ORIGINAL

Case No. 2011-0742

In The Supreme Court of Ohio

Appeal from the Court of Appeals
Fifth Appellate District
Stark County, Ohio
Case Nos. 2010-CA-124 & 2010-CA-130

GRACE BURLINGAME, ET AL.,
Plaintiffs-Appellees,

v.

CITY OF CANTON, ET AL.,
Defendants-Appellants.

FILED
OCT 24 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Merit Brief of the Appellants, City of Canton and James R. Coombs II

KEVIN R. L'HOMMEDIEU (0066815)
(Counsel of record)
KRISTEN BATES AYLWARD (0030824)
Canton Law Department
218 Cleveland Avenue, S.W.
Canton, Ohio 44701-4218
330.489.3251; Fax: 330.489.3374
kevin.lhommedieu@cantonohio.gov
Attorney for the appellants,
city of Canton and James R. Coombs

ELIZABETH BURICK (0012565)
1428 Market Avenue, North
Canton, Ohio 44714
330.456.3200
Attorney for the appellee,
Grace Burlingame

ORVILLE R. REED III (0023522)
Buckingham, Doolittle & Burroughs, LLP
3800 Embassy Parkway, Suite 300
Akron, Ohio 44333
330.376.5300; Fax: 330.258.6559
oreed@bdblaw.com
Attorney for the appellee, Eva Finley,
Administratrix of the Estate of Dale
Burlingame

RECEIVED
OCT 24 2011
CLERK OF COURT
SUPREME COURT OF OHIO

THOMAS J. LOMBARDI
101 Central Plaza, South, Suite 900
Chase Tower
Canton, Ohio 44702
330.456.8389
Attorney for the appellee, Eva Finley, Administratrix of the Estate of Dale Burlingame

STEVEN L. BYRON
(Counsel of record)
REBECCA K. SCHALTENBRAND
Schottenstein Zox & Dunn Co., LPA
4230 Willoughby, Ohio 44094
440.951.2303; Fax: 216.621.5341
sbyron@szd.com

JOHN GOTHERMAN
Ohio Municipal League
175 S. Third Street, #510
Columbus, Ohio 43215-7100
614.221.4349; Fax: 614.221.4390
jgotherman@columbus.rr.com

STEPHEN J. SMITH
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, Ohio 43215
614.462.2800; Fax: 614.462.5135
ssmith@szd.com
Attorneys for Amicus Curiae, The Ohio Municipal League

Table of Contents

Table of Authorities ii

Statement of the Case and Facts. 1

Argument. 4

1. First Proposition of Law. 4

   A violation of an internal department policy is not relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless under R. C. 2744.

2. Second Proposition of Law. 11

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

Conclusion. 13

Certificate of Service. 16

Appendix

Notice of Appeal (May 4, 2011). A-1

Judgment entries of the Fifth Appellate District (March 21, 2011). A-5

Opinion of the Fifth Appellate District. A-7

Judgment entry denying Canton's Motion to Certify a Conflict (April 15, 2011). A-29

Judgment entry of trial court granting summary judgment (April 23, 2010). A-32

Table of Authorities

Canton v. Burlingame
5th Dist. Nos. 2010-CA-124 & 2010-CA-130, 2011-Ohio-1325. . . .passim

Byrd v. Kirby
10th Dist. No. 04AP-451, 2005-Ohio-1261 13

Cunningham v. City of Akron
9th Dist. No. 22818, 2006-Ohio-519. 13

DeMartino v. Poland Local School Dist.
11th Dist. No. 10 MA 19, 2011-Ohio-1466. 4

Elsass v. Crocket
9th Dist. No. 22282, 2005-Ohio-2142. 5

Fabrey v. McDonald Village Police Department
70 Ohio St.3d 351, 1994-Ohio-368. . . . . 5, 6

Horton v. City of Dayton
(1988), 53 Ohio App.3d 68. 5

Jackson v. Poland Township
(Sep. 29, 1999), 7th Dist. Nos. 96 CA 261, 97 CA 13, 98 CA 105. 5

O'Toole v. Denihan
188 Ohio St.3d 374, 2008-Ohio-2574. . . . . 4, 5, 6, 12

Rogers v. DeRue
(1991), 75 Ohio App.3d 200. 5

Sanders v. Stover
8th Dist. No. 89241, 2007-Ohio-6202. 5

Scott v. Edinburg
346 F.3d 752 (7th Cir. 2003). 7

Smith v. Freland
954 F.2d 343 (6th Cir. 1992). 7, 9

Shalkhouser v. Medina
148 Ohio App.3d 41, 2002-Ohio-222. 5

Tanberg v. Sholtis
410 F.3d 1151 (10th Cir. 2005). 9

Thompson v. City of Chicago
472 F.3d 444 (7th Cir. 2006). 7

Thompson v. McNeill
(1990), 53 Ohio St.3d 102. 13

Virginia v. Moore
553 U.S. 164 (2008). 7

Wilson v. Stark Cty. Dept. of Human Servs.
(1994), 70 Ohio St.3d 450. 10

Wren v. United States
517 U.S. 806 (1996). 7, 8

Ybarra v. Vidra
6th Dist. No. WD-04-061, 2005-Ohio-2497. 13

Statutes and other authorities

42 U. S. C. § 1983 . . . . . 7, 9

R. C. 2744.01. 5

R. C. 2744.02. . . . . .4, 6, 11, 12

R. C. 2744.03. . . . . .4, 6

R. C. 4511.03. . . . . .3, 11, 12

Am. Sub. H.B. No. 176, Section 8, 141 Ohio Laws, Part I, 1733. 10

Statement of the Case and Facts

On July 4, 2007 at about 7:30 p.m., city of Canton firefighters were dispatched to a house fire.[1] James Coombs and two other firefighters, including a captain, rushed to the pumper truck.[2]

Mr. Coombs, who was driving, immediately activated the truck's lights and sirens.[3] But the siren stopped working shortly after they left the station.[4] When Mr. Coombs could not reactivate the siren, the captain ordered him to slow down and use the air horn to alert motorists, which he did.[5]

As the fire truck continued south toward the 18th Street intersection, it was daylight, the pavement was dry, and the traffic was light.[6] Mr. Coombs never exceeded 40 miles per hour in a 35 mile-per-hour zone.[7] The truck's emergency lights were activated and Mr. Coombs was "continuously" and "repeatedly" activating the air horn.[8] In fact, the air horn was so loud that a witness waiting at the 18th Street intersection "knew" that a safety vehicle

---

[1] Coombs's affidavit, ¶ 1.

[2] Coombs's deposition ("Dep."), pp. 7: 7–15; 24: 17–20.

[3] Dep., pp. 7: 7–9; 35: 19–24.

[4] Dep., pp. 32: 3–4; 39: 4–7.

[5] Dep., p. 42: 9–19.

[6] Dep., pp. 29: 5–6; 47: 23–24.

[7] Dep., p. 47: 15–22.

[8] Dep., p. 49: 2–16.

"must be approaching" and that it was not safe to enter the intersection, even on a green light.[9]

Mr. Coombs thought he saw his light at the 18th Street intersection turn green. But it didn't, it was red, and a van that had been stopped for the red light entered the intersection from the west.[10] Mr. Coombs saw the van pull into the intersection and tried to avoid hitting it by applying the brakes and swerving left of center, but he was unsuccessful and hit it on the driver's side.[11] The driver, Dale Burlingame, died at the scene, and his wife Grace, who was in the passenger's seat, was injured.[12]

Mrs. Burlingame sued Mr. Coombs and Canton in the Stark County Court of Common Pleas, alleging that they were willful, wanton, and reckless. She also sued her husband's estate, alleging that Mr. Burlingame was negligent. His estate denied that allegation and cross-claimed against Canton and Coombs, alleging the same claims as Mrs. Burlingame.

Canton and Coombs requested summary judgment, arguing that they were entitled to immunity under the undisputed facts. Mrs. Burlingame and Mr. Burlingame's estate opposed Canton's motion, arguing that Mr. Coombs's alleged violation of departmental policies and a traffic statute should be considered in determining if he was willful, wanton, or reckless. Specifically,

---

[9] Brooke James's affidavit, ¶ 5.

[10] Dep., p. 49: 2–16; 51: 8–10; James's affidavit, ¶ 5.

[11] Dep., p. 49: 1–3; 52: 22–25; 71: 9–10.

[12] Dep., p. 54: 20–22.

they relied on R. C. 4511.03, which provides that a driver of an emergency vehicle responding to an emergency call shall slow down for a red light and proceed cautiously past "with due regard for the safety of all persons using the street." Also, they relied on a Canton Fire Department policy that requires drivers of fire trucks to come to a complete stop at a red light.

The trial court rejected this argument, holding that R. C. 4511.03 is a traffic statute, not an immunity statute. The trial court further held that an alleged violation of a departmental policy "in no way strips [Coombs] or Canton of its immunity," and moreover, that "Ohio courts have repeatedly held that violations of internal departmental policy are not relevant ...."[13] Finally, the court held that though the results were tragic, "the evidence demonstrates that Coombs's actions were negligent at best" and therefore he and Canton were entitled to immunity.[14]

But the Fifth District reversed, holding "we do not agree" with the cases cited by the trial court and decided that violating a departmental policy or traffic law is relevant in determining if Coombs or Canton were willful, wanton, or reckless.[15] The court then discussed at length the fundamental right

---

[13] Apx. at A-35.

[14] Apx. at A-36.

[15] *Burlingame v. Canton*, 5th Dist. Nos. 2010-CA-124 & 2010-CA-130, 2011-Ohio-1325, at ¶ 41.

of a jury trial and concluded that the Burlingames should "have an opportunity to present their case to a jury who will decide whether Coombs was reckless."[16]

Canton and Coombs now appeal.

Law and Argument

A. First Proposition of Law

A violation of an internal department policy is not relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless under R.C. 2744.

A political subdivision is immune from liability under R. C. 2744.02(B)(1)(b) if "a member of a municipal corporation fire department ... was operating a motor vehicle while engaged in ... answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct." Similarly, under R. C. 2744.03(A)(6)(b) employees of political subdivisions are immune unless their "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]" Those standards are "functionally equivalent" to one another.[17]

This Court has held that an actor's conduct is in reckless disregard of the safety of others if he perversely disregards a known risk.[18] The actor "must

---

[16] *Burlingame*, 2011-Ohio-1325, at ¶ 62.

[17] E.g., *DeMartino v. Poland Local School Dist.*, 11th Dist. No. 10 MA 19, 2011-Ohio-1466, at ¶ 54.

[18] *O'Toole v. Denihan*, 188 Ohio St.3d 374, 2008-Ohio-2574, at ¶ 73.

be conscious that his conduct will in all probability result in injury."[19]

In cases involving emergency driving, Ohio's courts have made this determination by limiting their analysis to the *facts* surrounding the accident, such as the speed of the emergency vehicle, the speed limit, whether lights and sirens were activated, road conditions, available light and time of day, weather, obstructions, and volume of traffic.

At the same time, Ohio's courts have declined to consider alleged violations of internal departmental policies in determining whether a political subdivision or its employee was willful, wanton, or reckless. For example, in *Shalkhouser v. Medina*, the Ninth District held that a "violation of an internal departmental procedure is irrelevant to the issue of whether appellee's conduct constituted willful or wanton misconduct."[20] In this, the Ninth District is not alone. The Seventh,[21] Eighth,[22] and Eleventh Districts agree.[23]

---

[19] *O'Toole*, 188 Ohio St.3d 374, at ¶ 73, quoting *Fabrey v. McDonald Village Police Department*, 70 Ohio St.3d 351, 356, 1994-Ohio-368.

[20] 148 Ohio App.3d 41, 2002-Ohio-222, at ¶ 41; See also, *Elsass v. Crocket*, 9th Dist. No. 22282, 2005-Ohio-2142.

[21] *Jackson v. Poland Township* (Sep. 29, 1999), 7th Dist. Nos. 96 CA 261, 97 CA 13, 98 CA 105. (Whether a pursuit violated a departmental policy "is not relevant" to whether the officers' driving constituted willful or wanton misconduct.")

[22] *Sanders v. Stover*, 8th Dist. No. 89241, 2007-Ohio-6202, at ¶¶ 13-17.

[23] Rogers v. DeRue (1991), 75 Ohio App.3d 200, 205 (Whether an officer violated an internal departmental procedure "is irrelevant to the issue" of whether his actions in causing the traffic accident amounted to willful and wanton misconduct."); See also, *Horton v. City of Dayton* (1988), 53 Ohio App.3d 68 (Second District refused to consider Dayton Police Department's General Order requiring lights and sirens for an emergency call in deciding if an officer was on an "emergency call" as defined in R.C. 2744.01.)

But the Fifth District brushed these cases aside, holding, "we do not agree." Instead the court decided, "Violation of departmental policy ... may be a factor for the jury to consider in determining whether the conduct of [Canton and Coombs] rose to the level of wanton or reckless."[24]

This decision should be reversed for several reasons. First, it results in an unwarranted extension of the law, and an unpredictable one at that. The General Assembly established the standard for immunity of political subdivisions in R.C. 2744.02(B)(1)(b) and for their employees in R.C. 2744.03(A)(6)(b). And the General Assembly alone has the power to create a scheme for immunity and liability of political subdivisions.[25]

But the Fifth District's holding essentially allows political subdivisions to alter those standards by implementing more restrictive internal policies. So a firefighter—or police officer because the standard is identical—in Canton, or any city that had more restrictive internal policies, is more likely to be denied summary judgment and subjected to liability than a firefighter in another city with more lenient policies. In other words, the firefighter in Canton is more likely to be "willful" or "reckless" than the firefighter in the other city.

Federal courts have rejected this type of approach in similar cases. Just as R. C. 2744 provides plaintiffs the right to recover for certain state-law claims

---

[24] *Burlingame*, 2011-Ohio-1325, at ¶ 41.

[25] See *Fabrey*, 70 Ohio St.3d at 355.

against political subdivisions and their employees, 42 U. S. C. § 1983 allows plaintiffs to recover for constitutional violations. And like plaintiffs advancing claims under R. C. 2744, plaintiffs alleging § 1983 claims have attempted to use violations of departmental rules in proving constitutional violations.

But federal courts have had no difficulty recognizing the difference between the standard for defining constitutional violations under § 1983 and the role of departmental rules. The Sixth Circuit Court of Appeals has held that "the issue is whether [a police officer] violated the Constitution, not whether he should be disciplined by the local police force."[26] Put another way, the Seventh Circuit held that "§ 1983 protects plaintiffs from constitutional violations, not violations of ... departmental regulations and police practices."[27]

The United States Supreme Court held simply, "We thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices—even practices set by rule."[28] In *Wren v. U.S.*, the Court held that because local regulations vary from place to place and from time to time, they are an unreliable gauge by which to measure the reasonableness of police conduct under the Fourth Amendment.[29] But Fourth Amendment

---

[26] *Smith v. Freland*, 954 F.2d 343, 347–348 (6th Cir. 1992).

[27] *Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 2006), quoting *Scott v. Edinburg*, 346 F.3d 752, 760 (7th Cir. 2003).

[28] *Virginia v. Moore*, 553 U.S. 164, 172 (2008).

[29] 517 U.S. 806, 815–816 (1996).

protections are not "so variable" and cannot "be made to turn upon such trivialities" as local departmental regulations.[30]

Here, whether Mr. Coombs complied with a departmental rule to stop for the red light at the 18th Street intersection should only have been relevant to Canton's decision to discipline him—not to a court's decision determining if he is entitled to immunity from damages under Ohio law.

Federal courts do not allow political subdivisions' internal policies to shape federal law, and state courts should not allow them to define state law either. But that is exactly what the Fifth Appellate District's decision does.

Not only does the Fifth District's decision result in an unpredictable, unwarranted extension of the law, it threatens sound public policy and safety. Canton, like other cities, chooses to have departmental policies that hold its employees to a higher standard than the immunity standard established by Ohio law. Canton does so by implementing stricter departmental policies, which it enforces through administrative measures such as reprimands, suspensions, promotions, and demotions.

But under the Fifth District's holding, political subdivisions with strict policies are more likely to be held liable in damages than those with lax policies. This will force political subdivisions to choose between keeping heightened departmental policies that protect the public but invite liability, or eliminating

---

[30] *Wren v. U.S.*, 517 U.S. at 815

them which will promote effective risk management but compromise public safety. This Sophie's Choice is one that political subdivisions should not be forced to make, and one that the General Assembly never intended.

Federal courts have refused to force political subdivisions to make this choice when it comes to constitutional violations. The Sixth Circuit's analysis is cogent, concise, and cannot be improved on by Canton:

> A city can certainly choose to hold its officers to a higher standard than required by the Constitution without being subjected to increased liability under § 1983. To hold that cities with strict policies commit more constitutional violations than those with lax policies would be an unwarranted extension of the law, as well as a violation of common sense. [That] position, if adopted, would encourage all governments to adopt the least restrictive policies possible.[31]

The Fifth District even recognized that policies "are designed to make emergency responses safer for the public ... [and] they also exist for the protection of the firefighters ...."[32] But the court's inchoate analysis failed to address the crux of the problem: specifically, why political subdivisions would choose to maintain those policies if plaintiffs can use them to eviscerate the statutory standard for immunity. The fact is—just as federal courts have realized—they won't.

---

[31] *Smith*, 954 F.3d at 347–348; *Tanberg v. Sholtis*, 410 F.3d 1151, 1164 (10th Cir. 2005) ("If courts treated these administrative standards as evidence of constitutional violations ... under § 1983, this would create a disincentive to adopt progressive standards.")

[32] *Burlingame*, 2011-Ohio-1325, at ¶ 45.

As a result, political subdivisions will adopt the least restrictive policies possible, which will not only compromise public safety, but have a chilling effect on the ability of first responders to respond to emergencies.

Also, the Fifth District's decision is inconsistent with legislative policy. The General Assembly enacted R. C. Chapter 2744, stating that "the protections afforded to political subdivisions and employees of 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 to their residents."[33] And as this Court has observed, the "manifest statutory purpose of R. C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions."[34]

This is true now more than ever as political subdivisions struggle for purchase on firm financial ground as they continue to suffer from decreased tax revenue and declining, nearly extinct Local Government Funds. Even well-intentioned public officials who care greatly about public safety will be forced to jettison their heightened policy requirements in favor of the most lenient ones available to avoid inviting liability and to ensure financial security.

In short, by allowing local departmental policy to define the contours of immunity established by the General Assembly, the Fifth District's decision

---

[33] Am. Sub. H.B. No. 176, Section 8, 141 Ohio Laws, Part I, 1733.

[34] *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 453.

threatens public safety and compromises legislative policy. Therefore, Canton respectfully requests that this Court hold that internal department policies or regulations are not relevant to whether a political subdivision or its employee is willful, wanton, or reckless, and therefore entitled to immunity under R. C. 2744.

B. Second Proposition of Law

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

The Fifth District also held that the violation of a traffic statute–in this case, R. C. 4511.03–is a factor to consider in determining whether the conduct of a political subdivision employee rose to the level of wanton or reckless.[35] But R. C. 4511.03 is not an immunity statute. It is a traffic offense. It declares that it is a minor misdemeanor for a driver of an emergency vehicle to proceed through a red light or stop sign without "slowing down as necessary for safety to traffic" or proceeding past without "due regard for the safety of all persons using the street or highway."

The General Assembly, however, has already refused to apply that traffic statute to an immunity analysis for firefighters and police officers under R. C. 2744. That is not the case for emergency medical technicians. According

[35] *Burlingame*, 2011-Ohio-1325, at ¶ 41.

to R. C. 2744.02(B)(1)(c), EMTs enjoy immunity as long as they are not willful and wanton, have a valid commercial driver's license, and "compl[y] with the precautions of 4511.03 of the Revised Code."

But the General Assembly did not include the application of R. C. 4511.03 to the immunity that applies to a firefighter "proceeding toward where a fire is in progress." That section, R. C. 2744.02(B)(1)(b), only imposes the willful and wanton standard to firefighters like Coombs. Likewise for police officers under R. C. 2744.02(B)(1)(a).

Because the General Assembly expressly included the application of R.C. 4511.03 to the immunity requirements for EMTs, it implied that "the precautions" of R. C. 4511.03 do not apply to firefighters or police officers in an immunity analysis. After all, if it wanted to require the statute to apply to the immunity given to firefighters and police officers, it could have done so, but did not.[36] But in deciding that R. C. 4511.03, and presumably any traffic statute, is relevant to whether a police officer or firefighter may be entitled to immunity, the Fifth District has rewritten Ohio's immunity statute.

In addition to rewriting Ohio law, the Fifth District's decision that the violation of a traffic statute is relevant to a determination of statutory immunity will also compromise public safety. After all, if police and firefighters are worried that running afoul of a traffic statute could result in the loss of

---

[36] See *O'Toole*, 118 Ohio St.3d 374, at ¶ 57.

immunity, the question will not be how much they need to slow down at a red light "as necessary for safety to traffic," it will be whether to go through a red light at all. Of course the same analysis would apply in deciding whether to exceed the speed limit, even only a little, or go left of center to avoid traffic.

Police and firefighters could do all of these things to arrive at an emergency without risking the loss of immunity, as long as they were not willful, wanton, and reckless. But now, under the Fifth District's decision, doing any one of those things would violate a traffic statute and entitle a plaintiff to defeat immunity. This can only have a chilling effect on how police and firefighters respond to emergency calls, all to the detriment of the public they are trying to protect.

As such, Canton requests that this Court hold that a violation of a traffic statute is not relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless under R.C. 2744.

Conclusion

Mr. Coombs was driving to fight a house fire with lights flashing and air horn blaring, in daylight, on clear, dry roads, at no faster than 40 miles per hour in a 35 mile-per-hour zone. And when he accidently ran the red light, he tried to avoid an accident by applying the brakes and swerving to miss the Burlingames' van. The results were tragic, but the *facts* demonstrated negligence

at most, and came nowhere near the "substantially greater"[37] standard of willful, wanton, and reckless established by R. C. 2744, as other courts have found in similar cases.[38]

But instead of limiting its analysis to the facts, the Fifth District's decision focuses instead on the violation of departmental policies and traffic statutes, allowing both to be considered in deciding if Mr. Coombs and Canton were willful, wanton, or reckless. This will permit a plaintiff with the most threadbare of facts, like the Burlingames, to avoid statutory immunity by alleging even the slightest violation of a departmental policy or a traffic statute. That will cause the willful, wanton, and reckless standard to slouch toward negligence in a way that will leave the two standards indistinguishable.

In short, the Fifth District expanded Ohio law and compromised the legislative policy behind that law. Just as important, it threatens public safety by forcing political subdivisions to choose between maintaining strict, progressive policies intended to hold their employees to a higher standard and abandoning them in order to enjoy the scope of immunity that the General Assembly had always intended. For these reasons, the city of Canton and James

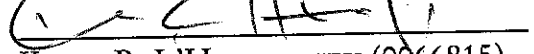
---

[37] *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104–05. See

[38] E.g., *Byrd v. Kirby*, 10th Dist. No. 04AP-451, 2005-Ohio-1261 (Police officer entitled to immunity where he drove 46 in a 35 mile-per-hour zone, through a red light because he activated lights and sirens, looked for traffic, and slowed down at the intersection.); *Cunningham v. City of Akron*, 9th Dist. No. 22818, 2006-Ohio-519; *Ybarra v. Vidra*, 6th Dist. No. WD-04-061, 2005-Ohio-2497.

R. Coombs II respectfully request that this Court reverse the decision of the Fifth District Court of Appeals and hold that the violation of departmental policy or a traffic statute is irrelevant to the issue of whether a political subdivision or its employee is entitled to immunity under R. C. 2744.

Respectfully submitted,
JOSEPH MARTUCCIO, LAW DIRECTOR



KEVIN R. L'HOMMEDIEU (0066815)
(Counsel of Record)
KRISTEN BATES AYLWARD (0030824)
Canton Law Department
218 Cleveland Ave. S.W.
Canton, Ohio 44701-4218
330.489.3251; Fax: 330.489.3374
kevin.l'hommedieu@cantonohio.gov
Attorneys for appellants,
city of Canton and James Coombs

Certificate of Service

I certify that I sent a copy of the foregoing by regular U.S. Mail this 21st day of October, 2011 to:

ELIZABETH A. BURICK
1428 Market Avenue North
Canton, Ohio 44714

Attorney for appellant, Grace Burlingame

ORVILLE L. REED, III,
3800 Embassy Parkway, Suite 300
Akron, Ohio 44333

Attorney for appellant, Eva Finley, Administrator of the Estate of Dale Burlingame

THOMAS J. LOMBARDI
101 Central Plaza South
Suite 900, Chase Tower
Canton, Ohio 44702

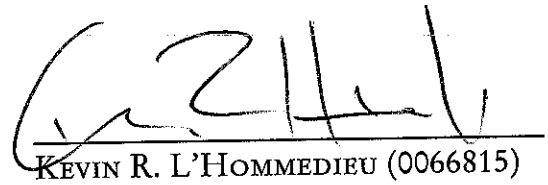
Attorney for appellant, Eva Finley, Administrator of Estate of Dale Burlingame

STEVEN L. BYRON
REBECCA K. SCHALTENBRAND
SCHOTTENSTEIN ZOX & DUNN CO., LPA
4230 WILLOUGHBY, OHIO 44094
440.951.2303; FAX: 216.621.5341
SBYRON@SZD.COM

Attorneys for the Amicus Curiae The Ohio Municipal League

JOHN GOTHERMAN
OHIO MUNICIPAL LEAGUE
175 S. THIRD STREET, #510
COLUMBUS, OHIO 43215-7100
614.221.4349; FAX: 614.221.4390
JGOTHERMAN@COLUMBUS.RR.COM

STEPHEN J. SMITH
SCHOTTENSTEIN ZOX & DUNN CO., LPA
250 WEST STREET
COLUMBUS, OHIO 43215
614.462.2800; FAX: 614.462.5135
SSMITH@SZD.COM



KEVIN R. L'HOMMEDIEU (0066815)

Appendix

Case No. 11-0742

In the Supreme Court of Ohio

Appeal from the Court of Appeals
Fifth Appellate District
Stark County, Ohio
Case Nos. 2010-CA-124 & 2010-CA-130

GRACE BURLINGAME, ET AL.,
Plaintiffs-Appellees,

v.

CITY OF CANTON, ET AL.,
Defendants-Appellants.

Notice of Appeal of Appellants City of Canton and James Coombs

KEVIN R. L'HOMMEDIEU (0066815)
(Counsel of record)
Kristen Bates Aylward (0030824)
Canton Law Department
218 Cleveland Avenue, S.W.
Canton, Ohio 44701-4218
330.489.3251; Fax: 330.489.3374
kevin.l'hommedieu@cantonohio.gov
Attorney for the appellees,
city of Canton and James R. Coombs

ELIZABETH BURICK (0012565)
1428 Market Avenue, North
Canton, Ohio 44714
330.456.3200
Attorney for the appellant,
Grace Burlingame

ORVILLE R. REED III (0023522)
Buckingham, Doolittle & Burroughs, LLP
3800 Embassy Parkway, Suite 300
Akron, Ohio 44333
330.376.5300; Fax: 330.258.6559
oreed@bdblaw.com
Attorney for the appellant, Eva Finley,
Administrator of the Estate of Dale
Burlingame

FILED
MAY 04 2011
CLERK OF COURT
SUPREME COURT OF OHIO

THOMAS J. LOMBARDI
101 Central Plaza, South, Suite 900
Chase Tower
Canton, Ohio 44702
330.456.8389
Attorney for the appellant, Eva Finley, Administrator of the Estate of Dale Burlingame

Notice of Appeal of Appellants, Village of Magnolia, Ohio

Appellants city of Canton and James Coombs, give notice of appeal to the Supreme Court of Ohio from the judgment of the Stark County Court of Appeals, Fifth Appellate District, entered in case numbers 2010-CA-124 and 2010-CA-130 on March 21, 2011. This case involves an issue of public and great general interest.

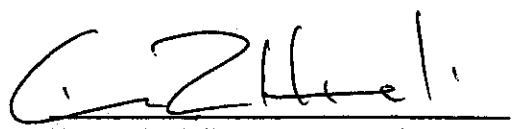
Respectfully submitted,
JOSEPH MARTUCCIO, LAW DIRECTOR

KEVIN R. L'HOMMEDIEU (0066815)
(Counsel of Record)
KRISTEN BATES AYLWARD (0030824)
Canton Law Department
218 Cleveland Ave. S.W.
Canton, Ohio 44701-4218
330.489.3251; Fax: 330.489.3374
kevin.l'hommedieu@cantonohio.gov
Attorneys for appellants,
city of Canton and James Coombs

Certificate of Service

I certify that I sent a copy of the foregoing by regular U.S. Mail this 4th day of May, 2011 to:

Elizabeth A. Burick 1428 Market Avenue North Canton, Ohio 44714	*Attorney for appellant,* *Grace Burlingame*
Orville L. Reed, III, 3800 Embassy Parkway, Suite 300 Akron, Ohio 44333	*Attorney for appellant,* *Eva Finley, Administrator of* *the Estate of Dale Burlingame*
Thomas J. Lombardi 101 Central Plaza South Suite 900, Chase Tower Canton, Ohio 44702	*Attorney for appellant,* *Eva Finley, Administrator of* *Estate of Dale Burlingame*



KEVIN R. L'HOMMEDIEU (0066815)

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

11 MAR 21 PM 2:43
NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

GRACE BURLINGAME Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ESTATE OF DALE BURLINGAME, ET AL Defendants-Appellants	:	CASE NO. 2010-CA-00124

And

JAMES R. COOMBS, II., ET AL

Defendants-Appellees

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accordance with law and consistent with this opinion. Costs to appellees.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

NANCY S. FEINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
11 MAR 21 PM 2:43

GRACE BURLINGAME Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ESTATE OF DALE BURLINGAME, ET AL Defendants-Appellants	:	CASE NO. 2010-CA-00130

And

JAMES R. COOMBS, II., ET AL

Defendants-Appellees

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion. Costs to appellees.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

MAR 24 2011

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GRACE BURLINGAME Plaintiff-Appellant -vs- ESTATE OF DALE BURLINGAME, ET AL Defendants-Appellants And JAMES R. COOMBS, II., ET AL Defendants-Appellees	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 2010-CA-00124 2010-CA-00130 OPINION

11 MAR 21 PM 2:43
NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Case No. 2009CV00689

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellant, James Burlingame, Administrator of Estate of Grace Burlingame, Deceased

ELIZABETH A. BURICK
1428 Market Avenue North
Canton, OH 44714

For Defendant-Appellee Canton City Fire Department, Canton City Hall and James R. Combs

KRISTEN BATES AYLWARD
KEVIN L'HOMMEDIEU
Canton Law Department
City Hall
Canton, OH

For Appellant Eva Finley, Administrator
THOMAS LOMBARDI
101 Central Plaza S., Ste 900
Chase Tower
Canton, OH 44702

For Appellant Eva Finley, Administrator
ORVILLE L. REED, III
Buckingham, Doolittle & Burroughs, LLP
3800 Embassy Parkway, Suite 300
Akron, OH 44333

A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By ..... Deputy
Date 3-21-2011

ENTERED BY 14

Gwin, P.J.

{¶1} Plaintiff-appellant Joseph Burlingame, as the representative of the Estate of Grace Burlingame, deceased, and defendant-appellant, Eva Finley, as the representative of the Estate of Dale Burlingame, deceased, appeal a summary judgment of the Court of Common Pleas of Stark County, Ohio, which found defendants-appellees the City of Canton and its employee James R. Coombs II are entitled to immunity from liability arising out of an accident between the decedent's vehicle and a Canton City fire truck. Appellant assigns a single error to the trial court:

{¶2} "I. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANTS/APPELLEES' MOTION FOR SUMMARY JUDGMENT AS REASONABLE MINDS COULD CONCLUDE THAT DEFENDANTS/APPELLEES OPERATED THE VEHICLE IN A WANTON, WILLFUL AND/OR RECKLESS MANNER."

{¶3} In the case before us, we are asked to decide whether appellees the City of Canton, and its employee James R. Coombs, II are entitled to immunity from liability in the operation of a fire truck that was involved in an accident with the decedent's van. For the reasons that follow, we hold that based upon the record of the case before us, reasonable minds could differ regarding whether they are.

{¶4} First, appellee the City of Canton has a complete defense to liability if, as the trial court found, the operation of the fire truck was not willful or wanton, and it was answering an emergency call. Similarly, the employees of the political subdivision such as appellee Coombs are also immune unless the employee's acts or omissions were done with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C.

2744.03 (A)(6)(b). Second, traffic statutes and departmental policies are factors a jury may consider in determining whether Coombs' actions were reckless. Accordingly, under the facts presented to the trial court, whether Coombs' conduct in the operation of the fire truck on July 4, 2007 rose to the level of willful or wanton is a genuine issue of material fact for a jury to decide.

{¶5} Accordingly, we reverse the judgment of the trial court.

I. Relevant Background

{¶6} On February 19, 2009, Grace Burlingame, filed suit seeking to recover money damages for the personal injuries that she suffered in a catastrophic collision that occurred on July 4, 2007 at the intersection of Cleveland Avenue and 18th Street, N.W. in the City of Canton. Burlingame named as Defendants, Joseph Burlingame, Executor of the Estate of Dale Burlingame, deceased, as well as the City of Canton, the Canton City Fire Department, James R. Coombs, II and Motorists Insurance Group.[1] Burlingame filed a cross-claim against the Canton City Fire Department, the City of Canton, James R. Coombs, II and the Canton City Fire Department seeking damages for the wrongful death of Dale Burlingame as a result of the accident of July 4, 2007. The City of Canton, James R. Coombs, II and the Canton City Fire Department filed an Answer to that cross-claim and included, among its affirmative defenses, that they were entitled to all the immunities, privileges and defenses granted to them pursuant to Chapter 2744 of the Ohio Revised Code. The City, Coombs and the Canton City Fire Department cross-claimed against the Estate of Dale Burlingame and claimed that they

[1] The claim against Motorists was that it should be required to set forth its subrogated claim to the extent that it had one.

were entitled to be indemnified for his alleged negligence. The City also sought to recover damages for the loss that it suffered to its fire truck.

{¶7} The trial court decided this case in appellees favor by summary judgment. We, therefore, construe the following facts from the record (which include depositions, transcripts, affidavits, pictures, accident reports and the pleadings) in the light most favorable to appellants. *O'Toole v. Denihan*, 118 Ohio St.3d 373, 889 N.E.2d 505, 2008-Ohio-2574 at ¶5. (Citing *State ex rel. Zimmerman v Tompkins* (1996), 75 Ohio St.3d 447,448 663 N.E.2d 639).

{¶8} On July 4, 2007, Appellants Grace and Dale Burlingame were heading home after enjoying a family picnic at their granddaughter's house. On their route home, Appellants were stopped at the red light at 18th Street, N.W., and Cleveland Ave, N.W. in Canton. When his light turned green, Mr. Burlingame slowly pulled his vehicle into the intersection to make a left turn. (Affidavit of Brooke James, filed by the City of Canton and Coombs in support of their Motion for Summary Judgment). Almost immediately, the Burlingames' vehicle was violently struck by Appellees' 20-ton fire-truck traveling at 40 mph from a perpendicular direction. (Deposition of James R. Coombs, II at 46). Mr. Burlingame was killed instantly; Mrs. Burlingame sustained serious personal injuries and later died from those injuries.

{¶9} The traffic signals in Canton, like many other large cities, have a device known as a "preemption system," that overrides the usual traffic light pattern. When properly initiated, this system affords an emergency vehicle a favored status (green light) at an intersection. (Deposition of Douglas E. Serban, City of Canton, Electronic

Computer Specialist at 12; 13; Coombs at 32, 44, and 45). It is the siren that initiates the preemption system, not a horn or other device. (Serban at 19).

{¶10} Coombs, who was driving, immediately activated the fire trucks lights and siren after pulling out of the station. As he drove south on Cleveland Avenue, the siren stopped working just south of the 22nd Street intersection. When Coombs could not successfully reactivate the siren, Captain Rick Sacco who was in the passenger seat of the fire truck ordered Coombs to slow down and use the truck's air horn to alert motorists.

{¶11} Testimony was presented that the City of Canton had trained its firefighters to stop at red lights even when responding to emergency calls. (Deposition of Jerry Ward, firefighter with the City of Canton, City employee for 21 years at 9). In addition, the firefighters were trained that, if the siren malfunctioned during a run, to convert the emergency response into a non-emergency. (Ward, supra at 14). In the case at bar, Coombs continued to proceed in an emergency response mode in spite of the malfunctioning siren. (Ward, supra at 15).

{¶12} As Coombs approached the intersection on a red light, he could see the cross-traffic stopped on 18th Street. (Sacco at 51; 52). An ambulance traveling with its siren activated and headed south on Cleveland Avenue passed through the intersection while the Burlingames' vehicle was stopped at the red light. (Coombs deposition at 59). Brooke James the driver of the vehicle that was behind the Burlingames' van saw the traffic light turn from red to green after the ambulance passed.

{¶13} As he approached the intersection, Coombs sounded the truck's air horn and was traveling at a speed between 35 to 40 miles per hour. Coombs thought he saw

his traffic light turn green, however it did not. Coombs saw the van pull into the intersection and attempted to avoid hitting it by swerving left of center.

{¶14} Plaintiff's expert witness Robert Krause offered his opinion that Captain Sacco and firefighter Coombs knew or should have known that continuing an emergency response without their siren caused a substantial risk of harm to the general public. A second expert witness Steven Wolfe offered an opinion based upon his review, training and experience that Coombs' actions arise to the standard of willful, wanton and reckless conduct in the operation of the fire engine.

{¶15} The City of Canton, Canton Fire Department and James R. Coombs, II moved for summary judgment. The trial court found the evidence demonstrated that appellee 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. The court concluded appellee Coombs and the City of Canton had statutory immunity from the Burlingames' suit.

II. ANALYSIS

{¶16} The issue before us is whether there is a genuine issue of material fact on the issue of whether appellees are entitled to immunity under R.C. Chapter 2744.

{¶17} Subject to a few exceptions, R.C. 2744.02(A)(1) provides that political subdivisions are "not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Likewise, immunity is extended, with several exceptions, to employees of

political subdivisions under R.C. 2744.03(A)(6). *O'Toole v. Denihan*, supra, 118 Ohio St.3d at 381, 889 N.E.2d at 512-513, 2008-Ohio-2574 at ¶ 47.

{¶18} Additionally, R.C. 2744.02(A) immunizes political subdivisions from actions for personal injury or wrongful death except as provided in Division (B) of 2744.02. R.C. 2744.02(B)(1) provides that a political subdivision is liable for death or injuries resulting from the negligent operation of a motor vehicle by an employee of the political subdivision acting within the course of its employment. However, R.C. 2744.02(B)(1)(b) provides that it is a full defense to the liability imposed by R.C. 2744.02(B)(1) upon the City if a fire truck causes an accident while in progress to a place where a fire is in progress unless the operator of the vehicle was operating the vehicle in a willful or wanton manner. A political subdivision's employee[2] is also immune 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.[3]

{¶19} Thus, the issue at the summary judgment stage is whether viewing the evidence most strongly in favor of the appellants, there is a genuine issue of material fact as to whether Coombs' conduct in the operation of the fire truck on July 4, 2007 was wanton or willful.

A. Standard of Review

{¶20} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C).

---

[2] Coombs, in the case at bar.
[3] R.C. 2744.03(A)(6)(b).

{¶21} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

{¶22} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, 605 N.E.2d 936, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46.

{¶23} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the

record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112,***.

{¶24} "The Supreme Court in *Dresher* went on to hold that when neither the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' Id. at 276. (Emphasis added.)" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶36-37, 40-42. (Parallel citations omitted.); *Egli v. Congress Lake Club* 5th Dist. No. 2009CA00216, 2010-Ohio-2444 at ¶ 24-26.

{¶25} In deciding whether there exists a genuine issue of fact, the evidence must be viewed in the nonmovant's favor. Civ.R. 56(C). Even the inferences to be drawn

from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the party opposing the motion. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123, 1127.

{¶26} Appellate review of summary judgments is *de novo*. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35,506 N.E.2d 212. We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court is found to support it, even if the trial court failed to consider those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42, 654 N.E.2d 1327; *Am. Fam. Ins. Co. v. Taylor,* Muskingum App. No. CT2010-0014, 2010-Ohio-2756 at 25-31.

B. RECKLESS, WILLFUL OR WANTON CONDUCT

{¶27} We turn to the issue of what constitutes willful, wanton, and reckless conduct under R.C. 2744.

{¶28} In *Brockman v. Bell* (1992), 78 Ohio App. 3d 508, 605 N.E. 2d 445, the First District Court of Appeals observed that civil liability for negligence is predicated upon injury caused by the failure to discharge a duty recognized in law and owed to the injured party. The existence of a duty depends on the foreseeability of the injury. The test for foreseeability is whether a reasonably prudent person, under the same or similar circumstances, should have anticipated that injury to another was the probable result of his performance or nonperformance of an act. As the probability increases that certain consequences will flow from certain conduct, the actor's conduct acquires the character

of intent and moves from negligence toward intentional wrongdoing. Thus, the court concluded, the terms "wanton," "willful" and "reckless," as used to describe tortious conduct, might best be defined at points on a continuum between negligence, which conveys the idea of inadvertence, and intentional misconduct.

{¶29} We observe that willful and wanton misconduct describe two distinct legal standards. *Gardner v. Ohio Valley Region Sports Car Club of Am.*, Franklin App. No. 01 AP-1280, 2002-Ohio-3556 at ¶11.

{¶30} Essentially, wanton misconduct is the failure to exercise any care. *Hunter v. City of Columbus* (2000), 139 Ohio App. 3d 962, 968, 746 N.E. 2d 246. Wanton misconduct has also been likened to conduct that manifests a "disposition to perversity." *Seymour v. New Bremen Speedway* (1971), 31 Ohio App.3d 141, 148, 509 N.E.2d 90, quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 269 N.E.2d 420, paragraph two of the syllabus. "'[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' " *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31, quoting *Roszman*, supra. See *Gardner v. Ohio Valley Region Sports Car Club of Am.*, Franklin App. No. 01 AP-1280, 2002-Ohio-3556 at ¶13.

{¶31} Willful misconduct involves "an intent, purpose, or design to injure." *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 375, 696 N.E.2d 201, quoting *McKinney v. Hartz & Restle Realtors, Inc.* (1987), 31 Ohio St.3d 244, 246, 510 N.E.2d 386. Willful misconduct is something more than negligence and it imports a more positive mental condition prompting an act than wanton misconduct. *Phillips v. Dayton*

Power & Light Co. (1994), 93 Ohio App.3d 111, 119, 637 N.E.2d 963, citing *Tighe v. Diamond* (1948), 149 Ohio St. 520, 526-527, 80 N.E.2d 122.

{¶32} In *Marchant v. Gouge,* this Court observed that wanton misconduct goes beyond mere negligence and requires the evidence to establish a disposition to perversity on the part of the tortfeasor such that the actor must be conscious that his conduct will in all probability result in injury. The "wanton or reckless misconduct" standard set forth in R.C. 2744.03(A)(6) and "willful or wanton misconduct" standard set forth in R.C. 2744.02(B)(1)(a) are functionally equivalent. 187 Ohio App.3d 551, 932 N.E.2d 960, 2010-Ohio-2273 at ¶ 32. (Citations and internal quotation marks omitted).

{¶33} In *Marchant*, supra we went on to observe that "willful misconduct" involves a more positive mental state prompting the injurious act than wanton misconduct, but the intention relates to the misconduct, not the result. We cited *Whitfield v. Dayton,* 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 which defined "willful misconduct" as "'an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing some wrongful acts with knowledge or appreciation of the likelihood of resulting injury.' " Id. at ¶ 30, quoting *Tighe v. Diamond* (1948), 149 Ohio St. 520, 527, 37 O.O. 243, 80 N.E.2d 122. In *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 319, 662 N.E.2d 287, the Supreme Court defined the term "willful misconduct" as "the intent, purpose, or design to injure."

{¶34} The Supreme Court of Ohio has adopted the definition of reckless misconduct set forth in Restatement of the Law 2d, Torts (1965) 587, Section 500. *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 100, 559 N.E.2d 699, 704 at n.3.

Comments *f* and *g* to Section 500 of the Restatement of Torts 2d, supra, at 590, provide a concise analysis, which differentiates between the three mental states of tortious conduct with which we are confronted. The court in *Marchetti* cited to these comments with approval. They provide as follows:

{¶35} "*f. Intentional misconduct and recklessness contrasted.* Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

{¶36} "*g. Negligence and recklessness contrasted.* Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct

negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind." See also *Marchant v. Gouge*, supra at ¶ 36.

{¶37} Appellants argue Coombs violated traffic law and departmental policies while driving the fire truck. R.C. 4511.03 is entitled "Emergency or public safety vehicles to proceed cautiously past red or stop signal" and provides:

{¶38} "(A) The driver of any emergency vehicle or public safety vehicle, when responding to an emergency 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."

{¶39} The statute does not refer to use of sirens and flashing lights. It directs all emergency vehicles to slow down at red lights and stop signs.

{¶40} The trial court cited *Pelc v. Hartford Insurance Co.*, Stark App. No. 2003CA00162, 2003-Ohio-6021 as authority for the proposition immunity from civil liability is a separate issue from immunity under the traffic code. The court misstates our holding. In *Pelc*, we noted R.C.2744.02 gave immunity to the firefighter because he was responding to an emergency and because his actions were not willful or wanton. 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.

{¶41} In the case at bar, the trial court found violations of departmental regulations do not strip Coombs of immunity because a city regulation cannot override the state statute granting immunity. The court stated courts in Ohio have repeatedly found violations of internal departmental policies are not relevant to a finding of malice, bad faith or wanton or reckless manner, citing *Elass v. Crockett*, Summit App. No.22282, 2005-Ohio-2142; *Shalkhauser v. City of Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129, at paragraph 37; and *Rodgers v. DeRue* (1991), 75 Ohio App.3d 200, 598 N.E.2d 1312. In actuality, these cases all arose out of the Ninth District, and we do not agree. Violation of departmental policy or 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.

{¶42} Appellee cites us to *O'Toole v. Denihan* 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505 as authority for the proposition a plaintiff cannot maneuver around political subdivision immunity by alleging violations of departmental policies or the Ohio Administrative Code.

{¶43} In *O'Toole v. Denihan,* 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 73, the Supreme Court noted that in the context of R.C. 2744.03(A) (6) (b), recklessness is a perverse disregard of a known risk. The *O'Toole* court held that violations of agency policy could rise to the level of recklessness if the circumstances demonstrate a perverse disregard for the risks involved. Id. at ¶ 92. The Court said:

{¶44} "Appellee's final attempt to maneuver around George-Munro's immunity status is based on the allegation that George-Munro violated various Ohio Administrative Code and CCDCFS policies regarding investigations. 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 violations "will in all probability result in injury," *Fabrey,* [*v. McDonald Village Police Department*] 70 Ohio St.3d at 356, 639 N.E.2d 31, evidence that policies have been violated demonstrates negligence at best. ***" O'Toole at paragraph 92.

{¶45} The laws and policies are designed to make emergency responses safer for the public. However, they also exist for the protection of the firefighters, who already face serious personal risks in their day-to-day jobs, and who must not be further imperiled en route to their humanitarian roles. We find violations of traffic statutes and departmental policies are factors a jury may consider in determining whether Coombs' actions were reckless.

{¶46} The 2008 Fire Department Policy Vehicle Operations/ Security requires drivers of fire department vehicles to come to a complete stop: if directed by a law enforcement officer; for red traffic lights; for stop signs ; for negative right-of way intersections; for blind intersections; if the driver cannot account for all lanes of traffic in an intersection.

{¶47} The Canton Fire Department 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 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; the driver collided with a vehicle making a turn; the driver collided with a vehicle making a turn in front of the city vehicle.

{¶48} Appellants urge from the above facts, reasonable minds could draw different conclusions regarding whether Coombs operated the fire truck recklessly.

{¶49} The question of whether a person has acted recklessly is almost always a question for the jury. *Hunter v. Columbus* (2000), 139 Ohio App. 962, 746 N.E. 2d 246, decided by the 10th District Court of Appeals. In *Hunter*, an emergency vehicle responding to an emergency call entered an intersection at 61 miles per hour in a 35 miles per hour zone. The court of appeals acknowledged the emergency vehicle operator's motives were humanitarian, but found nevertheless, he did not necessarily have immunity because the matter presented a genuine issue of fact to the jury. The *Hunter* case cited *Brockman v. Bell* (1992), 78 Ohio App. 3d 508, 605 N.E. 2d 445, arising out of the Eleventh District Court of Appeals, and *Ruth v. Jennings* (1999), 136 Ohio App. 3d 370, 736 N.E. 2d 917, arising out of the Twelfth District Court of Appeals. The *Bell* case involved a collision between an ambulance and a private vehicle, although *Ruth* concerned an excessive force to arrest situation. However, all three of the cases the Hunter court cited found resolution of the case was a matter for the jury.

{¶50} The Ohio Supreme Court has explained: negligence is mere inadvertence, incompetence, lack of skill, or failure to take precautions that would allow the person to cope with a possible or probable future emergency. Reckless consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The person does

not intend to cause the harm that results from it but realizes or, from known facts, should realize that there is a strong probability that harm may result, even though the person hopes or even expects that the conduct will prove harmless. Intentional misconduct occurs when the person intends to cause harm. *Marchetti v. Kalish*, 53 Ohio St.3d 95, 559 N.E.2d 699, footnote 3, citing Comments *f* and *g* to Section 500 of the Restatement of Torts 2d.

{¶51} The spectrum of intent stretches from negligence, through reckless, to intentional, and there are no bright lines. It is a jury question where on the continuum the appellees' actions fall. We agree with the *Bell* court that the line between willful and wanton misconduct and ordinary negligence can be a very fine one, *Bell* at 517, citing *Osler v. Lorain* (1986), 28 Ohio St. 3d 345, 504 N.E. 2d 19; *Hawkins v. Ivy* (1977), 50 Oho St. 2d 144, 363 N.E. 2d 367; *Tighe v. Diamond* (1948), 149 Ohio St. 520, 80 N.E. 2d 1122; and *Reynolds v. City of Oakwood* (1987), 38 Ohio App. 3d 125, 528 N.E. 2d 578. The *Reynolds* case arose out of the Second District Court of Appeals and dealt with a collision between a police car utilizing the siren and lights and a pedestrian vehicle.

{¶52} In *Hunter,* supra, the court of appeals noted each case must be evaluated on its particular facts, and the use of a siren and flashing lights is one factor a jury must consider. Whether the emergency vehicle has crossed left of center may be a factor, as is the speed at which an emergency vehicle is traveling, because it may exceed the reaction time of even an alert driver. Id., at 970-971. The *Reynolds* court found use of a siren and flashing lights is not the sole determinative fact, and the court discussed tree-lined streets as possible impairments to visibility and audibility. Id. at 127.

{¶53} 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 not found 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 matter for the trier of fact. The fact that the siren was not on is, of course, a matter that can be considered by the jury in determining whether appellants proved wanton or reckless misconduct, but the driver's conduct must be evaluated based upon all of the circumstances at the time he choose to continue into the intersection at the speed he was traveling.

{¶54} "It is assumed that twelve men know more of common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Sioux City & Pennsylvania Railway. Co. v. Stout*, (1873) 84 U.S. (17 Wall.) 657,664. Justice Story was writing in defense of one of the foundations of the American system of justice: the Seventh Amendment to the United States Constitution. It provides:

{¶55} "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

{¶56} Although the Seventh Amendment is not directly applicable to the individual states, Ohio has guaranteed the right to jury trial in Section 5, Article I of the Ohio Constitution. Article I section 5 of the Ohio Constitution provides:

{¶57} "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

{¶58} Because the right to jury trial is a substantive fundamental right, any rule or statute curtailing that right must be examined under a microscope. For this reason, the Ohio Supreme Court has held that even if the facts of a given case are undisputed, if a jury could draw different conclusions from those facts, a summary judgment cannot be entered. *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The jury must decide questions of fact; the judge decides how the law applies to those facts. The judge must not weigh the credibility of the evidence and must not decide how much emphasis to put on any one piece of properly admitted evidence.

{¶59} Summary judgment can be an important tool to streamline what may become a lengthy process. It is intended to weed out those cases that have no merit, or those that can be resolved simply by applying the law. However, courts must not be in a rush to judgment and must carefully preserve the right of litigants to have a jury of their peers determine the facts of their case. Recently, the Ohio Supreme Court explained:

{¶60} "This right [to a jury] serves as one of the most fundamental and long-standing rights in our legal system, having derived originally from the Magna Carta. See *Cleveland Ry.v. Halliday Co.* (1933), 127 Ohio St. 278, 284, 188 N.E. 1. It was

"[d]esigned to prevent government oppression and to promote the fair resolution of factual issues." *Arrington v. Daimler Chrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, 21. As Thomas Jefferson stated, the right to trial by jury is "the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's [sic] constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), reprinted in 15 The Papers of Thomas Jefferson (Boyd Ed.1958) 269.

{¶61} "However, the right is not absolute. See *Arrington* at 22. Section 5, Article I guarantees a right to a jury trial only for those causes of action in which the right existed in the common law when Section 5 was adopted. See *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 169 N.E. 301, paragraph one of the syllabus. It is settled that the right applies to both negligence and intentional-tort actions. See *Arrington* at 24." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007 -Ohio- 6948, 880 N.E.2d 420.

{¶62} This case is far from over. Our holding here does not mean appellants recover; it just means they could have an opportunity to present their case to a jury who will decide whether Coombs was reckless. It means there are important issues yet to be decided.

{¶63} We find the trial court erred in finding reasonable minds could not differ on this issue. Accordingly, the assignment of error is sustained.

{¶64} For the foregoing reasons the judgment of the Court of Common Pleas, Stark County, Ohio is reversed, and the cause is remanded for further proceedings in accordance with the law and consistent with this opinion.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

WSG:clw 0204

NANCY S. FEINGOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
11 APR 15 PM 3:13

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

GRACE BURLINGAME Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ESTATE OF DALE BURLINGAME Defendant-Appellant	:	CASE NO. 10-CA-124 10-CA-130

And

CITY OF CANTON, ET AL

This cause comes before us on appellees' motion to certify a conflict to the Ohio Supreme Court between our opinion in the within, filed March 21, 2011 and the opinions of four other jurisdictions on the issue:

"Whether a violation of internal departmental policy is relevant in determining whether the conduct of an employee of a political subdivision is willful, wanton, or reckless under R.C. 2744"

Article IV, Section 3(B)(4) of the Ohio Constitution states:

"Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

App. R. 25 governs Motions to Certify a Conflict:

"(A) A motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of a motion to certify a conflict does not extend the time for filing a notice of appeal. A motion under this rule shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed."

Pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, a court of appeals shall certify the case to the Supreme Court if it finds its judgment in conflict with a judgment of another court of appeals on the same question. At least three preconditions must be met before a conflict can be certified: "First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." (Emphasis in original.) *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596, 613 N.E.2d 1032.

Appellees cite us to opinions of the Seventh, Eighth, Ninth, and Eleventh Districts, decided in 1999, 2007, 2002, and 1991 respectively. In our opinion in the case at bar, we conceded our decision was not in accord with those cases. In 2008, the Ohio Supreme Court decided *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889

N.E.2d 505, which clarified and defined Ohio law on the above issue. Our decision in the within cited and conformed to the decision in *O'Toole,* while the appellate decisions supra were announced prior to *O'Toole* and therefore did not have the benefit of the Supreme Court's reasoning.

Where, as here, the Ohio Supreme Court has issued a decision on a point of law, there can be no conflict among courts of appeals.

The Motion to Certify a Conflict is overruled.

IT IS SO ORDERED.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

APR 21 2011

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

GRACE BURLINGAME	)	**CASE NO. 2009 CV 00689**
	)	
PLAINTIFF(S),	)	**JUDGE FORCHIONE**
	)	
VS.	)	
	)	**JUDGMENT ENTRY**
ESTATE OF DALE BURLINGAME, et al.,	)	
	)	
DEFENDANT(S).	)	

2010 APR 23 PM 12: 47
NANCY S. REINBOLT
CLERK OF COURTS
STARK COUNTY, OHIO

This matter is before the Court upon Defendants', City of Canton, ("Canton"), the Canton Fire Department, and James Coombs II, ("Coombs") Motion for Summary Judgment filed on November 6, 2009. Plaintiff filed her Response in Opposition on March 3, 2010. Defendants Canton and Coombs filed their Reply on March 17, 2010. Additionally, Defendant-Counterclaimant, the Estate of Dale Burlingame, ("Estate"), filed a Memorandum in Opposition on March 3, 2010.

Considering the pleadings, briefs of counsel and other supporting documents most strongly in favor of Plaintiff and Defendant-Counterclaimant Estate, the Court finds that a genuine issue of material fact does not exist and that Defendants Canton and Coombs are entitled to judgment as a matter of law.

The Ohio Supreme Court has clearly set forth the standard for summary judgment:

> A summary judgment shall not be rendered unless is appears from such evidence or stipulation and only there from, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.
>
> The inferences to be drawn from the underlying facts contained in the affidavits and other exhibits must be viewed in the light most favorable to the party opposing the motion, and if when so viewed reasonable minds can come to differing conclusions the motion should be overruled. *Hounshell v. American States Insurance Co.* (1981), 67 Ohio St.2d 427, 433. *See also Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150.

Additionally the Ohio Supreme Court in *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 292 stated:

ENTERED BY 8

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Court will note initially that Plaintiff has conceded that the Canton Fire Department is not an entity in and of itself and that Plaintiff voluntarily dismisses her claims against the Canton Fire Department.

The undisputed and relevant facts in this case are as follows: on July 4, 2007 at approximately 7:30 p.m., the Canton Police Department, and specifically James Coombs, Captain Sacco, and Jerry Ward, were responding to a structural fire at Hoover Place Northwest. Upon leaving the station at 25th St and Cleveland Ave Northwest, Coombs, who was driving, activated the lights and siren on the fire truck and proceeds south on Cleveland Ave. At some point prior to reaching the intersection of 18th and Cleveland Ave Northwest, the siren on the fire truck stops working. At that time, Coombs employs the air horn in conjunction with the siren to signal the fire truck's presence. Upon approaching the light at 18th and Cleveland, Coombs mistakenly believes that the preemptor system in place will turn his red light to green. At no time was the fire truck traveling at more than 40 miles per hour in a 35 miles per hour zone. Dale Burlingame, the first driver waiting at the light at 18th and Cleveland, but located eastbound on 18th St., slowly entered the intersection to turn north on Cleveland Ave. Coombs attempts to avoid hitting the van by swerving left of center, but collides with the driver's side of the van, killing the driver, Dale Burlingame, and severely injuring the passenger, Plaintiff in this matter. A witness, who was directly behind Dale Burlingame at the intersection, stated that the air horn employed by the fire truck was so loud that she "knew" a safety vehicle "must be approaching the intersection" and she felt that it would not be safe to proceed into said intersection.

Defendants Canton and Coombs move for summary judgment based on three arguments (discounting their initial argument regarding the Canton Fire Department, the claim against which

has been dismissed by Plaintiff): the claims alleging a violation of R.C. 4511.03 are not cognizable; because Coombs was responding to an emergency call, Defendants Canton and Coombs are immune from count two of Plaintiff's complaint alleging negligence; and; as no jury could find that Coombs acted with malicious purpose, in bad faith, or in a wanton or reckless manner, count three of Plaintiff's complaint and count two of Defendant Estate's cross-complaint must be dismissed.

In reading Plaintiff's Response in Opposition, it is clear to the Court that Plaintiff has incorporated her claims alleging a violation of R.C. 4511.03 into her argument regarding whether Coombs was responding to an emergency call. Therefore, the Court will address both these arguments together, along with the issue of whether Coombs acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

R.C. 2744.02(A)(1) provides that all political subdivisions in Ohio are provided immunity from civil liability "for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.02(B)(1) provides an exception to that immunity for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by the political subdivision's employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. However, an exception to the exception is made for a "member of a municipal corporation fire department" who 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 "where the operation of the vehicle did not constitute willful or wanton misconduct" under R.C. 2744.02(B)(1)(b). There is no language in the statute that would require the operation of the motor vehicle to involve the use of either emergency lights or siren, or both.

There clearly is no evidence to show that Coombs was responding to anything but a structural fire, or a "fire in progress", an emergency call as defined by R.C. 2744.02(B)(1)(b). Therefore, Defendant Canton is immune from any claims of negligence; Defendant Coombs can only be held liable if his "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

While Plaintiff makes much of the fact that Coombs was operating his fire truck in violation of R.C. 4511.03, R.C. 4511.041, and R.C. 4511.45, those sections are traffic statutes, not immunity statutes. This point has already been settled and the Fifth District Court of Appeals has specifically ruled that the issues of immunity from civil liability and immunity under the traffic code are two separate and distinct things. See *Pelc v. Hartford Fire Insurance* (2003), 2003 WL 22665987 (Ohio App. 5 Dist.), 2003-Ohio-6021.

Additionally, while Coombs may have violated departmental policy in regards to the operation of his siren-less fire truck, this violation of departmental policy in no way strips him or Canton of its immunity. Because the term "emergency call" for a firefighter is defined within R.C. 2744.02(B)(1)(b), any stricter definition used in a municipality's fire department regulations cannot override a statutory definition for statutory immunity purposes. *Horton v. City of Dayton* (1988), 53 Ohio App.3d 68. Furthermore, Courts in Ohio have repeatedly held that violations of internal departmental policy are not relevant to a finding of "malicious purpose, in bad faith, or in a wanton or reckless manner." See *Elsass v. Crockett*, 2005 WL 1026700 (Ohio App. 9 Dist), 2005-Ohio-2142, citing *Shalkhauser v. City of Medina* (2002), 148 Ohio App.3d 41. See also *Rodgers v. DeRue* (1991), 75 Ohio App.3d 200.

Accordingly, the Court turns to its inquiry as to whether Coombs' actions were with "malicious purpose, in bad faith, or in a wanton or reckless manner." "Malice" refers to a willful and intentional design to do injury. "Bad faith" connotes a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. "'Reckless' conduct refers to an act done with knowledge or reason to

know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that this risk is greater than that necessary to make the conduct negligent." *Shalkhauser*, Id at 50. "Reckless" can also be said to be a "perverse disregard of a known risk." *O'Toole v. Denihan* (2008), 118 Ohio St.3d 374, 386. "Although the determination of recklessness is typically within the province of the jury, the standard for showing recklessness is high, so summary judgment can be appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity." Id. at 387, citing *Fabrey v. McDonald Village Police Department* (1994), 70 Ohio St.3d 351.

This accident took place during daylight hours, in clear weather, on dry pavement. Once Coombs realized that the siren on the fire truck did not work, he employed an air horn to alert other motorists and pedestrians to the fire truck's position. This air horn was loud enough to be heard clearly by the driver immediately behind the Burlingames. At all times, the fire truck was operating with functional emergency lights. Coombs was never going more than 5 miles per hour over the posted speed limit; Coombs believed that the preemptor would turn his light to green, allowing him to safely pass through the intersection. Ultimately, once Coombs realized that Dale Burlingame had driven into the intersection, he attempted to avoid hitting his vehicle by swerving left of center.

The results of this incident are a tragedy which this Court cannot overlook. It is easy to be influenced by the devastating loss this family has suffered as a result of Defendants' Canton and Coombs emergency response. Nor can the Court let sympathy or compassion cloud its interpretation of the law. However, the evidence demonstrates that Coombs' actions were negligent at best. The record fails to demonstrate any evidence that Coombs' actions rise to the level of malicious purpose, in bad faith, or in a wanton or reckless manner which would be required for this Court to deny Defendants' Canton and Coombs Motion for Summary Judgment.

The Court finds Defendants' Canton and Coombs arguments to be persuasive and that summary judgment is appropriate. The Court therefore GRANTS Defendants' Canton and Coombs Motion for Summary Judgment in its entirety.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that summary judgment is GRANTED in favor of Defendants City of Canton and James Coombs and against Plaintiff and Defendant- Counterclaimant Estate of Dale Burlingame.

IT IS SO ORDERED.

FRANK G. FORCHIONE, JUDGE

NOTICE TO THE CLERK – FINAL APPEALABLE ORDER

The Clerk of Courts shall serve upon all parties not in default for failure to appear notice and a copy of the judgment and its date of entry upon the journal. Said notice and copy shall be sent within three days of entering the judgment upon the journal. The Clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket.

FRANK G. FORCHIONE, JUDGE