

ORIGINAL

IN THE SUPREME COURT OF OHIO

GRACE BURLINGAME,)	Case No. 11-0742
)	
Plaintiff-Appellee,)	On Appeal from the Stark County
)	Court of Appeals, Fifth Appellate
vs.)	District
)	
CITY OF CANTON, et al.,)	Court of Appeals
)	Case No.: 2010-CA-124 &
)	2010-CA-130
Defendants-Appellants)	

**MEMORANDUM OF DEFENDANT-APPELLEE, EVA FINLEY, ADMINISTRATOR
OF THE ESTATE OF DALE BURLINGAME, DECEASED, OPPOSING
JURISDICTION OF THE SUPREME COURT OF OHIO**

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<p>FILED</p> <p>JUN 03 2011</p> <p>CLERK OF COURT SUPREME COURT OF OHIO</p>

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<p>RECEIVED</p> <p>JUN 03 2011</p> <p>CLERK OF COURT SUPREME COURT OF OHIO</p>
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**EXPLANATION OF WHY THIS IS NOT A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

Appellants urge that their case is one of public or great general interest because it presents this Court with the unique opportunity to state that the violation of a departmental policy or rule is not relevant in determining whether an employee's conduct has been willful, wanton or reckless. Yet, just three years ago, in *O'Toole v. Denihan*, (2008) 118 Ohio St.3d 374, this Court determined that the violation of an internal policy may be relevant to such an inquiry.

In their Memorandum in Support of Jurisdiction, Appellants argue that “[o]ther¹ Ohio courts have refused to consider departmental rules in determining the issue of immunity,” citing various Seventh, Eighth, Ninth and Eleventh District cases. All of the various appellate district cases cited by Appellants, however, were decided *before* this Court's controlling decision in *O'Toole, supra*. Therefore, since this Court recently addressed the very issue raised by Appellants, there is no compelling reason why this Court should now accept jurisdiction of this case.

STATEMENT OF THE CASE AND FACTS

This lawsuit arises out of a fatal accident that occurred on July 4, 2007 when a City fire truck, operated by City employee James R. Coombs, II accelerated through a red light at the intersection of 18th Street, N.W. and Cleveland Avenue, N.W. in the City of Canton and collided with a car driven by Dale Burlingame. Prior to the collision that caused fatal injuries to both Grace Burlingame and Dale Burlingame, Mr. Burlingame was stopped at a red light at the intersection. When his light turned green, Mr. Burlingame slowly pulled his vehicle into the intersection to make a left hand turn from 18th Street in order to drive north along Cleveland Avenue. His vehicle was crushed by the 20-ton fire truck that was speeding in a southerly

¹ *i.e.* other than the Fifth District Court of Appeals.

direction along Cleveland Avenue and that proceeded through the red light governing traffic at the intersection of 18th and Cleveland Avenue². Mr. Burlingame, a belted driver, was killed instantly; Mrs. Burlingame, a belted passenger in the right front seat, sustained serious personal injuries and later died from those injuries.

The City's policies and procedures governing the operation of a Fire Department vehicle responding to an emergency require an operator to assume a "non-emergency status" when an emergency vehicle fails to operate normally. In a "non-emergency status," the operator must stop at a red light and wait for it to turn green before proceeding through the intersection. On July 4, 2007, the fire truck's siren *stopped working* shortly after it left the Fire Station. By the time he reached the intersection of Cleveland Avenue and 18th Street, Coombs had *actual knowledge* that his siren was not working. Nevertheless, when Coombs saw the red light at the intersection, despite the Department's policy requiring him to assume a "non-emergency status" and stop at the red light, he accelerated through the red light and caused the deaths of Mr. and Mrs. Burlingame.

Following the completion of discovery, the City of Canton and Coombs moved for summary judgment. The trial court granted summary judgment in favor of Defendants Coombs and the City of Canton, finding that they were entitled to immunity from liability. However, the Fifth District correctly reversed, holding that a "[v]iolation of departmental policy or of traffic laws may be a factor in determining if an employee of a political subdivision is entitled to immunity under R.C. 2744." Appellants thereafter asked the Fifth District Court of Appeals to certify its decision to the Supreme Court of Ohio because it was in conflict with other decisions

² Mr. Burlingame's vehicle, stopped at the intersection of 18th Street and Cleveland Avenue, would have been visible to the approaching fire truck. Furthermore, because Mr. Burlingame was to the right of the approaching fire truck, he would have, when so permitted by the traffic light, been moving into the path of the fire truck regardless of whether he intended to turn right, left or to proceed straight through the intersection.

from the Seventh, Eighth, Ninth and Eleventh District Courts of Appeals. The Fifth District Court of Appeals refused to certify the case as being in conflict because it relied upon the Supreme Court decision in *O'Toole v. Denihan, supra* as the basis of its decision to reverse the Order granting summary judgment in favor of the Defendants.

On May 4, 2011, Appellants City of Canton and Coombs filed their Notice of Appeal to the Supreme Court of Ohio, along with their Memorandum in Support of Jurisdiction.

ARGUMENT

I. The Supreme Court Of Ohio Recently Determined That A Departmental Policy May, Under The Totality Of The Circumstances, Be Relevant In Assessing Whether An Employee Of A Political Subdivision Acted Wantonly or Recklessly Within The Meaning Of R.C. 2744.03(A)(6)(b) And R.C. 2744.02(B)(1)(b)

Ohio Revised Code 2744.02(B)(1)(b) grants immunity to *political subdivisions* if “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.” Furthermore, an *employee* of a political subdivision is also entitled to immunity from liability for personal injury or wrongful death unless his operation of the emergency vehicle was performed with “malicious purpose, in bad faith, or in a wanton or reckless manner.” R.C. 2744.03(A)(6)(b).

Appellants maintain that the violation of a code section, traffic law or internal policy³ of a political subdivision should *never* be considered in determining whether an employee’s action is wanton or reckless. Appellants’ argument expressly contradicts a recent Supreme Court of Ohio decision on this very issue:

...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 a perverse disregard of the risk....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-Munro’s recklessness, and the record reflects that George-Munro did not perversely ignore the risk, the violations do not create a genuine issue of material fact regarding this issue of reckless. (Emphasis added.)

³ Appellants’ threat that the *O’Toole* decision will cause it to eliminate all departmental policies (which theoretically exist for the safety of the public as well as employees of the political subdivision), is myopic and counterintuitive. It seems wildly improbable that the elimination of safety policies will lead to fewer lawsuits, a safer society or more responsible government. The immunities provided by R.C. 2744.02 and 2744.03 already provide a mighty shield to political subdivisions and their employees.

O'Toole v. Denihan, 118 Ohio St. 3d 374, 390.

In *O'Toole, supra*, this Court recognized that the violation of an internal policy is sometimes relevant to the issue of whether an employee was reckless, in the ultimate determination of the applicability of political subdivision immunity. In fact, this Court went further and defined exactly when such a violation is relevant to the issue of recklessness. If “a claimant can establish that the violator acted with *a perverse disregard of the risk*,” this Court acknowledged that the violation of an internal policy may rise to the level of reckless conduct. *Id.*⁴ More specifically, if a claimant can produce evidence that the violator had “*an accompanying knowledge that the violation ‘will in all probability result in injury,’*”⁵ then the violation of an internal policy may be relevant in determining the employee’s recklessness. *Id.*

Although Appellants argue in their Memorandum in Support of Jurisdiction that several Ohio appellate districts have refused to consider departmental rules in determining the issue of an employee’s recklessness or wantonness, Appellants fail to mention that the appellate decisions they rely upon predate this Court’s 2008 decision in *O'Toole v. Denihan, supra*. Contrary to Appellants’ Proposed Proposition of Law, this Court has already (and only very recently) determined that a violation of internal department policy *may* be relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless, if the employee acted with “a perverse disregard of the risk.” The Fifth District Court of Appeals, in reversing the judgment of the lower court, determined that there was a genuine issue of fact whether the operator of the fire truck knew that, in all probability, his conduct, including his violation of a departmental policy, would result in serious injury to innocent users of the highway. That decision is perfectly consistent with controlling law.

⁴ Emphasis added, at p. 390.

⁵ Emphasis added, at p. 390.

CONCLUSION

Appellants claim there is a conflict among the appellate districts as to whether or not the violation of an internal policy may be considered in determining whether an employee acted recklessly. Indeed, if there ever were such a conflict, it no longer exists in light of this Court's recent pronouncement. Consistent with this Court's decision in *O'Toole v. Denihan*, the Fifth District correctly held that, considering all of the evidence in this case, the operator's violation of a departmental policy raises a jury issue on his recklessness in the operation of the fire truck.

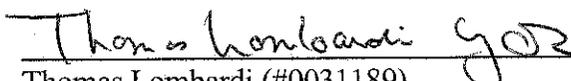
For the foregoing reasons, this Court should refuse to accept jurisdiction of this case.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Defendant-Appellee, Eva Finley, Administrator of the Estate of Dale Burlingame, Deceased, Opposing Jurisdiction of the Supreme Court of Ohio was sent by regular U.S. mail to the following this 2nd day of June, 2011:

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