

IN THE SUPREME COURT OF OHIO

GRACE BURLINGAME, et al.,	:	Case No. 11-0742
Plaintiffs-Appellees	:	On Appeal from the Fifth District
	:	Court of Appeals, Stark County, Ohio
	:	
	:	Court of Appeals
v.	:	Case No. 2010-CA-00124 and
	:	Case No. 2010-CA-00130
ESTATE OF DALE BURLINGAME,	:	
	:	
and	:	
	:	
CITY OF CANTON, et al.,	:	
Defendants-Appellants	:	

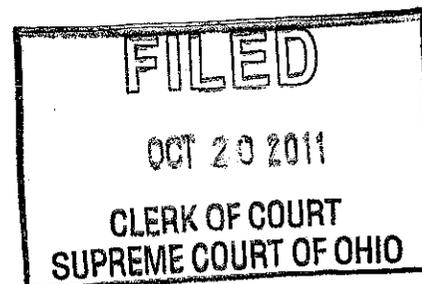
**BRIEF OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF THE DEFENDANTS
CITY OF CANTON AND JAMES R. COOMBS**

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INTRODUCTION

The Ohio Municipal League (“League”), as amicus curiae on behalf of the City of Canton (“City”), urges this Court to reverse the decision of the Fifth District Court of Appeals in *Grace Burlingame v. Estate of Dale Burlingame, et al*, 2011-Ohio-1325.

Ohio law provides immunity from liability to a political subdivision when one of its fire department vehicles is involved in an accident and: “[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).

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.”

Despite the clear statutory standards, the Fifth District, in *Burlingame*, held that an alleged violation of departmental policy and an alleged violation of traffic laws “are factors a jury may consider in determining whether” the conduct of the defendants rose to the level of wanton or reckless. *Burlingame* at ¶ 45. According to the Fifth District, because the plaintiffs have alleged the departmental policy violation and the traffic law violation, the City and its employee, James R. Coombs, II (“Coombs”), the driver of a City fire truck, are not entitled to summary judgment and immunity from liability arising out of an accident between the City’s fire truck and plaintiffs’ decedents, Grace and Dale Burlingame.

The Fifth District's conclusion is in direct conflict with the "malicious purpose, in bad faith, or in a wanton or reckless manner" standard, that has been legislatively established by the General Assembly, and with the definition of "recklessness" that has been previously applied by this Court.

This Court, for the reasons stated herein, should reverse the decision of the Fifth District and hold that an alleged violation of departmental policies and procedures, and an alleged violation of traffic laws, are 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). In order to reach the threshold that has been established by the legislature, a plaintiff must establish egregious conduct on the part of the driver of a political subdivision's emergency vehicle. The facts that conduct violated either a departmental policy or a traffic law cannot be used to reach that threshold.

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, on behalf of its members and other political subdivisions that are similarly situated, have an interest in the proper application of political subdivision immunity, as established by the Ohio General Assembly, and in ensuring that it is not diminished by the improper application of the law. This is particularly true for political subdivisions that self-insure, given the decrease in revenues that have been experienced by those political subdivisions over the past several years. To the extent those revenues are to be paid to plaintiffs, or expended in the defense claims by plaintiffs, when no recovery is authorized by law, that money is not available for the essential governmental services that are provided by political subdivisions, including, but not limited to, police, fire and EMS services.

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 Merit Brief filed by the Appellant, City of Canton.

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.

R.C. Chapter 2744 Three Tiered Analysis

The following three tiered analysis is used to determine if an Ohio political subdivision is immune from tort liability:

R.C. Chapter 2744 sets out the method of analysis, which can be viewed as involving three tiers, for determining a political subdivision's immunity from liability. First, R.C. 2744.02(A)(1) sets out a general rule that political subdivisions are not liable in damages. In setting out this rule, R.C. 2744.02(A)(1) classifies the functions of political subdivisions into governmental and proprietary functions and states that the general rule of immunity is not absolute, but is limited by the provisions of R.C. 2744.02(B), which details when a political subdivision is not immune. Thus, the relevant point of analysis (the second tier) then becomes whether any of the exceptions in R.C. 2744.02(B) apply. Furthermore, if any of R.C. 2744.02(B)'s exceptions are found to apply, a consideration of the application of R.C. 2744.03 becomes relevant, as the third tier of analysis.

Greene County Agricultural Society v. Liming (2000), 89 Ohio St.3d 551, 556-557.

Exception To R.C. Chapter 2744 Immunity for the Negligent Operation

of any Motor Vehicle

R.C. 2744.02(B)(1) provides: “[e]xcept 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.” Political subdivisions, therefore, *are* liable for claims caused by the negligent operation of a motor vehicle by an employee, *unless* a statutory exception applies, as further discussed below.

Responding to an Emergency is a Defense to a Claim of Negligence

R.C. 2744.02(B)(1)(b) provides that the following is a defense to the liability imposed for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle: “[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.” A political subdivision, therefore, is granted a defense to liability caused by the negligent operation of a motor vehicle when an employee of a fire department is responding to an emergency and the employee’s conduct was not willful or wanton misconduct.

Employee Liability and Immunity

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.” The employee of a political subdivision, therefore, is

also entitled to immunity unless the employee's conduct was done with a malicious purpose, in bad faith, or wanton or reckless.

Liability Standards Established by the General Assembly

The "willful or wanton misconduct" standard was established by the General Assembly as an exception to R.C. Chapter 2744 immunity for political subdivisions, and the "acts or omissions with malicious purpose, in bad faith, or in a wanton or reckless manner" standard was established by the General Assembly as an exception to R.C. Chapter 2744 immunity for employees of a political subdivision. These two standards are "the functional equivalent" of each other. *DeMartino v. Poland Local School District*, 2011 WL 1118480, at ¶54. The "willful or wanton misconduct" standard and the "acts or omissions with malicious purpose in bad faith, or in a wanton or reckless manner standard," therefore, for purposes of this brief, will be referred to herein collectively as the "wanton or reckless manner" standard.

This Court has held that the standard for demonstrating wanton misconduct is high and that "mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor. Such perversity must be under such conditions that the actor must be conscious that his conduct *will in all probability result in injury.*" *Fabrey v. McDonald Village Police Department* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31, quoting in part *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97, 269 N.E.2d 420. (Emphasis added.)

This Court, in *O'Toole v. Denihan* (2008), 188 Ohio St.3d 374, 2008-Ohio-2574, defined recklessness as requiring "something more than mere negligence" and, quoting *Fabrey v. McDonald Village Police Dept.*, concluded "the actor must be conscious that his conduct *will in all probability result in injury.*" *O'Toole* at ¶ 74. (Emphasis added).

The Fifth District's Standard

The Fifth District, noting that “policies are designed to make emergency responses safer for the public,” concluded that departmental policies are factors a jury may consider in determining whether an employee’s conduct was reckless. *Burlingame* at ¶45. 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 in all probability result in injury** and death to the Appellants.

There is no such evidence to support such a conclusion, and the Fifth District has substituted alleged departmental violations and alleged traffic law violations for such evidence to reach its conclusion. Coombs “was driving to a house fire with flashing lights and air horn (the siren became disabled shortly after leaving the station) on a clear day, in light traffic, through a red light that he thought was green, at no more than five miles per hour over the speed limit, when his fire truck struck a car.” *Appellants’ Memorandum In Support of Jurisdiction*, page 1. 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.

Policies and procedures are enacted for many reasons, including public safety, as noted by the Fifth District. Policies and procedures may also be enacted for administrative purposes and fiscal integrity. A conscious decision by an employee to violate a departmental policy or procedure does not guarantee that injury **will in all probability** occur. Public safety work, including emergency response work by fire personnel, often requires immediate responses in inherently dangerous situations. 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, a result in a determination that reckless conduct occurred. Department policies and procedures should not be relevant to the wanton and reckless manner analysis.

O'Toole

Appellees, however, argue that this Court's decision, in *O'Toole*, "determined that a violation of internal departmental 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" and "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." *Memorandum of Defendant-Appellee, Eva Finley, Administrator of the Estate of Dale Burlingame, Deceased, Opposing Jurisdiction of the Supreme Court of Ohio*, page 5, and *Memorandum of Plaintiff/Appellee, Grace Burlingame, Opposing Jurisdiction of the Supreme Court of Ohio*, page 12.

The *O'Toole* decision, however, concluded that the claimant's "final attempt to maneuver" around immunity status afforded to the employee failed, as the employee's alleged violation of Ohio Administrative Code and internal policies enacted by the Cuyahoga County Department of Children and Family Services did not raise to the level of recklessness conduct as the claimant could not establish a perverse disregard of the risk. *O'Toole* at ¶ 92.

The *O'Toole* decision, which related to the alleged violation of departmental policies and procedures, quotes the following from a Ninth District Court of Appeals case: "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 departmental procedure is

irrelevant to the issue of whether appellees' conduct constituted willful or wanton misconduct." *O'Toole* at ¶ 92, citing *Shalkhauser v. Medina* (2002), 148 Ohio App.3d 41, 51, 772 N.E.2d 129. (This conclusion, in *Shalkhauser*, was reached despite the fact that the claimant had witnesses who testified that the employee violated the police department's fresh-pursuit policy.)

Violation of a departmental policy or procedure, as this Court noted in *O'Toole*, is not a perverse disregard of risk. A perverse disregard of risk, therefore, must be found absent any violation of internal departmental policies or procedures, in order for the conduct of a political subdivision employee to rise to the level of recklessness. A perverse disregard of risk incorporates this Court's "definition of 'recklessness'" and, therefore "the actor must be conscious that his conduct ***will in all probability result in injury.***" *O'Toole* at ¶ 92, *O'Toole* at ¶ 74 (Emphasis added.)

This is a high standard and requires a deliberate and conscious decision to create conditions that ***will in all probability*** injure, harm, or kill another person or persons. A perverse disregard of risk would occur in a circumstance where a police officer, voluntarily, with deliberate intention, and knowing that his conduct ***will in all probability result in injury***, shoots at an unarmed suspect who has his hands in the air and is making no threatening gestures. This conduct would also likely violate departmental policies against the excessive use of force, and is likely a criminal act, but it is the willful and wanton conduct that is analyzed, not whether a departmental policy or law prohibits such conduct.

A perverse disregard of risk would also occur in a circumstance where the driver of a fire truck, on an emergency alarm, sees a group of children crossing the street and makes a deliberate and conscious decision to speed up, knowing that such conduct ***will in all probability result in injury or death.***

As egregious as these examples may be, they demonstrate the serious and extreme conduct that must occur in order for that conduct to rise to the level of the wanton and reckless standard.

As previously indicated, there is no evidence that Coombs engaged in conduct knowing that his conduct *would in all probability result in injury or death* to the Appellants' decedents. In the absence of such evidence, "evidence that policies have been violated demonstrates negligence at best" and, therefore, is irrelevant. *O'Toole* at ¶ 92.

Legislative Intent

The General Assembly enacted Chapter 2744 in 1985 and stated: "[t]he reason for such necessity is that the protections afforded to political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health and safety services for their residents." Am.Sub.H.B. No. 176, Section 8.

This court has recognized that the General Assembly's purpose in enacting Chapter 2744 "is the preservation of the fiscal integrity of political subdivisions." *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 453, 639 N.E.2d 105.

The League respectfully requests that this Court consider the negative impact that a lower standard of recklessness and/or perverse disregard of the risk will have on the fiscal integrity of political subdivisions (particularly those that are self-insured) and their ability to continue to provide operations and services necessary to ensure the public peace, health and safety of residents.

Lowered Standards

The final comment to be made on including the internal policies of political subdivisions in an analysis of their liability is the perverse incentive it will create. Political subdivisions will be incented to minimize the guidance they give emergency personnel through setting high internal standards. If the failure to follow a detailed operational policy can impose liability on a municipality or an employee if it is violated, irrespective of the surrounding facts, the political subdivision will have some incentive to minimize that standard.

This unintended consequence buttresses the League's position that departmental policies should be irrelevant to the liability analysis. The focus should be exclusively on the conduct of the employee, and whether the conduct rises to the level of willful and wanton conduct, or not. A measurement of the conduct based upon what a departmental policy has to say about the behavior does not provide appropriate guidance to the court in this evaluation, and consequently the policy should not be used as a unit of measurement.

Proposition of Law No. 2: 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 R.C. 2744.

The General Assembly did not include an exception to the immunities provided by R.C. 2744.02(B)(1)(b) and R.C. 2744.03(A)(6)(b) for violation of a traffic statute by a member of a fire department responding to an emergency alarm.

R.C. 2744.02(B)(5) provides “*** [c]ivil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be

sued, or because that section uses the term ‘shall’ in a provision pertaining to a political subdivision.”

This Court, in *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities* (2004), 102 Ohio St.3d 230, 809 N.E.2d 2, held that, in the absence of a Revised Code section expressly imposing civil liability for failure to perform certain duties, R.C. 2744.02(B)(5) “prohibits construing liability to exist solely because a statute imposes a responsibility or mandatory duty upon a political subdivision.” *Estate of Ridley* at ¶ 24.

The Fifth District, however, in direct conflict with R.C. 2744.02(B)(5), held that: “R.C. 4511.041 provides traffic laws do not apply to a driver of an emergency vehicle while responding to an emergency and gives immunity from prosecution for violating traffic laws. ***R.C. 4511.041 is a traffic law and does not provide immunity for civil liability for torts.***” *Burlingame* at ¶40 (Emphasis added.) The Fifth District then went on to conclude that violation “of traffic laws 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.

Contrary to the Fifth District’s articulation of the rule, a grant of immunity for liability from the alleged violation of a specific statute is not required. Immunity is the general rule as granted in Section 2744.02(A), which forms the first tier of analysis pursuant to *Greene County Agricultural Society, supra*. Civil liability, under R.C. 2744.02(B)(5), cannot be construed to exist under another section of the Revised Code unless such civil liability is ***expressly imposed on the political subdivision***. R.C. 4511.041 does not impose such liability, and no other section of the Revised Code imposes liability on political subdivisions for alleged traffic violations. Consequently, the lower court failed to follow the Chapter 2744 statutory framework and should be reversed.

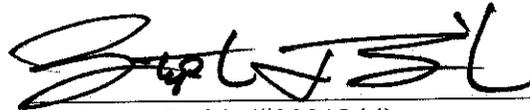
Any alleged violation of a traffic statute by Coombs, therefore, is irrelevant to a decision determining whether to grant a political subdivision summary judgment, in the absence of the imposition of civil liability by the statute itself.

CONCLUSION

The deaths of Appellants' decedents were unfortunate. 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.

Based upon the foregoing, the League respectfully requests this Court to reverse the judgment of the lower court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae the Ohio Municipal League In Support of the Defendants the City of Canton and James R. Coombs* has been sent via regular U.S. mail, postage pre-paid this ____ day of October, 2011 to:

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