bell*, 78 Ohio App.3d 508, 517, 605 N.E.2d 445; *Reynolds v. Oakwood* (1987), 38 Ohio App.3d 125, 127, 528 N.E.2d 578; *Burlingame v. Estate of Burlingame*, 5th Dist. No.2010CA00124, 2011-Ohio-1325, ¶ 53.

² See also, *Burlingame*, 2011-Ohio-1328, ¶ 49 (“whether a person has acted recklessly is almost always a question for the jury”); *Brockman*, 78 Ohio App.3d at 517; *Hunter v. Columbus* (2000), 139 Ohio App.3d 962, 970, 746 N.E.2d 246; *Ruth v. Jennings* (1999), 136 Ohio App.3d 370, 375, 736 N.E.2d 917; *Thompson v. Smith*, 178 Ohio App.3d 656, 666, 2008-Ohio-5532, 899 N.E.2d

(Continued)

Consequently, when determining whether to allow the jury to make this determination, lower courts nearly always consider the speed the emergency vehicle was traveling at the time the injury occurred as a factor in its analysis.³

The speed that Appellants Toles and Annen were operating the fire truck when colliding into the vehicle occupied by Ronald Anderson and his 4-year-old grandson, Javarre Tate, indeed shocks the conscience. The vehicle operated by Appellants was a 22.5 ton “quint” engine equipped with a 75-foot aerial ladder. Due to its size, the testimony adduced in this case confirmed that it is the second most difficult vehicle to drive in the entire Massillon Fire Department fleet. As the *second* engine dispatched in response to a minor car fire, the expert testimony in this case confirms that Appellants were operating the heavy vehicle at a speed in excess of 52 *mph* in a residential neighborhood, 27 *mph* over the posted speed limit.

The expert testimony further confirmed that this was the top speed that this vehicle could travel. In other words, Appellants were standing on the accelerator at the time they collided into Mr. Anderson and Javarre. However, speed was merely one factor intertwined among many others that existed in this situation.

1040, ¶ 43; *Edinger v. Allen Cty. Bd. of Commrs.* (Apr. 26, 1995), 3rd Dist. No. 1-94-84, 1995 WL 243438; *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, ¶ 39; *Matkovich v. Penn Cent. Transp. Co.* (1982) 69 Ohio St.2d 210, 214, 431 N.E.2d 652, 655; *Stickovich v. City of Cleveland* (June 20, 1997), Cuyahoga Cty. Ct. Cmn. Pleas No. CV-248365, 1997 WL 910801, *4; 70 Ohio Jur. 3d Negligence § 208.

³ See, e.g., *Whitfield*, 167 Ohio App.3d 172 at ¶¶12, 40 (finding the fact that an officer caused a collision after running a stop sign while traveling 25 *mph* over the speed limit in a residential area supported presenting the issue of wantonness to jury); *Hunter*, 139 Ohio App.3d at 970-71 (finding the fact that the driver of an emergency vehicle was traveling left of center and 26 *mph* over the speed limit indicated wanton or reckless conduct); *Peoples*, 70 Ohio App.3d at 849-50 (finding an emergency vehicle driver’s act of proceeding into an intersection at 15 *mph* over the speed limit supported the jury’s finding of wanton conduct); *Campbell v. Massucci*, 190 Ohio App.3d 718, 2010-Ohio-4084, 944 N.E.2d 245, ¶ 68 (speed of 16 *mph* over the limit factor that supported a finding of willful or wantonness).

Appellants were travelling at this top speed while driving through a residential neighborhood, in front of a daycare, while running through a stop sign and flashing red light at a blind intersection. It was under these circumstances that Appellants collided into the minivan occupied by Mr. Anderson and Javarre, who were traveling to the daycare adjacent to the intersection. With the minivan harpooned on its grille, it took over 100 yards for Appellants' fire truck to come to rest. Mr. Anderson was immediately crushed between the interior of the minivan and the front bumper of the fire truck. Javarre was ejected, drug by his shirt, and ultimately disemboweled beneath the tire of the moving fire truck. At no time through this series of events did Appellants ever attempt to apply the pedal brakes – not before entering the intersection, not after observing Mr. Anderson's minivan, and not after striking Mr. Anderson's vehicle. Plainly, these are relevant facts that are informative to the “totality of the circumstances” surrounding Appellants' conduct, and appropriately considered by the Court of Appeals.

To hold that excessive speed is not a material factor which deserves consideration in the “totality of the circumstances” analysis, as Appellants suggest, would obviously lead to nonsensical results. If such were the case, a police officer traveling 200 mph in order to catch up to a distant motorist with an expired license plate could never be held accountable if, during the process, that officer ignores a stop sign and kills a child in a marked cross-walk in a school zone. Stated simply, if the Ohio General Assembly wished to exempt excessive speed as a consideration from what may constitute reckless and wanton conduct for purposes of R.C. § 2744.03(A)(6)(b), the Ohio General Assembly would have done so.

Even assuming Appellants are somehow correct, and speed is completely irrelevant to the “totality of the circumstances” analysis, this is not the only fact that entered into the Court of Appeals' evaluation of Appellants' conduct. While the Court of Appeals specifically noted “the high rate of speed at which Appellee was traveling,” the Court of Appeals considered this fact “in

conjunction with the claimed obstructions in the intersection which would interfere with a clear view of the whole intersection.” *Anderson*, 2011-Ohio-1328, ¶ 72. In other words, Appellants were operating the massive fire truck not only at an unacceptable rate of speed, but doing so into an intersection with visual obstructions that prohibited Appellants from observing and avoiding other motorists. This is particularly egregious, considering Appellants traversed the intersection on a daily basis, and were thus fully aware of the visual obstructions present at the intersection. This risk was plainly disregarded.

Moreover, the Court of Appeals’ observation of Appellants’ high rate of speed and the blind nature of the intersection was not made to the exclusion of the other facts in this case demonstrating Appellants’ reckless and wanton conduct. *Id.* at ¶¶ 58, 61-77. Such facts included, *inter alia*:

- Entering an intersection at 52 mph while failing to stop or slow at a stop sign in violation of R.C. § 4511.03, which requires operators of emergency vehicles to slow at all stop signs, then proceed cautiously when traveling through the intersection, even though Appellants testified they *knew* that intersections are where collisions are most likely to occur;⁴
- Operating the massive fire truck at a speed of at least 52 mph through residential neighborhood, even though Appellants testified they *knew* that this speed caused the fire truck to outrun the effectiveness of its siren;⁵
- Violating numerous Massillon Codified Ordinances, Massillon Fire Department Polices, and well accepted standards in the field of Emergency Vehicle Response when operating the fire

⁴ *See, Neely v. Mifflin Tp.*, 10th Dist. No. 96APE03-283, 1996 WL 550170, *6 (“While we recognize that violation of R.C. §4511.03 through minor deviation from its requirements may rise only to the level of negligence, more serious deviation may rise to the level of recklessness.”)

⁵ *See, e.g., Robertson*, 2005-Ohio-5069 at ¶41 (finding an officer’s failure to appreciate that the sound of his own siren may have been masked by the police car being followed supported a finding of wanton or reckless conduct).

truck, even though Appellants *knew* that these rules exist for the safety of the motoring public;⁶ and

- Driving the fire truck in such a manner even though Appellants *knew* they were the second vehicle dispatched to respond to a minor vehicle fire.⁷

Consequently, even if Appellants were correct that excessive speed is irrelevant to the “totality of the circumstances” analysis, the Court of Appeals was nevertheless correct in determining that this case must proceed to a jury considering all of the other facts and circumstances.

In conclusion, as reflected by the above-discussion, the totality of the circumstances analysis attendant to whether a municipal employee engaged in “reckless” or “wanton” conduct is a highly individualized, fact driven inquiry, made on a case-by-case basis. However, the legal principles that apply to this analysis as articulated by this Court are well-defined. Far from making any grand pronouncements that would deviate in any way from the provisions of R.C. Chapter 2744 and this Court’s subsequent interpretations, the Court of Appeals merely determined that there existed a genuine issue of material fact that should be decided at trial. Granting jurisdiction in this case would not resolve any overarching legal issue of general or great public interest, but would instead apply to individualized factual issues that are of interest primarily to the parties in this case.

⁶ See, e.g., *Hunter*, 139 Ohio App.3d at 970 (finding that a violation of or compliance with municipality guidelines or policies for emergency responders may be “taken into consideration in determining what a reasonable speed is to protect the safety of all concerned”); *Whitfield*, 167 Ohio App.3d 172 at ¶¶38-40 (finding an officer’s violation of internal pursuit policy supported a finding of wantonness); *Robertson*, 2005-Ohio-5069 at ¶42 (finding a violation of State Highway Patrol policies and Ohio law supported a finding of wantonness); *Campbell*, 2010-Ohio-4084 at ¶47 (after examining internal policies, stating, “[i]t is with this standard of care in mind that we will analyze this case.”)

⁷ See, e.g., *Alliance v. Bush*, 5th Dist. No. 2007CA00309, 2008-Ohio-3750, ¶38 (finding the fact that the officer was one of several officers responding to an incident should have caused the officer to “evaluate[] the need to use excessive speed in a residential area”); *Brown v. Cuyahoga Falls*, 9th Dist. No. 24914, 2010-Ohio-4330, ¶24 (summary judgment inappropriate when officer was third car to respond to reported incident and admitted it was unnecessary to “run hot”).

Jurisdiction before this Court is therefore inappropriate, and this case should be permitted to proceed to final resolution before the trier of fact.

Response to Appellants' Proposition of Law Number 2:

APPELLANTS ADVOCATED TO THE COURT OF APPEALS THAT "RECKLESS AND WANTON" AS USED IN R.C. § 2744.03(A)(6)(b) IS THE FUNCTIONAL EQUIVALENT OF "WILLFUL AND WANTON CONDUCT" AS USED IN R.C. §2744.02(B)(1)(b), THEREFORE APPELLANTS MAY NOT CLAIM ERROR THAT THE COURT OF APPEALS ADOPTED THEIR PROPOSITION.

As the Court of Appeals recognized, and as stated by Appellants, it is true that the words "wanton," "reckless" and "willful" convey different concepts with different meanings. *Anderson*, 2011-Ohio-1328 at ¶¶ 30-43. However, both R.C. § 2744.03(A)(6)(b) and R.C. §2744.02(B)(1)(b) use the word "wanton." Consequently, *as stated by the Appellants in their brief before the Court of Appeals:*

"[T]he wanton or willful or reckless misconduct standards set forth in R.C. § 2744.03(A)(6) and willful and wanton misconduct standards set forth in R.C. § 2744.02(B)(1)(a) are functionally equivalent."

Appellants' Court of Appeals Brief, p. 13 (*citing, Fabrey*, 70 Ohio St.3d at 356; *Whitfield v. City of Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917).⁸ Therefore, Appellants may not now claim error in the Court of Appeals' analysis when it relied upon Appellants' representations by evaluating Appellants Toles, Annen, and the City of Massillon's conduct under functionally equivalent standards. *See, State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, 775 N.E.2d 517, ¶ 27 ("a party is not entitled to take advantage of an error that he himself invited or induced the court to make.") This conclusion does not change merely because the Court of Appeals utilized the word "reckless" as shorthand to refer to these functionally equivalent standards.

⁸ *See also, Brokman*, 78 Ohio App.3d at 515; *Hunter*, 139 Ohio App.3d at 969.

Even if Appellants' position were correct, and the Court of Appeals erred in applying functionally equivalent standards at Appellants' urging, Appellants' actions described above are more than sufficient to create an issue of fact as to whether Appellants engaged in "wanton" or "reckless" conduct within the meaning of R.C. § 2744.02(B)(1)(b) as defined by this Court's settled precedent. In any event, this is purely an issue unique to the parties to this case, and is not an issue of public or great general interest.

III. CONCLUSION.

The Court of Appeals in this case applied this Court's well-established precedent when considering Appellants the City of Massillon, Susan Toles, and Rich Annen's claim of immunity. That the Court of Appeals determined a genuine issue of material fact remains to be tried after application of these principles is not a matter of public or great general interest. This matter should proceed to final adjudication, where Appellants are free to raise their defense of political subdivision immunity and argue their points to the trier of fact who may ultimately find in their favor on those very same arguments.

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DATED: May 27, 2011

Respectfully Submitted,

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