

IN THE SUPREME COURT OF OHIO

GRACE BURLINGAME,)	CASE NO. 11-0742
)	
Plaintiff/Appellee)	On Appeal from Stark
)	County Court of Appeals
VS.)	Fifth Appellate District
)	
CITY OF CANTON, et al.,)	Court of Appeals Case No.
)	2010-CA-124 and 2010-CA-130
Defendants/Appellants)	

MEMORANDUM OF PLAINTIFF/APPELLEE, GRACE BURLINGAME, OPPOSING JURISDICTION OF THE SUPREME COURT OF OHIO

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Appellants' Proposition of Law No. 1:

A violation of internal departmental policy is not relevant to whether the action of an employee of a political subdivision are willful, wanton, or reckless under RC 2744.

Appellee's Response to Appellants' Proposition of Law No. 1:

Whether a person's conduct amounts to "recklessness" is based upon the totality of the circumstances of the case – not facts considered in isolation. A violation of various internal policies and/or a statutory duty may provide evidence of reckless conduct where the claimant can establish that the violator acted with a perverse disregard of the risk and, therefore, it is appropriate for the trial court to consider such violations when determining whether to grant judgment as a matter of law to a political subdivision under the immunity provisions of RC 2744.

Appellants' Proposition of Law No. 1I.

A violation of traffic statutes is not relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless under RC 2744.

Appellee's Response to Appellants' Proposition of Law No. 1I:

Whether a person's conduct amounts to "recklessness" is based upon the totality of the circumstances of the case – not facts considered in isolation. A violation of various internal policies and/or a statutory duty may provide evidence of reckless conduct where the claimant can establish that the violator acted with a perverse disregard of the risk and, therefore, it is appropriate for the trial court to consider such violations when determining whether to grant judgment as a matter of law to a political subdivision under the immunity provisions of RC 2744.

Appellants' Proposition of Law No. 1II:

A firefighter on an emergency call is entitled to immunity and not reckless despite driving through a red light when lights and air horn are activated, and he is driving less than five miles per hour over the speed limit, in daylight, on dry roads, and in light traffic.

Appellee's Response to Proposition of Law No. 111:

The immunity granted to firefighters under RC 2744 is not absolute and where there is evidence that the firefighter acted with perverse disregard of a known risk the determination of immunity should be based upon a totality of the circumstances and not limited to the facts set forth in Appellants' proposition of law No. III. Where there is evidence that the firefighter acted with a perverse disregard of a known risk a question of fact may be created with regard to recklessness and the Court may refuse to grant summary judgment on the issue of immunity.

Amicus Ohio Municipal League's Proposition of Law No. I:

The alleged violation of internal departmental policy or procedure is irrelevant to the "wanton or reckless conduct exceptions" to RC Chapter 2744 political subdivision and employee tort immunity, set forth in RC 2744.02(B)(1)(b) and RC 2744.03(A)(6)(b), and, therefore, is not to be considered in determining whether to grant a political subdivision summary judgment.

Appellee's Response to Ohio Municipal League's Proposition of Law No. I

Whether a person's conduct amounts to "recklessness" is based upon the totality of the circumstances of the case – not facts considered in isolation. A violation of various internal policies and/or a statutory duty may provide evidence of reckless conduct where the claimant can establish that the violator acted with a perverse disregard of the risk and, therefore, it is appropriate for the trial court to consider such violations when determining whether to grant judgment as a matter of law to a political subdivision under the immunity provisions of RC 2744.

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**APPELLEE'S EXPLANATION OF WHY THIS CASE
IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST**

Appellants argue that this Court must review this case in order to provide a uniform application of the law regarding whether the violation of internal policies and procedures and/or statutory provisions are relevant to a determination of recklessness under the immunity provisions set forth in RC 2744. They argue that this case "directly affects the safety of Ohio's citizens and the equal application of the law" and that the Fifth Appellate District's decision permits local departmental policies to "define the contours of statutory immunity." Appellants claim that under the ruling of the Fifth District Court of Appeals herein, the standard for statutory immunity will vary for each political subdivision depending on their internal department policy. Such an argument clearly exaggerates the impact and scope of the holding of the Fifth District Court of Appeals. The issue before the Court of Appeals was whether there was sufficient evidence, when construed in a light most favorably to the Plaintiff, to withstand a motion for summary judgment under the immunity provisions of RC 2744. The Court found that based upon a totality of the circumstances, on the specific facts of the case, there was a genuine issue of material fact with regard to whether the conduct of Appellant's employees was reckless, wanton or willful under RC 2744. The Court correctly stated and applied RC 2744.02(A), RC 2744.02(B) and RC 2744.03(A)(6) and articulated the differences between negligence, and willful, wanton and reckless conduct as set forth in this Court's opinion in *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95. It then rejected Appellant's premise that violations of departmental policy or traffic laws should be totally irrelevant to a jury's determination of whether the conduct was wanton or reckless under the authority of *O'Toole v. Denihan* 2008-Ohio-374.

The duty of safety to our public servants in performing their roles and to persons on the roadways has always been of paramount concern. This is the reason that fire departments and

other political entities have created safety rules; procedures and trained their employees on such rules and procedures. It is also the reason that the legislature did not make the immunity in RC 2744 absolute. The General Assembly mandated that political subdivisions be held accountable where the conduct of employees rises to the level of wanton, willful or reckless. It is ludicrous to argue that the dire financial circumstances that many Ohio cities are facing is somehow relevant to whether or not to hold a political subdivision accountable for the willful, wanton or reckless misconduct of its employees. Whether or not the City can afford to pay is irrelevant.

The Fifth District Court of Appeals properly looked at all of the facts and circumstances presented, including the violation of departmental policies and procedures and traffic statutes, in making its determination that there was sufficient evidence of reckless misconduct to withstand a motion for summary judgment. The facts presented were not "threadbare" as argued by Appellants, rather, there were numerous facts which support a finding that Appellant's employee acted recklessly, and the violations of departmental policy and procedures was only one of many factors which was considered by the Court of Appeals. The determination to consider the totality of the circumstances, including violations of traffic statutes and departmental policies, is in accord with established precedent, and as such, does not create a new issue meriting consideration by this Court. See, *O'Toole v. Denihan*, supra.

In, *O'Toole*, supra, the relationship between immunity, recklessness and a violation of internal departmental policies and/or statutory provisions (The Ohio Administrative Code) arose in the context of a wrongful death suit against the Cuyahoga County Department of Children Services and several of its employees alleging that the employees failed to report suspected abuse to law enforcement and acted recklessly in failing to remove the child from the home. In paragraph 3 of its syllabus, the Court sets forth the following definition of recklessness:

Recklessness is a perverse disregard of a known risk. Recklessness, therefore, requires something more than mere negligence. The actor must be conscious that his conduct will in all probability result in an injury.

With regard to whether evidence of violations of internal departmental policy and/or statutory provisions were relevant to a determination of recklessness this Court stated:

Given our definition of recklessness, a violation of various policies does not rise to the level of reckless conduct unless a claimant can establish that the violator acted with perverse disregard of the risk. *Shalkhauser v. Medina* (2002) 148 Ohio App.3d 41, 51 772 N.E.2d 129 (nor does appellant's contention that appellees violated the police department's fresh-pursuit policy create an issue of fact for a jury in this case: a violation of an internal policy is irrelevant to the issue of whether appellees' conduct constituted willful or wanton misconduct)". Without evidence of an accompanying knowledge that the violation will in all probability result in injury *Fabrey*, 70 Ohio St.3d at 356, 639 N.E.2d 31, evidence that policies have been violated demonstrates negligence at best. Because the issue here is George-Munroe's recklessness, and the record reflects that George-Munroe did not perversely ignore the risk, the violations do not create a genuine issue of material fact regarding the issue of recklessness.

The Fifth District Court of Appeals' decision did not make new law nor did it redefine the "contours of statutory immunity" as argued by Appellants, rather it applied the definition of recklessness set forth in *O'Toole*, supra, to the facts and circumstances of the case before it and found that violations of traffic statutes and departmental policies were factors a jury may consider in determining whether the employees' conduct was reckless. In other words, they may be considered when their violation provides evidence that the violator was acting with a perverse disregard of a known risk. This limited use of policy and regulatory provisions was in accord with this Court's directive in *O'Toole*.

The denial of summary judgment on the issue of immunity where an emergency vehicle is responding to a call is, likewise, not unique. See *Fitzpatrick v. Spencer* 2004-Ohio-194 ("given the conflicting testimony, reasonable minds could disagree whether Officer Spencer's actions were reckless or wanton in relation to the duty imposed by RC 4511.03, and the issue is one

properly determined by a jury."), *Hunter v. Columbus* (2009) 139 Ohio App.3d 962 ("the circumstances are extreme enough that the evaluation of whether the recklessness was great enough to be willful or wanton misconduct is a matter for the trier of fact") and *Zivich v. Village of Northfield* 2010-Ohio-1039 ("Based on conflicting evidence between the parties as to the speed at which both vehicles were traveling, whether the trees obstructed the view of either driver, and whether the light had changed from red to green for traffic on Aurora Road, we conclude that there remains a genuine issue of material fact regarding *Northfield's* ability to avail itself of the immunity protections of RC 2744.02(B)(1)(c).) The denial of summary judgment in the instant case was made upon similar facts and circumstances and does not merit further review by this Court.

Appellants further argue that this Court should accept the instant appeal as the decision of the Fifth District Court of Appeals conflicts with decisions from the Ninth District Court of Appeals in *Elsass v. Crockett*, 2005-Ohio-2142 (holding that violation of certain police procedures does not create a genuine issue of material fact for the jury) and the Eleventh District case of *Rodgers v. DeRue* (1991) 75 Ohio App.3d 200-203, (found that the violation of internal departmental policies did not create an issue of fact as to whether the officer acted in a willful or wanton manner). This argument is without merit and was rejected by the Fifth District Court of Appeals for the reason that the foregoing cases preceded this Court's ruling in *O'Toole*, supra, and *O'Toole* resolved any potential conflict between the appellate courts on the issue of whether violation of policies and procedures could be relevant by determining that they are relevant only where there is "evidence of an accompanying knowledge that the violation will in all probability result in injury".

The propositions of law set forth by Appellants and in the amicus brief of the Ohio Municipal League fall squarely within the confines of *O'Toole* and the issues have, therefore, been asked and answered. The holding of The Fifth District Court of Appeals does not create new law and is limited to the facts and circumstances before the Court. Accordingly, the instant case presents no issue of general or great public interest and does not merit review by this Court.

STATEMENT OF THE FACTS

On July 4, 2007, Plaintiff/Appellee Grace Burlingame and her husband Dale Burlingame were driving home from a picnic at their granddaughter's home. At 7:30 p.m., with Dale Burlingame behind the wheel of their vehicle, they stopped for a red light at the intersection of 18th St. N.W. and Cleveland Ave. in Canton, Ohio.

The local fire station received a call at approximately 7:00 p.m. for a fire at a "vacant" house located on Hoover Place. The fire truck was a pump truck and weighed approximately 20,000-40,000 pounds. Appellant's employee, Mr. Coombs (hereinafter referred to as "Coombs"), testified that he was the driver on the responding pump truck. Coombs testified that as he exited the station, the truck's siren was working. Then, somewhere between 18th St. and 22nd St., N., the siren quit working and never worked again prior to the accident. Coombs was assigned to the fire station at 25th and Cleveland Ave. and he was familiar with the peculiar nature of this intersection as he had traveled through the intersection in question many times. At this intersection, 18th St. N.W. is off-set and requires two traffic signals. Further, on the northwest corner of 18th St. N.W., there is a large funeral home which has two signs, and both are very close to Cleveland Ave. These signs totally block the view of any driver stopped on 18th St. N.W. and looking for traffic heading in a southerly direction on Cleveland Ave.

An ambulance traveling with its siren activated, heading in a southerly direction on Cleveland Ave., passed through the intersection while the Burlingame vehicle was stopped. A witness, Brooke James, who was driving a vehicle directly behind the Burlingame's vehicle, saw that their light was red. Ms. James witnessed the light change from red to green after the ambulance passed, and then witnessed the Burlingame vehicle move forward into the intersection. Mr. Burlingame entered the intersection and was broadsided by the City of Canton fire truck driven by the Defendant/Appellant Coombs. Because of the force of the collision, Dale Burlingame was killed instantly and Appellee Grace Burlingame was seriously injured and she was taken by life-flight from the scene. She was hospitalized for several months and incurred over \$350,000 in medical bills. Appellee Grace Burlingame never returned to her own home and remained in a nursing facility until the end of her life. The question before the Court was whether the fire truck was operated in a wanton, willful and/or reckless manner.

The fire truck has three warning devices to use when responding to an emergency: 1) flashing lights, 2) siren, and 3) air horn. As Coombs approached the intersection, when he first saw the traffic light for 18th and Cleveland Ave. it was red. Coombs testified that he is trained in the operation of the fire truck and that when responding to an emergency, you come to a light that is red, you should slow down and stop. Coombs then testified that you are then required to make sure all the lanes of traffic are clear before proceeding through. This can only be done after stopping and making sure that it is clear. This is also supported by the testimony of the Fire Department's training officer, Urick. The procedure manual also provides that if the light is red, then the emergency vehicle must come to a complete stop.

The light at the intersection of 18th St. and Cleveland Ave. was equipped with a system known as a preemptor which is used to change the traffic light to green as an emergency vehicle

approaches i.e. a fire truck approaching an intersection with its siren activated. Coombs acknowledged that when he saw the light was red, he assumed that the preemptor would work and change his light to green. This also seems to be the position of Appellant, City of Canton as stated in its Brief for Summary Judgment at footnote 52:

“[T]hese facts can be reconciled by virtue of the preemptor, which likely changed the Burlingame’s light to red immediately after they entered the intersection, resulting in Coombs’ green light. This is consistent with the witness, who saw the Burlingame’s light turn green, but she could not testify if it stayed green or whether the preemptor might have immediately changed it back to red. “Defendant’s Summary Judgment Brief pg. 10.

Mr. Serban, who works in the City of Canton’s lighting division, testified that the preemptor system is only activated by a siren. There are Federal regulations and the sirens on the emergency vehicle are tested to make sure they meet these guidelines as to decibels to be an emergency siren. The manufacturers of the preemptory system can use these standards to set the siren noise necessary to activate the system. Mr. Serban testified that an air horn on an emergency vehicle would not initiate the preemptor to change the light.

Appellant provided the light sequence for the date of the accident for 18th and Cleveland Ave. The sequence shows that the preemptor was activated by the ambulance at 7:37 p.m. It then shows a second activation occurred at 7:41 p.m. which is for the fire truck that was traveling behind the truck being driven by Coombs. The police report states that the crash had been reported at 1939 or 7:39 p.m.

There is no evidence that as the fire truck entered the intersection, the air horn was sounded. Appellants argued that Brooks, an independent witness, heard the air horn and, therefore, she did not enter the intersection. Appellee argued that what the witness heard was the siren of the ambulance before the accident based upon her recorded statement wherein

Ms. James stated: "Yeah, you heard like a constant siren because the ambulance had just come through and then you hear the other sirens coming." Appellant's truck had no siren.

A second question of fact exists -- whether Coombs reduced his speed prior to the collision. The Canton Fire Department Policy Manual at Vehicle Operations/Security states that during emergency responses, drivers of fire department vehicles shall bring the vehicle to a complete stop under any of the following circumstances:

- a. When directed by a law enforcement officer
- b. Red traffic light
- c. Stop signs
- d. Negative right-of-way intersections
- e. Blind intersections
- f. When the driver cannot account for all lanes of traffic in an intersection

This policy is restated in the City of Canton Vehicle Policies and Procedures:

viii. When approaching a controlled intersection showing a stop sign, red or yellow traffic light, or any obstructed intersection, the vehicle operator will:

- (1) Reduce speed, take foot off accelerator and cover the brake pedal.
- (2) Change siren to a different mode, i.e. yelp or according to local practice
- (3) Bring vehicle to a complete stop, make eye contact with the other vehicle operators, secure one lane at a time and proceed with Due Regard through the intersection and yield to other vehicles if warranted.

After leaving the stationhouse, Coombs told Captain Sacco, who was also aboard the truck, that the siren was not working. Coombs was told by Captain Sacco that he was to slow down to road traffic and use the air horn more to let people know they were coming. Coombs' testimony was that he was going 35-40 mph down Cleveland Ave. when he saw the light was red. His Captain told him not to slow down until they reached the intersection. There is no evidence on either the police report or the fire department's report of any skid marks by the Appellant's vehicle.

The facts in this case, if construed most favorably to Appellee, were that Appellant Coombs was heading to a fire at a vacant building when the siren on the truck quit working. Despite the fact that the fire truck was traveling without a siren, the operators of the truck did not slow down. Coombs knew the intersection was unusual and that the visibility was impaired. He did not stop or even slow down at the red light. The vehicle weighed between 20,000 and 40,000 lbs. Coombs disregarded the safety training and manuals and failed to slow and make sure the intersection was clear. The fire truck proceeded into the intersection at 35-40 miles per hour. This clearly disregarded a known risk—the risk that a car at the intersection would enter the intersection when its light turned green. This risk was compounded by the weight of the vehicle and the rate of speed. The force at impact was deadly. In fact, there is no evidence that the brakes were even applied. This method of operation was contrary to Appellant's training, procedures, and policy manuals and in violation of Ohio statutes setting standards for operation of emergency vehicles on public roadways.

STATEMENT OF THE CASE

The accident in the instant case occurred on July 7, 2007. A Complaint was filed by survivor Grace Burlingame on February 19, 2009 naming the City of Canton, its employee James Coombs II and the Estate of Dale Burlingame, the vehicle's driver. With regard to Appellants, the City of Canton and Coombs, the Complaint alleges that Appellant Coombs' operation of the vehicle was wanton, willful and/or reckless. A motion for summary judgment was filed by Appellants Coombs and the City of Canton. Appellee filed a response and Appellants filed a reply. ~~The Court granted summary judgment in favor of Appellants in an opinion dated April 23, 2010.~~ Appellee filed her Notice of Appeal to the Fifth District Court of appeals on May 18, 2010.

The Estate of Dale Burlingame filed its appeal to the Fifth District Court of Appeals on May 20, 2010. The file was transmitted to the Court of Appeals on June 3, 2010.

The Fifth District Court of Appeals reversed the findings of the trial court on March 21, 2011 and remanded the case for further proceedings. On March 31, 2011, Appellants, the City of Canton and Coombs, moved the Court of Appeals to certify a conflict between this case and cases in the Seventh, Eighth, Ninth, and Eleventh Districts decided in 1999, 2007, 2002 and 1991 respectively. On or about April 15, 2011, the Fifth District Court of Appeals denied that a conflict existed stating that *O'Toole* clarified and defined Ohio law on the issues in question.

Appellants filed their Notice of Appeal to this Court on May 4, 2011 asserting a discretionary appeal on three propositions of law. An amicus brief in support of jurisdiction was filed by the Ohio Municipal League.

ARGUMENT

Appellants' Proposition of Law No. 1:

A violation of internal departmental policy is not relevant to whether the action of an employee of a political subdivision are willful, wanton, or reckless under RC 2744.

Appellants' Proposition of Law No. 1I:

A violation of traffic statutes is not relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless under RC 2744.

Amicus Ohio Municipal League's Proposition of Law No. I:

The alleged violation of internal departmental policy or procedure is irrelevant to the "wanton or reckless conduct exceptions" to Revised Code Chapter 2744 political subdivision and employee tort immunity, set forth in R.C 2744.02(B)(1)(b) and RC 2744.03(A)(6)(b), and, therefore, is not to be considered in determining whether to grant a political subdivision summary judgment.

Response of Appellee To Appellant's Propositions of Law I and II and Ohio Municipal League's Proposition of Law I:

Whether a person's conduct amounts to "recklessness" is based upon the totality of the circumstances of the case – not facts considered in isolation. A violation of various internal policies and/or a statutory duty may provide evidence of reckless conduct where the claimant can establish that the violator acted with a perverse

disregard of the risk and, therefore, it is appropriate for the trial court to consider such violations when determining whether to grant judgment as a matter of law to a political subdivision under the immunity provisions of RC 2744.

When determining whether to grant judgment as a matter of law to a political subdivision under the immunity provisions of RC 2744 the Court must make an initial determination of whether there is sufficient evidence to create an issue of fact regarding whether the actor's conduct was reckless, wanton or willful. This determination is to be made upon a totality of the circumstances – not facts considered in isolation. No one has argued, or is arguing, that a violation of an internal policy or procedure or even a statutory provision is, in and of itself, per se reckless conduct. The finding of the Court of Appeals was simply that violations could be considered as one factor when determining whether the actor's conduct was reckless under RC 2744.03(a)(6)(b). What makes such provisions relevant is that they contribute to the actor's knowledge of risks and consequences. RC 4511.03 provides that an emergency vehicle, when responding to a 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." The Appellant's policy manual provides: "When approaching a controlled intersection showing a stop sign, red light or yellow traffic [sic], or any obstructed intersection the vehicle operator will Bring the vehicle to a complete stop, make eye contact with the other vehicle operators, secure one lane at a time and proceed with Due Regard through the intersection and yield to other vehicles if warranted. " The Canton Fire Department's Policy Incident and Collision Investigation guidelines list collisions at intersections preventable if "the driver failed to completely stop at an intersection controlled by a red control device or stop sign; the driver failed to control the speed so the vehicle could be stopped safely; the driver failed to check cross traffic and wait for all lanes of

traffic to stop or clear before entering the intersection, even if the driver had the right of way; the driver pulled out into the face of oncoming traffic...".

These provisions clearly underscore the importance of stopping at a red light and yielding to traffic when operating an emergency vehicle. The foregoing violations were used as evidence that Appellee Coombs knew that he should stop, or at least proceed cautiously, when approaching an intersection showing a red light and traffic at the intersection. The Fifth District Court explained its limited use of these provisions stating: "violations of traffic statutes and departmental policies are factors a jury may consider in determining whether Coombs' actions were reckless" Opinion paragraph 45. More specifically it noted that:

The question of whether conduct is reckless in the case at bar in relation to whether the probability of harm is great and known to the alleged tortfeasor requires a more substantial analysis. The city cites situations where emergency vehicle drivers were found not to be driving in a wanton or reckless manner, but each situation must be evaluated on its own unique facts. In this case, the circumstances are extreme enough that evaluation of whether the recklessness was great enough to be reckless or wanton misconduct is a question for the trier of fact. Opinion paragraph 53.

The foregoing use of statute and departmental policies and guidelines is in accord with this Court's pronouncement in *O'Toole*, supra, that a violation of various internal policies and/or statutory provisions may be considered relevant as evidence of reckless conduct where the claimant can establish that the violator acted with a perverse disregard of the risk.

The General Assembly did not make the immunity statutes absolute even in circumstances where employees are responding to an emergency. In such instances immunity will not be provided where the employees act in a willful wanton or reckless manner. This statutory scheme presupposes analysis of the facts and circumstances of each case before immunity will be granted. The ruling of the Court of Appeals in this case was based upon the unique facts and circumstances of this case, which included, but was not limited to, violations of

traffic laws and departmental policy. Such analysis is in accord with this Court's analysis in *O'Toole* and does not present a question of great public interest. Accordingly, Appellee requests that Appellants' request for discretionary appeal be denied.

Appellants' Proposition of Law No. 111:

A firefighter on an emergency call is entitled to immunity and not reckless despite driving through a red light when lights and air horn are activated, and he is driving less than five miles per hour over the speed limit, in daylight, on dry roads, and in light traffic.

Appellee's Response to Proposition of Law No. 111:

The immunity granted to firefighters under RC 2744 is not absolute and where there is evidence that the firefighter acted with perverse disregard of a known risk the determination of immunity should be based upon a totality of the circumstances and not limited to the facts set forth in Appellants' proposition of law No. III. Where there is evidence that the firefighter acted with a perverse disregard of a known risk a question of fact may be created with regard to recklessness and the Court may refuse to grant summary judgment on the issue of immunity.

It is important to note that the facts singled out in Appellants' Proposition of Law III are only those favorable to Appellants. Proposition of Law No. III disregards the mandates of Rule 56 of the Ohio Rules of Civil Procedure which requires that the evidence be construed in a light most favorably to the nonmoving party. Civ. Rule 56(C), *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341. Although Appellants argue that Appellees' claims were "threadbare," the evidence in this case, when construed most favorably to Appellee, clearly create a case for "recklessness" as set forth in the exceptions to immunity delineated in RC 2744. The facts presented are that Appellants were heading to a fire at a vacant building when the siren on the truck quit working. Despite the fact that they were traveling without a siren, the operators of the truck did not slow down. They knew the intersection was unusual and that the visibility was impaired. Appellant Coombs did not stop at the red light or even slow down. The fire truck vehicle weighed between 20,000 and 40,000 lbs. They disregarded the safety training and

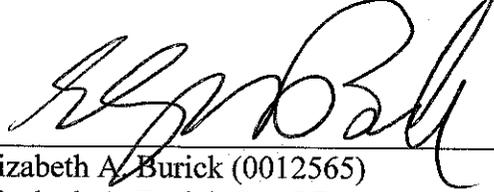
manuals and failed to slow and make sure the intersection was clear. The truck proceeded into the intersection at 35-40 miles per hour. Appellant Coombs disregarded a known risk—the risk that the car at the intersection would enter the intersection when its light turned green. This risk was compounded by the weight of the vehicle and the rate of speed. The force at impact was deadly. In fact, there is no evidence that the brakes were even applied. This method of operation was contrary to their training, procedures, and policy manuals and in violation of Ohio traffic statutes setting standards for operation of emergency vehicles on public roadways.

It was upon a review of all of these facts, and upon reviewing them in a light most favorable to the nonmoving party, that the Fifth District Court of Appeals found that a genuine issue material fact existed regarding the issue of recklessness and that, therefore, Defendants/Appellants were not entitled to judgment as a matter of law on the issue of immunity. The Fifth District Court of Appeals properly applied Rule 56 of the Ohio Rules of Civil Procedure and the law as set forth in *O'Toole*, supra to the facts of the case at bar. Accordingly, Appellee respectfully requests that this Court decline to accept jurisdiction over the instant case on appeal.

CONCLUSION

As there is already a rule in place governing the relevancy of internal policies and procedures and statutory authority in cases involving the immunity granted to political subdivisions and exceptions thereto as set forth in Ohio Revised Code Chapter 2744, this case is

not one of public or great general interest. As such, Appellee respectfully submits that Appellants' application for jurisdiction for further review of this matter should be denied.



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