

ORIGINAL

IN THE SUPREME COURT OF OHIO  
Case No. 2011-0742

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ON APPEAL FROM THE COURT OF APPEALS  
FIFTH APPELLATE DISTRICT  
STARK COUNTY, OHIO  
CASE NOS. 2010-CA-00124, 2010-CA-00130

GRACE BURLINGAME, *et al.*,  
Plaintiffs-Appellees

v.

ESTATE OF DALE BURLINGAME, *et al.*,  
AND  
JOHN R. COOMBS, II, *et al.*,  
Defendants-Appellants

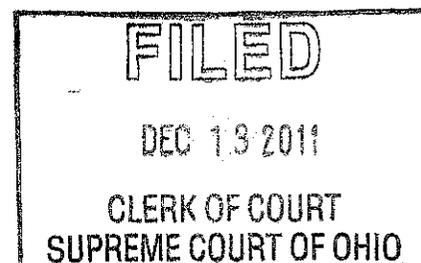
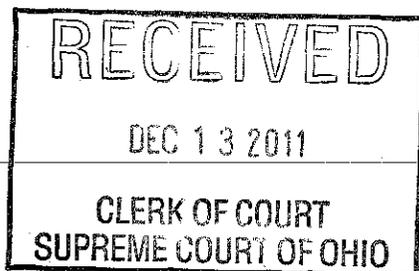
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BRIEF OF AMICI CURIAE  
JOHN HUFFMAN AND OLIVIA DUTY  
IN SUPPORT OF THE PLAINTIFF-APPELLEE  
GRACE BURLINGAME

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**Identification and Position of *Amici Curiae* John Huffman and Olivia Duty**

*Amici Curiae*, John Huffman and Olivia Duty (collectively “*Amici*”), are plaintiffs in the case entitled *Huffman v. Johnson* currently pending in the Ottawa County Court of Common Pleas, Case No. 2011-CV-221C. The legal issue presented in this appeal will directly affect the proceedings in *Amici*’s case. Both cases involve the question of whether firefighters, and the political subdivisions that employ them, are immune from liability under the Political Subdivision Tort Liability Act, R.C. 2744, *et seq.*, for injury that results from their operation of a vehicle in response to an emergency call. In both cases, that determination depends upon whether the firefighter’s acts or omissions were done in a willful, wanton, or reckless manner under R.C. 2744.

*Amici* submit this brief in support of Plaintiff-Appellee Grace Burlingame urging this Court to affirm the judgment of the Fifth District Court of Appeals in this case that “violations of traffic statutes and departmental policies are factors a jury may consider in determining whether [the firefighter’s] actions were reckless.” *Burlingame v. Estate of Burlingame*, 5th Dist. Nos. 2010-CA-00124, 2010-CA-00130, 2011-Ohio-1325, at ¶ 45. In support of that determination, *Amici* endorse the proposition of law propounded by *Amicus* Ohio Association of Justice (“OAJ”):

**To determine whether reasonable minds could conclude that an employee of a political subdivision was reckless, wanton, or willful, the court must look at the totality of the circumstances and construe all relevant evidence in the record in a light most favorable to the non-moving party.**

Brief of Amicus OAJ, at p. 4.

To adopt the propositions of law offered by Appellants would prevent plaintiffs with viable claims against a political subdivision and/or its employee(s) from introducing the fact that the employee’s conduct violated a safety statute, policy, or regulation in seeking to establish that

the employee's conduct was willful, wanton, or reckless. In addition to the fact that Appellants' propositions of law are legally untenable, adopting Appellants' propositions of law would result in an injustice where a plaintiff could be barred from introducing evidence of a defendant's violations that are egregious enough to warrant criminal charges.

The facts in *Amici's* case, *Huffman v. Johnson*, are indicative of one such case where potentially criminal conduct may be immunized by this Court's adoption of Appellants' propositions of law.

**Statement of the Case and Facts in *Huffman v. Johnson***

**1. Defendant Johnson's Willful, Wanton, and Reckless Conduct in Responding to an Emergency Call Caused a Fatal Collision.**

On July 16, 2010, Ian Huffman and Olivia Duty occupied a vehicle that was struck by a vehicle recklessly, willfully, and wantonly operated by Defendant Timothy L. Johnson. The crash killed Ian, age 24, and resulted in severe and painful injuries to Olivia, age 20, including multiple fractures of her pelvis, a fracture of her scapula, laceration of her liver, post-concussive syndrome, and emotional trauma. Defendant Johnson suffered minor injuries. Defendant Johnson's reckless, willful, and wanton conduct violated a number of safety statutes, policies, and procedures.

Ian and Olivia were traveling westbound on Oak Harbor Southeast Road in Olivia's 1999 Mazda Protégé (the "Mazda"). Earlier in the evening, the couple had gone out to dinner before Ian left for law school. Around 11:00 p.m., Olivia was driving her Mazda with Ian as a passenger, she was alert and paying attention to roadway, was wearing her seatbelt, and was not under the influence of drugs or alcohol. The Mazda came to a stop at a stop sign at the State Route 19 intersection before turning right onto northbound State Route 19.

After turning, the Mazda traveled northbound on State Route 19 at a normal rate of acceleration for a short distance before indicating a signal to turn left onto West Portage River Road. When the Mazda was attempting to negotiate its left turn onto West Portage River Road, a 2004 GMC Sierra (the "GMC") attempted to pass Olivia's vehicle through the intersection. The crash occurred when the front of the GMC struck the left rear of the Mazda.

The GMC was being operated by Defendant Johnson, a volunteer firefighter with the Portage Fire District ("Portage" or the "District") located in Oak Harbor, Ottawa County, Ohio. Defendant Johnson was operating his GMC in response to an emergency call initiated by Portage for a structure fire at Tim & Deanna's Recreation, an abandoned bowling alley in neighboring Clay Center.

The GMC's airbag control module – a "black box" type device – indicated that just five seconds before the collision Defendant Johnson was traveling at a rate of 98 m.p.h. and had slowed to 83 m.p.h. one second before the collision. Witness statements are unclear whether Defendant Johnson had activated his light and siren. On November 9, 2010, Defendant Johnson was indicted as a result of the July 16, 2010, crash in the Ottawa County Common Pleas Court on felony charges of aggravated vehicular homicide and aggravated vehicular assault, Case No. 10CR1311.

**2. Defendant Johnson's Conduct Violated a Host of Safety Statutes, Policies, and Procedures Designed for his Safety and the Safety of the Public.**

At the time of the fatal collision, Portage Fire District had many safety guidelines and procedures in place that were designed for the safety of its firefighters and the public. Portage's Standard Operating Guideline No. 6 ("SOG-06") establishes minimum guidelines to assure efficient response of personnel to the station, and apparatus and personnel to the emergency scene without danger to the public or the District's personnel.

John Humphrey, Chief of Portage Fire District, routinely stressed to all of his firefighters the importance of following the safety guidelines, in particular those about driving safety. After each call Portage received, the District's officers would gather the firefighters together and discuss whether, in responding to the emergency call, the firefighters followed the safety guidelines. Defendant Johnson was present during many of these discussions. Moreover, SOG-06 requires that, in responding to emergency calls, the firefighters know the safety guidelines, follow the safety guidelines, and are accountable for their conduct.

Despite having been required to know and follow the driving laws and safety guidelines for all of his 11 years as a member of the Portage Fire District, Defendant Johnson's reckless conduct on the night of July 16, 2010, violated a host of those laws and guidelines. The most egregious violation consisted of Defendant Johnson traveling at a rate of 98 m.p.h. in an area with a posted speed limit of 55 m.p.h. SOG-06 specifically mandates that under ideal conditions firefighters travel *no more than ten miles per hour over the posted speed limit* when responding to an emergency call. In less than ideal conditions, SOG-06 sets the maximum allowable speed at the posted speed limit.

SOG-06 also requires that each firefighter must have all audible and visual warning devices in operation when making an emergency response. According to witness statements, it is unclear whether Defendant Johnson had activated his dash light and siren on the evening of July 16, 2010. Moreover, the siren system's power switch in Defendant Johnson's vehicle was flipped down in the "off" position after the collision. However, the siren system itself could not be located by law enforcement after the collision. Additionally, intersections are specifically identified in SOG-06 as always being the most dangerous areas to approach during an emergency

response. Despite that clear warning and the obvious danger, Defendant Johnson attempted to pass another motor vehicle in a double intersection against a double-yellow line.

Finally, SOG-06 mandates that in responding to emergency calls, firefighters must operate their vehicles with due regard for the safety of others on the road. The details above establish that Defendant Johnson operated his vehicle on the night of July 16, 2010, with *no* regard, or very slight regard if at any all, for the safety of others on the road.

### Argument and Analysis

#### **1. *Amici's* Case Involves the Same Fundamental Issue as This Case.**

In *Amici's* case, Defendant Portage, as a township fire department, is a political subdivision pursuant to R.C. 2744.01(F). Therefore, Defendant Portage will be immune from liability unless *Amici* can demonstrate that Defendant Johnson's conduct was "willful or wanton." R.C. 2744.02(B)(1)(b). Even though he was a volunteer and not compensated, Defendant Johnson was still an employee of Portage. See, R.C. 2744.01(B). Therefore, he is also entitled to immunity from liability unless *Amici* can demonstrate that his conduct was "wanton or reckless." R.C. 2744.03(A)(6)(b).

The fundamental issue in *Amici's* case, then, is the same as in this case: whether the operator of the vehicle acted in a willful, wanton, or reckless manner in responding to an emergency call. The court below merely held that in making that determination, the jury may consider violations of traffic statutes and departmental policies. *Burlingame*, 2011-Ohio-1325, at ¶ 45. That determination forms the basis of this appeal.

## 2. Appellants' Propositions of Law.

**Proposition of Law No. 1: A violation of an internal department policy is not relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless under R.C. 2744.**

**Proposition of Law No. 2: A violation of a traffic statute is not relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless under R.C. 2744.**

As framed by Appellants' propositions of law, the only issue in this appeal is whether violations of safety statutes and/or departmental policies are relevant to determining the level of an actor's misconduct under R.C. 2744. Regardless of how one conceptualizes the terms willful, wanton, and reckless, the fundamental inquiry remains the same: how certain would a reasonable person have been under the same or similar circumstances that his conduct would result in injury. See, *Brockman v. Bell* (1994), 78 Ohio App.3d 508, 514-15, 605 N.E.2d 445 ("As the probability increases that certain consequences will flow from certain conduct, the actor's conduct acquires the character of intent and moves from negligence toward intentional wrongdoing.") (internal citations omitted).

That means that a claimant must demonstrate to the jury that the defendant knew his actions were unreasonably unsafe. Violations of traffic safety statutes and/or departmental policies are, at the very least, *relevant* to such a demonstration. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." OHIO R. EVID. 401.

Such statutes and policies often set the baseline standard for safe conduct under certain circumstances. Evidence demonstrating that an actor knew the safety standards, knew that he was required to comply with those standards, yet nevertheless still knowingly violated them is *highly relevant* to determining whether the actor knew his actions were unreasonably unsafe.

Indeed, one appellate court recently considered a school employee's contravention of the school's safety policies when it concluded that the plaintiff had sufficiently alleged that the employee acted in a wanton, willful, and reckless manner under R.C. 2744. See, *DeMartino v. Poland Local School Dist.*, 7th Dist. No. 10 MA 19, 2011-Ohio-1466.

In *DeMartino*, the school had two safety rules in place to protect students from the dangers associated with commercial grade lawn mowers: (1) "[e]mployees were not permitted to mow in the vicinity of students"; and, (2) "when mowing without a bag, employees were required to attach the manufacturer-provided discharge chute." *Id.*, at ¶ 3. Despite these safety rules, the employee asked his supervisor for permission to mow an area near a parking lot where the band was practicing. *Id.*, at ¶ 5. When his supervisor did not object, the employee removed the bag from the commercial lawn mower without installing the discharge chute and proceeded to mow the area near the band. *Id.* The lawnmower ejected a metal object which struck the plaintiff, a student in the band, in the head causing serious injury. *Id.*

While not *determinative*, the fact that the employee ignored the school's safety policies was certainly *relevant*, among other facts, to the court's determination that the plaintiff adequately alleged wanton, willful, and reckless conduct on the part of the employee. *Id.*, at ¶ 47, 50. In light of the *DeMartino* court's decision, and contrary to the speculation of Appellants, *Amici* have not been made aware of any situation where a large number of schools have "jettison[ed] their heightened policy requirements in favor of the most lenient ones available to avoid inviting liability and to ensure financial security." Br. of Appellants, p. 10.

### **3. The Facts of *Amici's* Case Demonstrate the Unjust Result of Adopting Appellants' Propositions of Law.**

Like other political subdivisions, Portage Fire District established guidelines to ensure the safety of its firefighters and the public at large. Despite knowing those guidelines and having

their importance continuously stressed to him, Defendant Johnson flagrantly violated them. That fact bears directly upon the extent to which Defendant Johnson could be certain that harm would result from his conduct. As in this case, that knowledge or his degree of certainty that harm would result is the crux of the recklessness determination that underlies the issue of liability in *Amici's* case.

Defendant Johnson's violations were so egregious that they warranted an indictment on two felony charges: aggravated vehicular homicide and aggravated vehicular assault. Yet Appellants' position would prevent *Amici* from presenting those flagrant violations to the jury. The circumstances of *Amici's* case makes clear that if this Court adopts Appellants' propositions of law, it could very well open the door to immunizing potentially criminal conduct.

#### **Conclusion**

To prevent such an injustice, *Amici* respectfully request this Court to reject Appellants' propositions of law, endorse the proposition of law propounded by *Amicus* OAJ, and affirm the decision of the Fifth District Court of Appeals that violations of traffic statutes and departmental policies are factors the trier of fact may consider in determining whether the actions of a political subdivision employee were reckless.

Respectfully Submitted,

  
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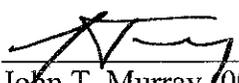
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