

ORIGINAL

IN THE SUPREME COURT OF OHIO

CYNTHIA ANDERSON, Administratrix of)	Case No. 2011-0743
the Estates of Ronald E. Anderson and)	
Javarre J. Tate, deceased,)	
)	
Plaintiff-Appellee,)	
)	On Appeal from the Stark
vs.)	County Court of Appeals,
)	Fifth Appellate District
CITY OF MASSILLON, et al.,)	
)	Court of Appeals
Defendants-Appellants.)	Case No. 2010 CA 00196

MERIT BRIEF OF DEFENDANTS-APPELLANTS
 THE CITY OF MASSILLON, SUSAN J. TOLES AND RICK H. ANNEN

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STATEMENT OF FACTS

This case arises out of a traffic accident between a private passenger vehicle and a city fire engine. Both of the appellee's decedents died on May 6, 2008, at approximately 8:35 a.m., when Mr. Ronald Anderson, operating a van, pulled into the path of a fire engine operated by Susan Toles of the Massillon Fire Department. Importantly, it is undisputed in this case that at the time of the accident, the fire engine was responding to an emergency call, and the engine had its lights and sirens operating. Further, the undisputed evidence is that Mr. Anderson failed to yield at an intersection to the clear presence of the fire engine. The appellee, in her capacity as administratrix, filed this action against the City of Massillon, Susan Toles, and Captain Richard Annen, alleging the wrongful deaths of her husband and grandson. (Supp. p. 1).

The record of this case was fully developed. On the morning of May 6, 2008, a Massillon resident called 911 to report a car fire she had observed. The precise time was 8:30:32 a.m. The call was received by the "Red Center," the central dispatch for Massillon and other political subdivisions. Dispatcher Lynne Martin Joiner received the call, and her deposition was taken as part of this case. (Joiner depo. p. 9). Ms. Joiner routed the call to Thomas Thornberry, the fire dispatcher, and he consulted his computer to dispatch the first available fire engine from the Massillon department. (Joiner depo. p. 7 - Supp. p. 157). Thornberry, a 26 year veteran dispatcher, properly inquired of dispatcher Joiner whether the fire was near a house.

Less than two minutes later, at 8:31:40, a tone was sounded in Station 1 of the Massillon Fire Department for Engine 214 to respond to the reported fire. Pursuant to department policy, a single fire engine, such as Engine 214, and a separate truck would respond to car fires. (Burgasser depo. p. 16 - Supp. p. 217). However, also pursuant to policy, the dispatcher is required to inquire if the

car fire is near a building or structure in order to determine which vehicles to dispatch. (Thornberry depo. p. 12 - Supp. p. 159). Based on this policy, dispatcher Joiner called the 911 caller and inquired as to whether the fire was near a house. Joiner interpreted the information she received as indicating the car fire was near a house, and she relayed this information to Thornberry. (Joiner depo. p. 7 - Supp. p. 157). Based on this new information, Thornberry then toned Station 1 at 8:33:03 and dispatched the second engine, Engine 211. (Thornberry depo. p. 14 - Supp. p. 160). At 8:33:43, engine 214 left Station 1, operated by Firefighter Greenwood, commanded by Capt. Smith. Engine 214 proceeded down Erie Street to Walnut Street toward the dispatched location. Approximately a minute later, at 8:34:25, Engine 211 left Station 1, operated by Susan Toles, commanded by Capt. Annen. (Toles depo. p. 131 - Supp. p. 166). Engine 211 began to follow the same route as Engine 214 toward the fire. (Toles depo. p. 141 - Supp. p. 169).

Capt. Annen worked 20 to 30 shifts a year at Station 1. (Annen depo. p. 85 - Supp. p. 195). On this day, he was the commander of the Station, and directed all firefighters in the assignments that morning. (Annen depo. p. 90 - Supp. p. 197). Annen assigned Toles to Engine 211, in which he would command, in the event of a call out. (Annen depo. p. 87 - Supp. p. 196). These assignments were set before any dispatch tone was received. (Annen depo. p. 87 - Supp. p. 196). As a result, when the emergency call was toned to Station 1, Toles responded, pursuant to her training, and operated Engine 211 toward the fire.

Capt. Smith is a 20 year veteran of the Massillon Department and was the commander of Engine 214 which left Station 1 before Engine 211. (Smith depo. p. 10 - Supp. p. 204). Bound by the same Department rules and the Ohio Revised Code, Capt. Smith testified that his Engine did not stop at the intersection of 3rd and Walnut, even though there is a traffic signal at that location. (Smith

depo. p. 44 - Supp. p. 207). Capt. Smith testified that he is uncertain of the exact speed of Engine 214 as it was eastbound on Walnut Street, but he would not be surprised if the Engine speed exceeded 40 miles per hour. (Smith depo. p. 44 - Supp. p. 207). When Engine 214 came through the intersection, where the accident with Engine 211 later occurred, there was no school bus pulled over on Walnut. (Smith depo. p. 45 - Supp. p. 208).

Ms. Toles was Capt. Smith's regular partner and on numerous occasions he rode with her in emergency situations. Smith has no reservations about Toles' ability to operate any emergency vehicle, including Engine 211. (Smith depo. p. 29 - Supp. p. 205).

Engine 211 was driven by the appellant Toles, an 18 year veteran firefighter and commanded by appellant Annen, the senior officer in charge. (Toles depo. p. 9 - Supp. p. 162; Smith depo. p. 39 - Supp. p. 206). Both firefighters were familiar with the area of the fire, and agreed that the best route to the fire was to proceed on Walnut Street. When the call came in, Toles knew exactly where the fire was located and also knew the appropriate route when she left Station One. (Toles depo. p. 139 - Supp. p. 167). The route from Station One required engines 214 and 211 to proceed down South Erie Street, turn left onto Walnut, climb a hill to Walnut and Third, proceed through the Third Street intersection onto a straightaway where Walnut flattens out leading to the Johnson Street intersection. (Toles depo. p. 142 - Supp. p. 170).

Toles was specifically trained in the operation and use of Engine 211 along with all other emergency vehicles in the Department. (Toles depo. p. 53 - Supp. p. 181). The Department protocol and procedure for driving to an emergency permits the operator to exceed the posted speed limit. (Burgasser depo. p. 26). Department Regulation 407.05(D), in effect at the time of the accident, also provided that an operator could proceed through an intersection regulated by a stop sign or red light

as long as the intersection was not a "blind intersection" and the operator could account for all traffic in the intersection. (Burgasser depo p. 27 - Supp. p. 218).

Capt. Richard Annen is a 28 year veteran of the Massillon Fire Department, having been promoted to Captain in 1993. (Annen depo. p. 6 - Supp. p. 191). He is trained in emergency vehicle operation, and, as officer in charge of Engine 211, he was responsible for enforcing departmental regulations. (Annen depo. p. 8, 57, 70 - Supp. pp. 192, 193, 194).

Ronald Anderson was driving his grandson, Javarre Tate, to pre-school, which is located at the intersection of the accident at Walnut and Johnson Street. Javarre Tate was usually dropped off by 8:45 a.m. (Anderson depo. p. 32 - Supp. p. 211). In order to arrive at the pre-school, Anderson would normally proceed northbound on Johnson Street until the intersection of Johnson Street and Walnut. At this intersection, Mr. Anderson would drive straight across Walnut to reach the pre-school parking lot. (Anderson depo. p. 32 - Supp. p. 211). The intersection of Walnut and Johnson is a four-way stop street, with a red flashing light for all traffic. (Anderson depo. p. 31 - Supp. p. 210). There was nothing unusual occurring in the Anderson home on the day of the accident. (Anderson depo. p. 33 - Supp. p. 212).

As engine 211 proceeded to the fire, a combination of the wail siren and the air horn was engaged. (Toles depo., p. 103 - Supp. p. 164). Additionally, Capt. Annen sounded the air horn at intersections. (Toles depo., p. 103 - Supp. p. 164). Annen was seated in the front passenger seat directly next to the driver Toles. (Toles depo., p. 130 - Supp. p. 164). Firefighters Ernest Bard and Jason Castile were positioned in rear facing jump seats in the back portion of engine 211. (Toles depo., p. 131 - Supp. p. 166). Because of the configuration of the fire engine, neither Castille nor

Bard could see the intersection at issue as the engine proceeded to the call, because they were belted into seats facing the rear of Engine 211. (Castille depo., p. 181).

Pursuant to her training and Department protocol, Toles exceeded the speed limit, but described the emergency run as a “normal call, a normal run.” (Toles depo., p. 143 - Supp. p. 171). The speed limit posted in the area was 25 miles per hour. (Toles depo., p. 143 - Supp. p. 171). The location of the car fire was approximately one-half mile from the intersection of Johnson and Walnut. (Toles depo., p. 143 - Supp. p. 171). Weather was not a factor in the accident, as it was a clear day with dry pavement. (Toles depo., p. 144 - Supp. p. 172).

Capt. Annen could not see the speedometer from his front seat in Engine 211, but as the commander of the engine, he did not feel that Toles’ speed was excessive or presented any danger. (Annen depo. pp. 100 and 101 - Supp. pp. 198, 199). He did not advise her to slow down, or speed up. In his judgment, the Engine’s speed was appropriate for the conditions and the nature of the fire emergency. (Annen depo. p. 101 - Supp. p. 199).

As Engine 211 approached the intersection of Johnson and Walnut, Toles recalled a car parked on the right just before the intersection. A few cars were also pulled over on Walnut just beyond the intersection with Johnson. (Toles depo. p. 146 - Supp. p. 174). In addition, there was a stopped school bus east of the intersection. (Toles depo., p. 148 - Supp. p. 176). There is a tree at the corner of Johnson and Walnut, however it did not block Toles’ view of the intersection. (Toles depo., p. 149 - Supp. p. 177). Ms. Toles could clearly see the intersection of Johnson and Walnut as she approached. (Toles depo., p. 149 - Supp. p. 177). When appellant Toles saw the school bus pulled over on Walnut Street in her lane of travel east of the intersection, she did slow

down. This maneuver was to make sure there were no children on the street and that the school bus stop sign was not out. (Toles depo. p. 150 - Supp. p. 178).

Toles does not recall looking at the speedometer and determining precisely her speed as she approached the intersection. The emergency lights on engine 211 were operating along with the wail siren; and Captain Annen engaged the air horn as Engine 211 approached each cross intersection, including the intersection of Johnson and Walnut. (Toles depo., pp. 151 and 152 - Supp. pp. 179-180).

After Toles determined that the school bus was yielding, she moved left of center because of the presence of a parked car and the bus. Moving the engine in this fashion was a reflection of Toles' careful and prudent operation, in light of the presence of the school bus and the car pulled over. Toles viewed the entire intersection, in a fashion which she described as: "scanning, making sure the intersection was clear. There was nobody at the intersection." (Toles depo., p. 155 - Supp. p. 183).

As Toles approached the intersection with Johnson, she saw the Anderson van "shoot out in front" of Engine 211. Toles began to move "immediate[ly] left even more, to try to avoid his vehicle and get around." (Toles depo., p. 156 - Supp. p. 184). Just prior to the moment she saw the van pull out in front of Engine 211, Toles heard Annen say "he's not stopping." (Toles depo., p. 156 - Supp. p. 184). Toles recalled seeing the Anderson van go "completely through the stop sign right in front" of Engine 211. (Toles depo., p. 156 - Supp. p. 184). Toles never saw the Anderson vehicle stopped at the stop sign. (Toles depo., p. 156 - Supp. p. 184).

Toles did not bring Engine 211 to a stop at the intersection. (Toles depo., p. 159 - Supp. p. 187). Neither Department protocol nor Ohio law requires an operator of an emergency vehicle to

completely stop at intersections. Toles and Annen did not consider the intersection "blind," given their daily commute through the area. As Ms. Toles approached the intersection, she took her foot off the accelerator when she saw the school bus. (Toles depo., p. 159 - Supp. p. 187). Before the collision she depressed the accelerator, having "cleared the intersection" and analyzed the position of the school bus. (Toles depo., p. 159 - Supp. p. 187). Although Toles steered further left in an effort to go around the van, the Anderson van proceeded forward without stopping, and Mr. Anderson drove his van directly into the path of Engine 211. (Toles depo., p. 160 - Supp. p. 188).

Sadly, as the Anderson van failed to yield, ran the stop sign, and pulled into the path of the fire engine, Toles was able to see Mr. Anderson. She observed that Anderson was looking to his right, in the opposite direction. "He never turned around." (Toles depo., p. 162). If Mr. Anderson had looked to the west, he would have seen the approach of the fire engine, and would have been able to stop his van short of impact. However, given these undisputed facts, Mr. Anderson's failure to yield to a clearly visible and audible emergency vehicle made the accident unavoidable the instant he chose to enter the intersection.

It was not until approximately 20 to 30 feet from a house located on the corner of Johnson and Walnut that appellant Annen saw the Anderson van coming into the intersection without stopping. (Annen depo. p. 126 - Supp. p. 202). Appellant Annen observed during his deposition that the van "was coming through . . . and just kept coming through the intersection." (Annen depo. p. 124 - Supp. p. 201). When Annen stated to Toles, "he is not stopping," at that point, Engine 211 was approximately just 150 feet from impact. (Annen depo. p.126 - Supp. p. 202). Before arriving at the subject intersection, Annen did not tell Toles to slow down or stop at the intersection as the engine approached the area. (Annen depo. p.116 - Supp. p. 200). As Toles approached the

intersection, Capt. Annen was operating the Q siren and the air horn. (Annen depo. p. 116 - Supp. p. 200).

From appellant Annen's observations, the Anderson van was traveling approximately 5 to 10 miles an hour, prior to the accident. (Annen depo. p. 116 - Supp. p. 200). Captain Annen does not recall seeing any cars behind the Anderson van. (Annen depo. p. 124 - Supp. p. 201). Again, Mr. Anderson never looked in the direction of Engine 211 as he proceeded through the intersection and the engine approached. (Annen depo. p. 124 - Supp. p. 201).

Based upon this record of facts, Engine 211 would have been visible to Mr. Anderson because the engine moved left of center, all the while with its lights, sirens, and air horn engaged. Every other vehicle in the vicinity responded to the approach of the fire engine. However, even if Mr. Anderson did not hear the emergency sirens and air horn, he had an absolute duty to yield and not pull into the path. Mr. Anderson's failure to look to the west to observe the approach of Engine 211 was the cause of this tragic accident. Mr. Anderson's familiarity with his route and the intersection may have caused him to make the fatal assumption that all approaching traffic would stop at the stop sign. Had he simply looked to the west, at any time, he would have been able to stop and avoid the collision. The physical facts document that he pulled into the path of the engine.

The Ohio State Patrol investigated the accident. Trooper Cook determined that the point of impact was just across the center line. (Cook depo. p. 67 - Supp. p. 214). According to the State Patrol calculations, if Anderson would have stopped at the intersection before entering, Engine 211 would have been visible if Mr. Anderson looked to the west before pulling into the Engine's path. (Cook depo. p. 71 - Supp. p. 215). Under this record, it is apparent that Mr. Anderson either failed

to look to the west, as established by Toles and Annen, or he looked, and chose to enter the intersection as the emergency vehicle was so close as to create an immediate hazard.

Toles brought Engine 211 to a stop by pressing the brake as soon as it was safe to do so. (Toles depo., p. 161 - Supp. p. 189). At impact, the van became attached to the front of the Engine and was pushed to the east, with both vehicles ultimately striking a telephone pole before coming to a stop. During this time, Toles struggled to keep the vehicle under control. There was a ravine to the left, and Toles was concerned, based on her training, that the Engine could roll if she over corrected, or steered the Engine into the area of the ravine. (Toles depo., p. 162).

Supported by this factual record, the appellants moved for summary judgment in the Common Pleas Court based upon the Political Subdivision Tort Liability Act. The trial court granted appellants' motion (Appendix "E"), recognizing that no genuine issues of material fact existed, and appellants were entitled to summary judgment as a matter of law. This was, by all accounts, a tragic accident, but neither Susan Toles nor Richard Annen acted with a malicious purpose, in any perverse manner, in bad faith, or in a wanton or reckless manner.

The Fifth District Court of Appeals reversed and remanded the case on March 21, 2011, determining that reasonable minds could find appellants' actions in this case were reckless. (Appendix "C"). This Court accepted review on August 24, 2011.

ARGUMENT

Proposition of Law No. I:

A MEMBER OF A MUNICIPAL FIRE DEPARTMENT OPERATING A FIRE TRUCK IN RESPONSE TO AN EMERGENCY CALL IS ENTITLED TO THE PRESUMPTION OF IMMUNITY FROM LIABILITY, AND THE HIGH STANDARD FOR DEMONSTRATING RECKLESSNESS UNDER R.C. §2744.03(A)(6)(b) IS NOT SATISFIED BY EVIDENCE THAT THE FIRE TRUCK ENTERS AN INTERSECTION AT A RATE OF SPEED IN EXCESS OF THE SPEED LIMIT.

In its decision reversing the entry of summary judgment in this case, the appellate court stated:

As Ladder Truck 211 proceeded to the fire, a combination of the lights, wail siren and the air horn were engaged. (Toles depo. at 103 - Supp. p. 164). Additionally, Capt. Annen, who was seated in the passenger seat next to Toles, sounded the air horn at intersections. Id.

...

The facts in the case sub judice are that at approximately 8:30 a.m. on May 6, 2008, Firefighter Toles was traveling approximately 52 mph down walnut Street while operating Ladder Truck 211 and did not stop as she crossed through the intersection with Johnson Street

...

In this case, [Anderson] claims that a large tree, a utility pole, a fence and bushes at or near the intersection created obstructions which required Firefighter Toles to bring the vehicle to a complete stop

Upon review, we find that at the summary judgment stage, we must assume such facts in favor of [Anderson]. **Viewing the facts in this case** in a light most favorable to [Anderson], **specifically the high rate of speed at which [Firefighter] was traveling in conjunction with the claimed obstructions** in the intersection which would interfere with a clear view of the whole intersection, we find reasonable minds could find that Appellees [appellants herein] actions in this case were reckless.

(Opinion, ¶¶ 15, 61, 72, 73). Based strictly upon these determinations drawn from the record, the court of appeals denied the appellants the immunities to which they are entitled by operation of law. However, the mere fact that a fire truck enters an intersection at a rate of speed in excess of the posted speed limit for the roadway involved cannot satisfy the high standard for reckless conduct applicable to the immunity exception found at R.C. §2744.03(A)(6)(b). While the court of appeals cited to this Court's O'Toole decision (Opinion, ¶¶ 52, 71), the appellate court quite clearly stopped short of applying the rule of law announced in O'Toole to the material facts involved in this case.

Liability of an employee of a political subdivision requires analysis under the Political Subdivision Tort Liability Act. R.C. §2744.03(A)(6) sets forth the circumstances under which an employee of a political subdivision is immune from civil liability, which provides, in part, that the employees are personally immune from liability unless their conduct is "with malicious purpose, in bad faith, or in a wanton or reckless manner." See, Lambert v. Clancy, 125 Ohio St.3d 231, 2010 Ohio 1483, ¶8. It is obvious from the reading of this code section that, for the initial stage of analysis and application, the general assembly created the presumption that the employee of a political subdivision is entitled to immunity for acts or omissions within the scope of the employee's duties or employment. Zieber v. Heffelfinger (Mar. 17, 2009), Richland App. No. 08 CA 0042, 2009 Ohio 1227, ¶ 44 ("R.C. 2744.03[A][6] operates as a presumption of immunity."). This presumption is not to be discarded lightly but, instead, the standard for the exception found at R.C. §2744.03(A)(6)(b) is recognized as a high burden on one seeking to remove the immunity.

This Court, in O'Toole v. Denihan, 118 Ohio St.3d 374, 2008 Ohio 2574, reviewed the concepts developed to describe degrees of conduct and reduced the analysis of all of these principles to the general description of "reckless conduct." O'Toole, 118 Ohio St.3d at 386. This Court

specifically referred to its prior decision in Thompson v. McNeill (1990), 53 Ohio St.3d 102, stating that a party's conduct is in reckless disregard of the safety of others if the person intentionally knows of "facts which would lead a reasonable man to realize not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." Id. at 104-105; O'Toole, supra, 386. This Court went further and stated "distilled to its essence, in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk." O'Toole, supra. (Emphasis added).

The court of appeals elected to focus its attention on the speed of the emergency vehicle, in relation to conditions alleged by the appellee suggesting that the view of the subject intersection was obstructed by a tree, utility pole, fence, bushes and a house close to the street. However, despite the court's holding that a question of fact exists on the issue, appellate courts, including the Fifth District, have held that the operation of an emergency vehicle on an emergency run at a speed in excess of the posted limit does not equate to recklessness. See, Marchant v. Gouge, Richland County App. No. 2009 CA 1043, 2010 Ohio 4542; Hewitt v. City of Columbus, Franklin App. No. 08AP-1087, 2009-Ohio-4486; Elsass v. Crockett, Summit App. No. 22282, 2005 Ohio 2142. The purported reliance upon an intersection obstruction, as an additional factor, does not legitimately alter the outcome called for in this case – the recognition of appellant Toles' (and appellant Annen's) immunity from liability.

In Marchant v. Gouge, supra, a wrongful death action was pursued against a Sheriff's Deputy and department following an accident. The deputy had been dispatched to an emergency call, and was driving with lights and siren activated. Marchant v. Gouge, supra at ¶5. The plaintiff's decedent, a pedestrian, entered an intersection in front of the cruiser, leading to the accident. Among

the facts relied upon by the plaintiff to suggest that immunity was not afforded to the deputy or his department was evidence that the cruiser was driving “at 67 miles per hour in a 35 mile per hour zone.” Id. at ¶39. “Appellant argues reasonable minds could find the deputy was going too fast for conditions and did not slow appreciably before he struck [decedent].” Id. at ¶40. The court concluded that “the solitary fact of Gouge’s speed is not sufficient to establish an issue of whether his conduct rose to the level of recklessness.” Id. at ¶46. Thus, summary judgment was affirmed. This Court declined review of Marchant v. Gouge, 2010 Ohio 4542. In this case, the Court of Appeals overruled the appellants’ motion for reconsideration and en banc hearing on April 20, 2011. (Appendix “D”). A hearing en banc would have appropriately addressed the readily-apparent conflict between the decision rendered in this case and that announced in Marchant v. Gouge by the same appellate court.

The Marchant v. Gouge court cited to Hewitt v. City of Columbus, Franklin App. No. 08AP-1087, 2009 Ohio 4486, another case in which speed and condition were considered in the context of immunity. In that case, the officer was driving 67 miles per hour in a 45 mile per hour zone, *without* lights or siren. A car turned in front of the officer, resulting in an accident. Nevertheless, the court in Hewitt affirmed summary judgment, finding that the evidence did not rise to the level of recklessness. Irrespective of the speed argument advanced by the claimant, the motorist was not deprived of his opportunity to yield the right of way to the emergency vehicle. See, Marchant v. Gouge, *supra* at ¶¶ 44, 45. Likewise, the appellee’s decedent was not deprived of the opportunity to yield the right of way to the fire engine, under the record of this case.

Elsass v. Crockett, *supra*, is another case where the factor of speed was addressed. In Elsass, a police officer was on an emergency run, driving at approximately 45 miles per hour in a 25 mile

per hour zone. Id., at ¶31. The appellate court affirmed summary judgment under R.C. §2744.03(A)(6). The fact that the police cruiser was exceeding the speed limit while on an emergency run did not create a genuine issue of material fact for trial, under the “recklessness” standard required to be satisfied under the employee exception from immunity.

Toles, while operating Engine 211, proceeded according to all applicable precautions for an emergency run. Appellants were entitled to exceed the posted speed limit while on an emergency run, therefore, the claim of excessive speed is irrelevant. Appellants had lights and siren operating throughout the emergency run, and the firefighters kept looking for other traffic. The weather was sunny and dry, there was no opposing traffic and the route was familiar. Merely exceeding the posted speed limit is not enough to create a question of fact on recklessness in a case such as this, where the immunity of emergency personnel responding to an emergency call is the essential issue. There was nothing to indicate an unnecessary risk of physical harm under the circumstances. There certainly is nothing in this record to indicate a perverse disregard of a known risk. We must remember that, under these circumstances, a case such as this should not be considered using 20-20 hindsight in viewing a situation and making decisions with a consideration of any tragic results. O’Toole v. Denihan, supra, ¶76. Rather, the proper focus must center upon the information and circumstances the actor had before him or her at the time he or she chose to act.

In addition, the conduct of these firefighters was consistent with the Ohio statutory law regarding the operation of emergency vehicles during an emergency call. Engine 211 was en route to a fire, on an emergency call utilizing its lights, sirens, and air horns. The firefighters involved used their judgment, experience, and discretion to determine how to fulfill the dual responsibility of arriving at the fire as quickly as possible to save potential lives and property, while at the same

time, maintaining due regard for the safety of citizens that may be encountered en route to the fire. Again, there was no evidence of a “perverse disregard of a known risk.” In contrast, the evidence reveals that appellants Toles and Annen were scanning the subject intersection upon their approach, and determined that there was no traffic in the intersection. More importantly, even if Ms. Toles would have observed the Anderson van approaching the stop sign, she would have been entitled to assume, based upon the applicable law, that Mr. Anderson would at a minimum stop at the stop sign, observe her presence, and simply obey the law. Given her position in the road at the time the Anderson van suddenly entered the intersection, had Mr. Anderson hesitated even slightly, or simply paused at the intersection to more fully observe the approach of the fire truck, there would have been no collision. The fire truck would have cleared the intersection well before Mr. Anderson could have entered the west bound lane left of center.

As this Court recognized in O’Toole:

Distilled to its essence, and in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk.

...

[T]he 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. (Emphasis added).

2008 Ohio 2574, ¶¶ 73, 75. Summary judgment was appropriate in this case, and the trial court’s decision to that effect should have been affirmed. The operation of a fire truck, on an emergency run – with lights, siren and horn activated – does not demonstrate a disposition to perversity.

Otherwise, in its opinion, the court of appeals misplaced reliance upon alleged violations of Massillon Fire Department policies. (Opinion, ¶¶ 58, 67-70). In Elsass v. Crockett (May 4, 2005),

Summit App. No. 22282, 2005 Ohio 2142, ¶ 25, the appellate court held that “a violation of an internal departmental policy is not relevant to the issue of whether the officer’s conduct constituted reckless behavior.” The policies had no bearing in this case because of the absence of evidence establishing that Toles or Annen acted with a perverse disregard of the risks involved in operating a fire engine on an emergency run. See, O’Toole, supra at ¶ 92. “Without evidence of an accompanying knowledge that the violations “will in all probability result in injury,” evidence that policies have been violated demonstrate negligence at best.” Id., citing Fabrey, infra.

Applying these concepts, there is no evidence of a perverse disregard for the safety of Massillon citizens. Instead, these firefighters were trying to accomplish their mission to protect people and property from the hazards associated with fires, which effort would be hindered pursuant to the conflicting messages of the Fifth District Court of Appeals’ decision.

Proposition of Law No. II.

THE GENERAL ASSEMBLY DID NOT INCLUDE “RECKLESS” CONDUCT IN R.C. §2744.02(B)(1)(b) AND, THUS, ABSENT EVIDENCE DEMONSTRATING A QUESTION OF FACT AS TO “WILLFUL OR WANTON MISCONDUCT,” A POLITICAL SUBDIVISION IS ENTITLED TO IMMUNITY FROM LIABILITY FOR AN ACCIDENT INVOLVING A FIRE DEPARTMENT VEHICLE WHILE ON AN EMERGENCY RUN.

It is not disputed that the City of Massillon is a political subdivision pursuant to R.C. §2744.01(F), which is immune from liability pursuant to R.C. §2744.02(A)(1). Further, it is undisputed that providing fire services is a governmental function pursuant to R.C. §2744.01(C)(2)(a). Although R.C. §2744.02(B)(1) states that there is no immunity when death is caused by the negligent operation of any motor vehicle by employees who are engaged within the scope of their employment and authority, a full defense applies where a member of a municipal

corporation's fire department is 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)(b). Once it is established that the vehicle was being operated on an emergency call, the burden shifts to the plaintiff to establish that the alleged activity was willful or wanton. Even if Engine 211 was operated in a negligent manner, appellants are entitled to the defense of immunity, as a matter of law – appellants Toles and Annen for the reasons addressed above, and appellant Massillon for the reason that the operation of the fire engine in this case did "not constitute willful or wanton misconduct."

Importantly, the only conclusion reached by the court of appeals as to the conduct of the firefighter who was operating the fire truck involved in this case was that from the factor of speed, while proceeding into the intersection in question alleged to have had various obstructions, "reasonable minds could find that Appellees [operator's] actions in this case were reckless." (Opinion, ¶ 73). The court proceeded to reverse the entry of summary judgment outright, as to all involved defending parties, Massillon, Toles and Annen. However, the appellate court did not identify any evidence from the record that would support any reasonable conclusion that the operation of the fire truck was somehow "willful or wanton." Consequently, the court of appeals should have affirmed summary judgment as to the appellant Massillon. The determination under the "reckless" standard has no bearing under R.C. §2744.02(B)(1)(b), since the General Assembly did not include reckless conduct as part of exception from the "full defense to . . . liability" found therein.

The Fifth District Court of Appeals erred in reversing the trial court's summary judgment ruling because the appellee failed to establish any issue of fact regarding alleged willful or wanton misconduct by Ms. Toles, which could then extend to the City of Massillon. The court of appeals specifically found that allegations of "the high rate of speed at which [Toles] was traveling in conjunction with the claimed obstructions in the intersection which would interfere with a clear view of the whole intersection" prevented summary judgment as reasonable minds could reportedly find appellant's actions in the case were somehow "reckless."

In its judgment granting the appellants' motion for summary judgment, the trial court recognized appellant Massillon's "full defense" to liability, under R.C. §2744.02(B)(1)(b). (Appendix "E," p. 28). In doing so, the trial court properly recognized the heightened standards for willful or wanton misconduct, since those are the degrees of conduct used in the applicable statute. (*Id.*). The trial court determined, from the record, "there has been no evidence provided which demonstrates any willful or wanton misconduct by the Defendants on May 6, 2008, including, but not limited to the operation of Engine 211." (*Id.*). There is no reference in the appellate court's opinion in this case suggesting that, from the evidence in the record, reasonable minds could conclude that the operation of Engine 211 could be found to constitute willful or wanton misconduct. Consequently, the court of appeals should not have interchangeably used the word "reckless," drawn from R.C. §2744.03(A)(6)(b) in order to reverse the summary judgment rendered in favor of the appellant Massillon.

As the Court is well-aware, "where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Terry v. Sperry*, ___ Ohio St. 3d ___, 2011 Ohio 3364, ¶25. Thus, the

standard for “recklessness” should not be read into R.C. §2744.02(B)(1)(b), since the General Assembly did not use it there. The trial court also correctly stated a distinct definition for “wanton” misconduct. “‘Wanton misconduct’ has been defined as ‘the failure to exercise any care toward one to whom a duty of care is owed when the failure occurs under circumstances for which the probability of harm is great and when the probability of harm is known to the tortfeasor.’” (Judgment Entry, p. 6). Citing, Brockman v. Bell (1992), 78 Ohio App. 3d 508, 515.

“Willful misconduct” has otherwise, and more recently, been defined as “conduct involving ‘the intent, purpose, or design to injure.’” Robertson v. Dept. of Public Safety (Sept. 27, 2007), Franklin App. No. 06 AP 1064, 2007 Ohio 5080, ¶14, citing Byrd v. Kirby (July 22, 1999), Franklin App. No. 04 AP 451, 2005 Ohio 1261, ¶22 and Gladon v. Greater Cleveland Regional Transit Authority (1996), 75 Ohio St.3d 312. Factoring these more-recent pronouncements of a heightened level of conduct required to satisfy the definition of “willful misconduct,” and in light of a record which does not in any sense reflect let alone support any conclusion of intent to injure, the court of appeals erred when it reversed summary judgment entered in favor of appellant Massillon.

Recent cases, such as Robertson v. Dept. of Public Safety, supra, have further accepted that “wanton misconduct” too requires some evidence which “establishes a disposition to perversity on the part of the tortfeasor.” Robertson v. Dept. of Public Safety, supra at ¶18. Again, this record does not rationally support a genuine issues of material fact on such heightened standard, for purposes of R.C. §2744.02(B)(1)(b). The cumulative record does not suggest, and does not demonstrate, any disposition to perversity on the part of the fire department officers who were operating Engine 211 at the time of the accident involved in this case. Under a heightened perverse disregard for safety

standard, which this Court should adopt for purposes of the wanton misconduct component of R.C. §2744.02(B)(1)(b), summary judgment in favor of appellant Massillon should be reinstated.

The terms “willful,” “wanton” and “reckless” are defined differently, and they should be applied only to the extent their individual meanings are satisfied. To the extent the terms are meant to convey a continuum, from negligence to intentional (willful) conduct, the terms should not be viewed as interchangeable. In Whitfield v. City of Dayton, 167 Ohio App. 3d 172, 2006 Ohio 2917, the terms used in R.C. §§ 2744.02(B)(1)(b) and .03(A)(6)(b) were viewed as functional equivalents. (Opinion, ¶ 46). If that is correct, then the Court’s decision in O’Toole (rendered after the appellate court decision in Whitfield) would need to be revisited and clarified, with recklessness defined as an even higher standard than stated in O’Toole. If they are functional equivalents, with reckless conduct being the same as willful, then reckless conduct must require evidence of deliberate purpose and knowledge that injury would result from the subject actions. In Fabrey v. McDonald Village Police Dept., 70 Ohio St. 351, 356, 1994 Ohio 368, the Court recognized that R.C. §2744.03(A)(6) “by its very terms applies only to individual employees and not to political subdivisions.” The separate standards used in the statutes should not, in application, effectively be merged.

In a case involving similar facts, decided the same day as this appeal and also pending before this Court, the court of appeals recognized that the “spectrum of intent stretches from negligence, through reckless, to intentional, and there are no bright lines.” Burlingame v. Estate of Burlingame (March 21, 2011), Stark App. Nos. 2010 CA 00124, 130, 2011 Ohio 1325, ¶ 51. No matter how “fine the line” between negligence, recklessness, and willful or wanton conduct may be, the distinctions must be recognized as a matter of law and applied accordingly by the courts.

Considering a continuum of conduct, moving from negligence toward intentional wrongdoing, both of the terms “willful” and “wanton” have been separately defined under Ohio law. The respective definitions recognize that, as the probability of harm or other consequences may result from one’s conduct, there is a shift along the line from inadvertence to intentional acts. For instance, and the trial court in this case recognized, “[w]illful misconduct’ is ‘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 wrongful acts with knowledge or appreciation of the likelihood of resulting injury.’” (Judgment Entry, p. 5). See, Tighe v. Diamond (1948), 149 Ohio St. 520, 527.

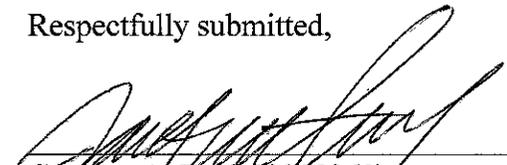
The General Assembly saw fit to using different standards in the statutes implicated in this case. The immunity exception found in R.C. §2744.02(B)(1)(b) is clearly limited to cases involving “willful or wanton misconduct.” The General Assembly distinguished R.C. §2744.02(B)(1)(b) from R.C. §2744.03(A)(6)(b), but the court of appeals (and other courts as well) has effectively combined the separate standards. Consistent with the continuum of conduct between negligence and intent, this Court should settle the independence of these code sections. Because there is no evidence in the record of this case upon which it could ever remotely be determined that the operation of fire engine 211 by appellant Toles, and supervision of same by appellant Annen, was “willful or wanton,” the appellant Massillon was entitled to summary judgment in this case.

CONCLUSION

For the reasons set forth above, the record of this case fully supported the entry of summary judgment in favor of the appellants as ordered by the trial court. Reasonable minds can reach only one conclusion from the evidence, finding that the fire engine involved in the accident in this case was not operated in a willful, wanton or reckless manner – there was no perverse disregard for safety. Consequently, the appellants were entitled to immunity and to judgment as a matter of law.

WHEREFORE, appellants, The City of Massillon, Ohio, Susan J. Toles and Rick H. Annen, respectfully request that this Court reverse the decision of the Fifth District Court of Appeals and reinstate the judgment of the trial court in favor of the appellants.

Respectfully submitted,



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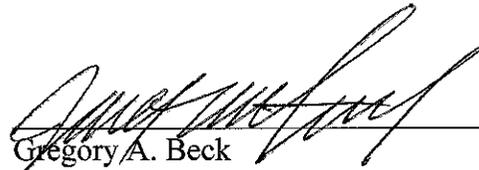
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PROOF OF SERVICE

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IN THE SUPREME COURT OF OHIO

CYNTHIA ANDERSON, Administratrix of
the Estates of Ronald E. Anderson and
Javarre J. Tate, deceased,

Plaintiff-Appellee,

vs.

CITY OF MASSILLON, et al.,

Defendants-Appellants.

11-0743

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

Court of Appeals
Case No. 2010 CA 00196

NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS
THE CITY OF MASSILLON, SUSAN J. TOLES AND RICK H. ANNEN

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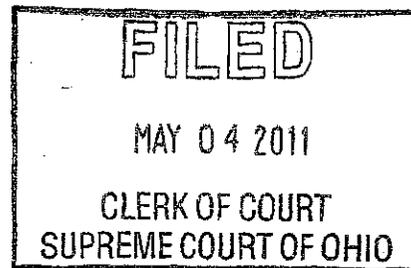
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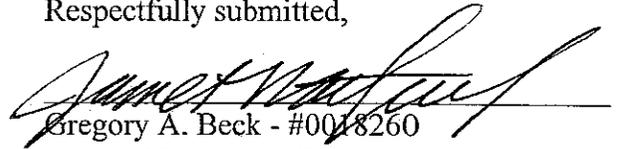


NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS
THE CITY OF MASSILLON, SUSAN J. TOLES AND RICK H. ANNEN

Appellants, The City of Massillon, Ohio, Susan J. Toles and Rick H. Annen, hereby 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 Court of Appeals Case No. 2010 CA 00196 on March 21, 2011.

This case presents a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

11 MAR 21 PM 2:42
NANCY S. FENBERG, CLERK
COURT OF APPEALS
STARK COUNTY, OHIO

CYNTHIA ANDERSON, Adm. of the
Estate of RONALD E. ANDERSON
and JAVARRE J. TATE

Plaintiff-Appellant

-vs-

CITY OF MASSILLON, et al.

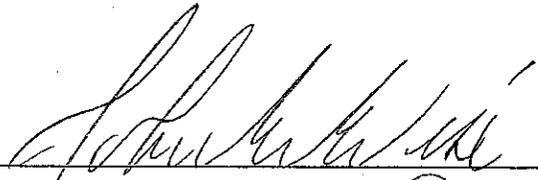
Defendants-Appellees

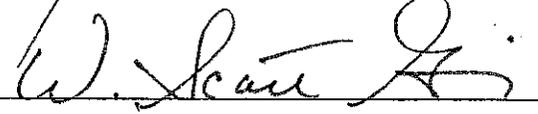
JUDGMENT ENTRY

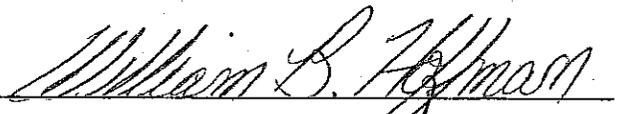
Case No. 2010 CA 00196

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

Costs assessed to Appellees.







JUDGES

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
11 MAR 21 PM 2:42

CYNTHIA ANDERSON, Adm. of the
Estate of RONALD E. ANDERSON
and JAVARRE J. TATE

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Plaintiff-Appellant

-vs-

Case No. 2010 CA 00196

CITY OF MASSILLON, et al.

Defendants-Appellees

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 2009 CV 03641

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

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RECEIVED
MAR 21 2011

Appendix "C"

/ A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By *[Signature]* Deputy
Date *3-21-2011*

Wise, J.

{¶1} Appellant Cynthia Anderson, Administratrix of the Estates of Ronald E. Anderson and Javarre J. Tate, appeals the trial court's July 15, 2010, Judgment Entry granting Appellees' Motion for summary Judgment.

{¶2} Appellees are the City of Massillon, Susan Toles and Rick Annen.

STATEMENT OF THE FACTS AND CASE

{¶3} This case concerns Ohio's statute on sovereign immunity for municipalities and their employees; specifically, whether a municipality and a member of the city's fire department have immunity when the employee causes an accident when responding to an emergency.

{¶4} On the morning of May 6, 2008, an accident occurred at the intersection of Johnson Street and Walnut Street, when the vehicle being operated by Ronald Anderson collided with Massillon City Fire Aerial Ladder Truck 211, resulting in the death of Ronald Anderson and his grandson Javarre Tate.

{¶5} On that morning, the following events transpired:

{¶6} At 8:30:32 a.m., Massillon resident Tammy Lockey called 911 to report a car fire she observed out her window. The call was received by the RED Center, the central dispatch for Massillon and other political subdivisions. Dispatcher Lynne Martin Joiner received the call. (Joiner depo. at 9). Ms. Joiner routed the call to Thomas Thornberry, the fire dispatcher, and he consulted his computer to dispatch the first available fire engine in Massillon. (Joiner depo. at 7). Thornberry, a 26-year veteran dispatcher, inquired of dispatcher Joiner whether the fire was near a house.

{¶17} At 8:31:40, a tone was sounded in Station 1 of the Massillon Fire Dept. for Engine 214 to respond to the car fire. Pursuant to department policy, a single fire engine, such as Engine 214, and a separate truck would respond to car fires. (Burgasser depo. at 16). However, also pursuant to policy, the dispatcher is required to inquire if the car fire is near a building or structure in order to determine which vehicles to dispatch. (Thornberry depo. at 12). Based on this policy, dispatcher Joiner called 911 caller Tammy Lockey back and inquired as to whether the fire was near a house. Joiner interpreted the information she received as indicating the car fire was near a house, and she relayed this information to Thornberry. (Joiner depo. at 7). Based on this new information, Thornberry then toned Station 1 at 8:33:03 and dispatched the second engine, Engine 211, a 75 foot aerial ladder truck. (Thornberry depo. p. 14).

{¶18} At 8:33:43 engine 214 left Station 1, operated by Firefighter Greenwood, commanded by Capt. Smith. Engine 214 proceeded down Erie Street to Walnut Street toward the dispatched location.

{¶19} At 8:34:25, Ladder Truck 211 left Station 1, operated by Firefighter Susan Toles and commanded by Capt. Rich Annen. (Toles depo. at 131). Ladder Truck 211 began to follow the same route as Engine 214 toward the fire. (Toles depo. at 141).

{¶110} A school bus yielded to Engine 214 at Third Street, then traveled down Walnut and through the subject intersection before Ladder Truck 211 appeared. The bus then pulled over east of the intersection as Ladder Truck 211 approached.

{¶111} At the same time as Ladder Truck 211 was travelling eastbound on Walnut Street, SE, Ronald Anderson was travelling northbound on Johnson Street, SE, in Massillon, with his grandson Javarre Tate as a passenger in his vehicle.

{¶12} Walnut Street is a two-lane road in a residential area. The intersection of Walnut and Johnson is a three-way stop, with a red flashing light for all traffic. A large tree was located on the corner of Walnut and Johnson, which, along with a utility pole, a fence, bushes and a house close to the street, Appellant claims obstructed a clear view of the intersection.

{¶13} The posted speed limit in this area is 25 miles per hour.

{¶14} Toles stated that she exceeded the speed limit, but described the emergency run as a "normal call, a normal run." (Toles depo. at 143).

{¶15} As Ladder Truck 211 proceeded to the fire, a combination of the lights, wail siren and the air horn were engaged. (Toles depo. at 103). Additionally, Capt. Annen, who was seated in the passenger seat next to Toles, sounded the air horn at intersections. Id.

{¶16} Toles stated that she could clearly see the intersection of Johnson and Walnut as she approached. (Toles depo. at 149). Capt. Annen stated that, although there is a tree at that intersection, one can see through the branches to the intersection. (Annen depo. at 82-84).

{¶17} Toles recalled that when she saw the school bus pulled over on Walnut Street in her lane of travel east of the intersection, she slowed down in order to make sure there were no children on the street and that the school bus stop sign was not out. (Toles depo. at 150). Toles stated that after she determined that the school bus was yielding, she moved left of center because of the presence of a parked car and the bus. Toles stated that she scanned the entire intersection to make sure the intersection was clear and determined that there was no one in the intersection". (Toles depo. at 155).

{¶18} According to Toles, as she approached the intersection, she saw the Anderson van “shoot out in front” of Ladder Truck 211. She stated that she began to move “immediate[ly] left even more, to try to avoid his vehicle and get around.” (Toles depo., at 156). Just prior to the moment she saw the van pull out in front of Ladder Truck 211, Toles stated that she heard Capt. Annen say “he’s not stopping”. Id. Toles recalled seeing the Anderson van go “completely through the stop sign right in front” of Ladder Truck 211. Id. Toles stated that she never saw the Anderson vehicle stopped at the stop sign. Id. Ladder Truck 211 collided with Anderson’s vehicle, resulting in the death of both Ronald Anderson and Javarre Tate.

{¶19} Eyewitnesses stated that Appellees did not slow down or stop before proceeding through intersection. (See Affidavits of Clark, Jackson, Green and Maroon attached to Plaintiff’s Motion for Partial Summary Judgment).

{¶20} Appellant Cynthia Anderson, the Administratrix of the estates of her husband, Ronald E. Anderson, and her grandson, Javarre Tate, filed a wrongful death action asserting claims against Appellees Susan Toles, Richard Annen and the City of Massillon.

{¶21} On May 19, 2010, Appellant filed a Motion for Partial Summary Judgment on the issue of liability.

{¶22} On May 19, 2010, Appellees also filed a Motion for Summary Judgment asserting the affirmative defense of sovereign immunity.

{¶23} On July 15, 2010, following the filing of response and reply briefs by the parties, the trial court granted Appellees’ Motion for Summary Judgment and denied Appellant’s Motion for Partial Summary Judgment.

{¶24} Appellant now appeals to this Court, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶25} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS/APPELLEES."

SUMMARY JUDGMENT

{¶26} 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 which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case 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. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶27} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment, bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine

issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio- 207, 662 N.E.2d 264.

{¶28} It is based upon this standard that we review Appellant's assignments of error.

I.

{¶29} In her sole assignment of error, Appellant argues that the trial court erred in finding that Appellee was immune from liability under R.C. §2744.01, et seq. We agree.

{¶30} The Supreme Court of Ohio has held:

{¶31} "Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis. *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 556-557, 733 N.E.2d 1141. * * * The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. *Id.* at 556-557, 733 N.E.2d 1141 * * *; R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B); *Carter v. Cleveland* (1998), 82 Ohio St.3d 24, 28. * * *.

{¶32} "The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political

subdivision to liability. Id. at 28. * * * At this tier, the court may also need to determine whether specific defenses to liability for negligent operation of a motor vehicle listed in R.C. 2744.02(B)(1)(a) through (c) apply.

{¶33} "If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability." *Colbert v. Cleveland*, 99 Ohio St.3d 215, 790 N.E.2d 781, 2003-Ohio-3319, at ¶ 7-9. (Parallel citations omitted.)

{¶34} The three-tiered analysis of liability applicable to a political subdivision as set forth above does not apply when determining whether an employee of the political subdivision will be liable for harm caused to an individual. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 865 N.E.2d 9, 2007-Ohio-1946, at ¶ 17.

{¶35} Pursuant to R.C. §2744.03(A)(6), an employee of a political subdivision is immune from liability unless:

{¶36} "(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

{¶37} "(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

{¶38} Appellees herein claim they are entitled to immunity pursuant to R.C. §2744.02, which provides, in part:

{¶39} "(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to

person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

{¶40} "(1) Except 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. The following are full defenses to that liability:

{¶41} " * * *

{¶42} "(b) 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..."

{¶43} Here, since the deaths of Ronald Anderson and Javarre Tate were caused by a municipal employee, who is a member of a municipal fire department and who was proceeding toward a place where a fire was in progress, the question to be answered is if the record establishes an issue of fact concerning whether Firefighter Toles and/or Capt. Annen's actions constitute reckless, willful and/or wanton misconduct.

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

{¶45} "Wanton" conduct is the complete failure to exercise any care whatsoever. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31. Mere negligence will not be construed as wanton misconduct in the absence of

evidence establishing 'a disposition of perversity on the part of the tortfeasor', the actor must be aware that his conduct will probably result in injury. *Id.* (quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 97, 269 N.E.2d 420).)

{¶46} 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. *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, at ¶ 34.

{¶47} " '[W]illful misconduct' involves a more positive mental state prompting the injurious act than wanton misconduct, but the intention relates to the misconduct, not the result." *Id.* at ¶ 29. The *Whitfield* court 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."

{¶48} 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, which states that an actor's conduct is reckless if the following occurs: "[R]eckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an

unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." *Brockman*, 78 Ohio App.3d at 516, 605 N.E.2d 445.

{¶49} In *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 100, 559 N.E.2d 699, the Supreme Court of Ohio again quoted the Restatement, contrasting intentional misconduct and recklessness and negligence and recklessness:

{¶50} "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.

{¶51} "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.”

{¶52} 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 Supreme Court reminded us not to use 20-20 hindsight in viewing a situation and not to color our decision with a consideration of any tragic results. *Id.* at ¶ 76. Our analysis must center upon the information and circumstances the actor had before him at the time he chose to act.

{¶53} The *O’Toole* court held that even violations of agency policy do not rise to the level of recklessness unless the circumstances demonstrate a perverse disregard for the risks involved. *Id.* at ¶ 92.

{¶54} “Generally, issues regarding malice, bad faith, and wanton or reckless behavior are questions presented to the jury. *Fabrey*, * * *. However, summary judgment is appropriate in instances where the alleged tortfeasor’s actions show ‘that he did not intend to cause any harm ..., did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest purpose....’ *Fox v. Daly* (Sept. 26, 1997), Trumbull App. No. 96-T-5453 [1997 WL 663670], (quoting *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772, 663 N.E.2d 384). *Henney* at paragraphs 48-50.” *Doe*

v. Jackson Local School Dist., Stark App.No. 2006CA00212, 2007-Ohio-3258 at ¶ 38; *Sisler v. Lancaster*, Fairfield App.No. 09-CA-47, 2010-Ohio-3039.

{¶55} Thus, when the facts presented show that reasonable minds could not conclude that the conduct at issue meets that high standard, a court may determine that such conduct is not willful, wanton, or reckless as a matter of law and such determination is made considering the totality of the circumstances. *Ybarra v. Vidra*, 6th Dist. No. WD-04-061, 2005-Ohio-2497, ¶ 10, citing *Reynolds v. Oakwood* (1987), 38 Ohio App.3d 125, 127, 528 N.E.2d 578.

{¶56} In the case at bar, the trial court analyzed the totality of the circumstances and found that there was "no evidence provided which demonstrates any willful or wanton misconduct by the [Appellees] on May 6, 2008, including, but not limited to the operation of Engine 211." (Judgment Entry, July 15, 2010).

{¶57} Appellant argues that reasonable minds could find that under the totality of the circumstances, Appellees' conduct was reckless, willful and/or wanton. Appellant lists the following factors in support of whether Appellees' conduct was willful, wanton, or reckless:

{¶58} (1) The failure of Appellees to stop or slow at the stop sign; (2) The speed Appellees were traveling, which was in excess of 50 mph in a 25 mph zone; (3) Any obstructions near the intersection which affected visibility; (4) The fact that Appellees were traveling left of center; (5) Appellee's failure to apply the brakes prior to impact with Anderson's vehicle; (6) The fact that the aerial ladder truck Appellee was driving was the second vehicle dispatched to a minor vehicle fire; (7) Whether Appellee's speed caused the audible siren to be ineffective; (8) whether the siren of the ladder truck was

masked by the siren from the first emergency vehicle; (9) Whether Appellee violated certain Massillon Ordinances and/or Massillon Fire Department policies.

{¶59} Initially, we will address Appellant's argument that three independent witnesses opined that the Appellees conduct in this case was "reckless." However, upon review we find that no definition of "reckless" or "recklessness" as it applies to statutory immunity cases pursuant to R.C. § 2744.03 was provided to these witnesses prior to asking them to make such a legal determination. As such, we do not find these opinions to be dispositive.

{¶60} As such, our review turns to whether reasonable minds could conclude that Appellees' conduct rose to the level of willful, wanton or reckless misconduct.

Analysis: Totality of the Circumstances

{¶61} The facts in the case sub judice are that at approximately 8:30 a.m. on May 6, 2008, Firefighter Toles was traveling approximately 52 mph down Walnut Street while operating Ladder Truck 211 and did not stop as she crossed through the intersection with Johnson Street and struck the vehicle in which Ronald Anderson and Javarre Tate were traveling.

{¶62} Initially we note that because Appellees were responding to an emergency call, Toles was authorized by R.C. §4511.03 to proceed through the stop sign under the following conditions:

{¶63} "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." (Massillon Ordinance 331 mirrors this language).

{¶64} In this case, Appellant claims that Appellees violated the above statute in addition to a number of Massillon Fire Department policies §307.01, §307.03(D) and §307.04(C) and City of Massillon Ordinances §331.20(a) and §303.041.

{¶65} Ord. §303.041, which is modeled after R.C. 4511.45, addresses when an emergency vehicle may travel left of center and provides that operators must exercise "due regard" for all other persons on the roadway.

{¶66} In this case, we do not find the fact that Appellees were left of center contributed to the accident. This is not a situation where the accident was a head-on collision where the emergency vehicle was in the lane of travel of oncoming traffic, resulting in a collision.

{¶67} As to the Massillon Fire Department policies:

{¶68} MFD §307.01 provides that "...if another vehicle fails to yield the right of way to an emergency vehicle, the emergency vehicle operator cannot force the right of way."

{¶69} MFD Policy §307.03(D) provides that "[d]uring emergency response, the driver shall bring the vehicle to a complete stop for any of the following...blind intersections, when the driver cannot account for all lanes of traffic in an intersection, when other intersection hazards are present..."

{¶70} MFD §§307.04(C) and (D) apply to Capt. Annen's duties as the officer on board the aerial ladder truck and provide "the Officer must issue warnings about road conditions and physical hazards to the driver when necessary" and "shall assist the

driver with intersection crossing, locating the scene, backing and any other necessary safety practice.”

{¶71} As stated above, it has been held that violations of internal departmental policies are not determinative as to the issue of whether the conduct herein constituted reckless behavior unless the circumstances demonstrate a perverse disregard for the risks involved. *O’Toole*, supra.

{¶72} In this case, Appellant claims that a large tree, a utility pole, a fence and bushes at or near the intersection created obstructions which required Firefighter Toles to bring the vehicle to a complete stop arguing that she could not “account for all lanes of traffic in an intersection” and that “other intersection hazards [were] present.”

{¶73} Upon review, we find that at the summary judgment stage, we must assume such facts in favor of Appellant. Viewing the facts in this case in a light most favorable to Appellant, specifically the high rate of speed at which Appellee was traveling in conjunction with the claimed obstructions in the intersection which would interfere with a clear view of the whole intersection, we find that reasonable minds could find that Appellees actions in this case were reckless.

{¶74} This ruling should not be interpreted to mean that we find the conduct herein was, in fact, reckless. Rather, we are holding that Appellant should have an opportunity to present her case to a jury to make such a determination.

{¶75} We therefore conclude that the trial court erred in determining that the facts material to the case are not in genuine dispute, and for this reason, summary judgment was inappropriate.

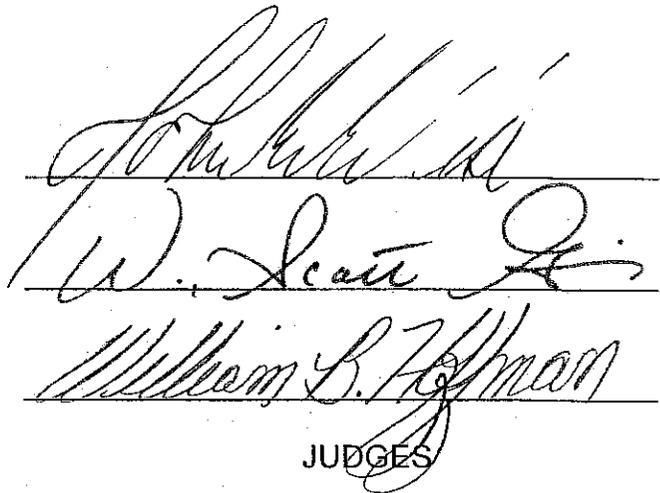
{¶76} Therefore, we sustain Appellant’s sole assignment of error.

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

By: Wise, J.

Gwin, J. and

Hoffman, J. concur



JUDGES

JWW/d 0317

NANCY S. REINGOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

11 APR 20 PM 4: 27

CYNTHIA ANDERSON, Administratrix :
of the Estates of Ronald E. Anderson :
and Javarre J. Tate :
Plaintiff-Appellant :

JUDGMENT ENTRY

vs. :

Case No. 2010-CA-00196

CITY OF MASSILLON, et al., :
Defendants-Appellees :

This matter came before this Court on Appellees' Motion for Reconsideration and Application for En Banc Consideration, filed March 31, 2011, and Appellant's Memorandum in Opposition, filed April 13, 2011.

Upon review of Appellees' Motion for Reconsideration, we find that Appellant has failed to bring to this Court's attention an obvious error or raise an issue that was not fully considered or considered at all when it should have been.

As Appellees have not raised any issues in said Application that this Court did not carefully consider when making its decision, we find said Motion for Reconsideration and Motion for En Banc Consideration not-well taken and hereby deny same.

A-22

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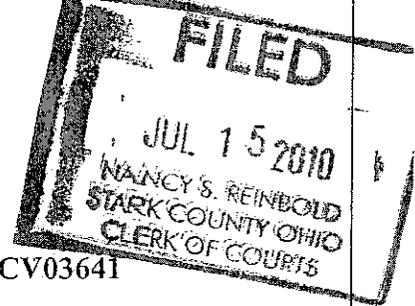
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ENTERED BY 13
JUDGES

Appendix "D"

STARK COUNTY CLERK
NANCY S. REINGOLD, CLERK
By *[Signature]* Deputy
Date 4-21-11

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO



CYNTHIA ANDERSON, Administratrix)
of the Estates of Ronald E. Anderson)
and Javarre J. Tate, Deceased,)
)
Plaintiff,)
)
vs.)
)
THE CITY OF MASSILLON, et al.,)
)
Defendants.)

CASE NO. 2009CV03641
JUDGE CHARLES E. BROWN, JR.
JUDGMENT ENTRY GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

This matter is before the Court on Defendants City of Massillon, Susan Toles and Rick Annen's Motion for Summary Judgment filed on May 19, 2010, Plaintiff Cynthia Anderson's, Administratrix of the Estates of Ronald E. Anderson and Javarre J. Tate, Deceased, Memorandum in Opposition to Defendants' Motion for Summary Judgment filed on June 2, 2010, and Defendants' Reply filed on June 9, 2010.

Also before the Court is Plaintiff's Motion for Partial Summary Judgment filed on May 19, 2010, Defendants' Brief Opposing Plaintiff's Motion for Partial Summary Judgment filed on June 2, 2010, and Plaintiff's Reply filed on June 9, 2010.

Summary Judgment Standard

Summary Judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The moving party must initially inform the trial court of the basis for its motion and identify those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex v. Catrett* (1986), 477 U.S. 317, citing with approval in *Wing v. Anchor Media Ltd. of Texas* (1991), 59

Ohio St.3d 108. See, also, *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292.

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 the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth the specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Civ.R. 56(E).

Once the moving party has satisfied his initial burden, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Vahila* at 1171, quoting *Dresher* at 293.

Statement of the Case

Plaintiff Cynthia Anderson has filed the within action against Defendants City of Massillon, Susan Toles and Rich Annen alleging claims for the wrongful deaths of her husband, Ronald Anderson, and of her grandson, Javarre Tate.

Plaintiff argues that the Defendants conduct in this matter was reckless, willful, and wanton in that Defendants violated Ohio State Statutes and Standard Operating Procedures of the City of Massillon Fire Department.

Defendants move the Court for Summary Judgment based upon the Political Subdivision Tort Liability Act arguing that the Defendants are immune from liability.

Brief Statement of Facts

On May 6, 2008, Ronald Anderson was operating a 1996 Dodge Caravan minivan

northbound on Johnson Street, SE in Massillon. His grandson, Javarre R. Tate, was a passenger in the car. At the same time, Defendant Susan Toles, an 18-year veteran of the Massillon Fire Department, was operating a fire engine, Engine 211, which was responding to an emergency call. Susan Toles was driving eastbound on Walnut Street, SE in Massillon. Defendant Captain Richard Annen, a 28-year veteran of the City of Massillon Fire Department, was seated in the front passenger seat directly next to Susan Toles.

At the intersection of Johnson and Walnut Streets, there is a four way stop sign and a red flashing traffic light.

As Engine 211 responded to the emergency call it was using a combination of the wail siren and the air horn. As Susan Toles operated Engine 211 East on Walnut Street through the intersection, Ronald Anderson proceeded to drive Northbound on Johnson Street into the path of the oncoming Engine 211. Susan Toles steered the engine left of center to try and proceed around the minivan, but was unable to avoid hitting the minivan of Ronald Anderson.

Law and Analysis

A. Defendants' Motion for Summary Judgment

Political Subdivision Tort Liability Act

1. City of Massillon

Liability of a political subdivision, pursuant to the Political Subdivision Tort Liability Act, requires a three-tiered analysis, which was set forth by the Ohio Supreme Court in *Campbell v. Burton* (2001), 92 Ohio St.3d 336. The first tier requires the Court to determine whether the Defendant is entitled to immunity pursuant to R.C. 2744.02(A)(1). If this is answered in the affirmative, the second tier requires the Court to determine whether any of the exceptions to immunity found in R.C. 2744.02(B)(1) through (5) apply. The third and final tier requires the

Court to review whether R.C. 2744.03 is applicable to provide a defense or immunity to establish nonliability.

With regard to the first tier as set forth above, the Court finds that Defendant City of Massillon is a political subdivision pursuant to R.C. §2744.01(F), which is immune from liability pursuant to R.C. §2744.02(A)(1), which states:

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is 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.

Further, providing fire services is a governmental function pursuant to R.C. §2744.01(C)(2)(a).

Defendant City of Massillon is therefore immune from liability unless one of the exceptions to immunity applies (second-tier of the analysis). The applicable exception to immunity in this case is R.C. §2744.02(B)(1). This exception states that there is no immunity when death is caused by the negligent operation of any motor vehicle by employees who are engaged within the scope of their employment and authority. This exception would normally trigger further analysis under the third tier (R.C. §2744.03) to determine whether a defense applies to establish nonliability. In the instant case, however, the third tier analysis is not necessary, as a full defense to this exception is set forth in R.C. §2744.02(B)(1)(b). A full defense applies where a member of a municipal corporation fire department is 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 did not constitute willful or wanton misconduct.

The applicable statutes as set forth above provide:

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except 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. The following are full defenses to that liability:

(b) 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)(b).

The Court finds that the operation of the fire truck in the instant case was in answer to an “emergency call.” Therefore, the Court finds that the city is afforded a full defense to liability pursuant to R.C. §2744.02(B)(1)(b) unless the operation of the fire truck constituted willful or wanton misconduct. Even if the fire truck was operated in a negligent manner, the city is afforded a defense to liability. As such, the burden shifts to the Plaintiff to establish that the operation of the fire truck constituted willful or wanton misconduct.

“Willful misconduct” is “ ‘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 wrongful acts with knowledge or appreciation of the likelihood of resulting injury.’ ” (Citations omitted.) *Id.*, quoting *Tighe v. Diamond* (1948), 149 Ohio St. 520, 527.

“Wanton misconduct” has been defined as “the failure to exercise any care toward one to whom a duty of care is owed when the failure occurs under circumstances for which the

probability of harm is great and when the probability of harm is known to the tortfeasor.”
(Citations omitted.) *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 515.

Upon review of the evidence in the instant case, the Court finds that there has been no evidence provided which demonstrates any willful or wanton misconduct by the Defendants on May 6, 2008, including, but not limited to the operation of Engine 211. As such, the Court grants Defendant City of Massillon’s Motion for Summary Judgment.

2. Individual Liability of Susan Toles and Richard Annen

a. Immunity under R.C. §2744.03(A)(6)

Liability of an employee of a political subdivision requires analysis under the Political Subdivision Tort Liability Act. R.C. §2744.03(A)(6) sets forth the circumstances under which employees of political subdivisions are immune from civil liability. In order to defeat summary judgment on Plaintiff’s claims against Defendants Susan Toles and Richard Annen under this statute, Plaintiff must show some genuine issue of material fact as to whether the Defendants acted with “malicious purpose, in bad faith, or in a wanton or reckless manner.” The statute provides:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(6) [T]he employee is immune from liability unless one of the following applies:

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]

R.C. §2744.03(A)(6)(b).

“Malicious purpose” has been defined as the “willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through * * * unlawful or unjustified” conduct. *Cook v. Hubbard Exempted Village Bd. of Edn.* (1996), 116 Ohio App.3d 564, 569.

“Bad faith” implies more than mere bad judgment or negligence. *Id.* It 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.” *Jackson v. McDonald* (2001), 144 Ohio App.3d 301, 309.

“Wanton” conduct is the complete failure to exercise any care whatsoever. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356. Mere negligence will not be construed as wanton misconduct in the absence of evidence establishing “ ‘a disposition to perversity on the part of the tortfeasor’ ”; the actor must be aware that his conduct will probably result in injury. *Id.*, quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 97.

Lastly, one acts “recklessly” “if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.” *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448 454, quoting *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105.

Generally, issues regarding malice, bad faith, and wanton or reckless behavior are questions presented to the jury. *Fabrey*, supra, 70 Ohio St.3d at 356. However, the standard for showing such conduct is high. *Id.* As a result, summary judgment is appropriate in instances where the alleged tortfeasor's actions show “ ‘that he did not intend to cause any harm * * *, did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest

purpose.’ ” *Fox v. Daly*, 1997 WL 663670 (Ohio App. 11 Dist.), quoting *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772.

Based upon the evidence provided in the instant case, the Court finds that there has been no evidence provided that demonstrates that Defendants Susan Toles and Richard Annen acted with a malicious purpose, in bad faith, or in a wanton or reckless manner on May 6, 2008, including, but not limited to the operation of Engine 211. As such, the Court grants Defendant Susan Toles and Defendant Richard Annen’s Motion for Summary Judgment.

b. Immunity under R.C. §2744.03(A)(3) and R.C. §2744.03(A)(5)

In addition to the immunity provided to Defendant Richard Annen under R.C. §27544.03(A)(6), the Court finds that Defendant Richard Annen is also entitled to immunity under R.C. §2744.03(A)(3) and R.C. §2744.03(A)(5) as set forth below:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

B. Plaintiff’s Motion for Partial Summary Judgment

In light of the Court’s granting of Defendants’ Motion for Summary Judgment, Plaintiff’s Motion for Partial Summary Judgment is denied.

Conclusion

For the reasons stated above, the Court finds that there are no genuine issues of material fact, and viewing the evidence in a light most favorable to the Plaintiff, Defendants are entitled to judgment as a matter of law. Plaintiff's Motion for Partial Summary Judgment is denied.

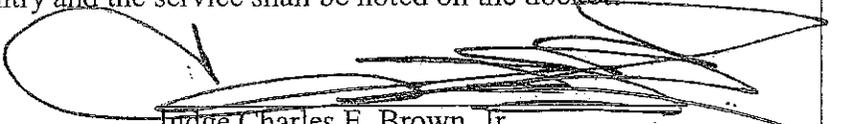
IT IS SO ORDERED.



Judge Charles E. Brown, Jr.

**NOTICE TO THE CLERK:
FINAL APPEALABLE ORDER**

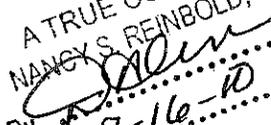
IT IS HEREBY ORDERED that notice of the foregoing Judgment Entry shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket.



Judge Charles E. Brown, Jr.

Copies:

Lee E. Plakas, Esq./Edmond J. Mack, Esq.
David G. Utley, Esq.
Gregory A. Beck, Esq./Mel L. Lute, Jr., Esq.

A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By  Deputy
Date 7-16-10

2744.02 Classification of functions of political subdivisions; liability; exceptions.

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is 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.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except 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. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) 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;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil 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.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

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2744.03 Defenses or immunities of subdivision and employee.

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil 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 an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

2001 SB 106 04-09-2003