ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF DEFENDANT-APPELLEE, EVA FINLEY, ADMINISTRATOR OF THE ESTATE OF DALE BURLINGAME, DECEASED

Orville L. Reed, III (0023522)
Buckingham, Doolittle & Burroughs
3800 Embassy Pkwy., Suite 300
Akron, OH 443333
(330) 376-5300
(330) 252-5523 (facsimile)
oreed@bdblaw.com

Thomas Lombardi (0031189)
101 Central Plaza, S., Suite 900
Chase Tower
Canton, OH 44702
(330) 456-8389
Attorneys for Defendant-Appellee, Eva Finley, Administrator of the Estate of Dale Burlingame

Kevin L'Hommedieu (0066815)
Kristen Lea Bates-Aylward (0030824)
Canton Law Department
Canton City Hall
7th Floor, 218 Cleveland Ave., S.W.
Canton, OH 44702
(330) 489-3251
Fax: (330) 489-3374
Attorney for Appellants, City of Canton and James R. Coombs

Elizabeth Burick (0012565)
1428 Market Avenue North
Canton, OH 44714
(330) 456-3200
Attorney for Appellee, Grace Burlingame

FILED
DEC 13 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE FACTS 1

A. Procedural History 1

B. The Relevant, Underlying Facts 4

ARGUMENT 7

Appellants' Proposed Propositions of Law No. I and II 7

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

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

CONCLUSION 12

CERTIFICATE OF SERVICE 14

APPENDIX ..... A-1 **TO A-15**

A-2 Ohio Revised Code §2744.02

A-2 Ohio Revised Code §2744.02(B)(1)(b)

A-4 Ohio Revised Code §2744.03(A)(6)(b)

A-15 Ohio Revised Code §4511.03

A-6 Ohio Revised Code §4511.21(A)

A-6 Ohio Revised Code §4511.21(B)(1)(a)

TABLE OF AUTHORITIES

Cases

Fabrey v. McDonald Police Dept. (1994), 70 Ohio St.3d 351, 356 ..... 7, 8, 9, 12

Hawkins v. Ivy, (1977) 50 Ohio St.2d 114 11

O'Toole v. Denihan (2008) 188 Ohio St.3d 374, 390 ..... 3, 7, 8, 9, 12

Thompson v. City of Chicago, (7th Cir. 2006) 472 F.3d 444 ..... 11, 12

Thompson v. McNeill (1990) 53 Ohio St.3d 102 ..... 8, 9

Statutes

Ohio Revised Code §2744.02 ..... 2, 13

Ohio Revised Code §2744.02(B)(1)(b) 12

Ohio Revised Code §2744.03(A)(6)(b) 12

Ohio Revised Code §4511.03 ..... 5, 7, 10, 12

Ohio Revised Code §4511.21(A) 9

Ohio Revised Code §4511.21(B)(1)(a) 8

STATEMENT OF THE FACTS

A. Procedural History

This lawsuit has its origins in a fatal accident that occurred on July 4, 2007 when a Canton City fire truck, operated by City employee James R. Coombs, II[1], accelerated through a red light at the intersection of 18th Street, N.W. and Cleveland Avenue, N.W. in the City of Canton and collided with a van driven by Dale Burlingame and in which Grace Burlingame, Dale's wife, was riding in the front passenger seat.

Grace Burlingame filed suit in the Court of Common Pleas of Stark County on February 19, 2009 (Case No. 2009 CV 00689) seeking to recover money damages for the personal injuries that she suffered in the catastrophic collision that occurred on July 4, 2007 at the intersection of Cleveland Avenue and 18th Street N.W. in the City of Canton. Mrs. Burlingame named Joseph Burlingame, Executor of the estate of Dale Burlingame, deceased, as well as the City of Canton, the Canton City Fire Department, James R. Coombs, II and Motorists Insurance Group as Defendants in her lawsuit. (In her Complaint, she requested that Motorists Insurance Group be required to set forth its subrogated claim to the extent that it had one.)

All parties timely filed their Answers to the Plaintiff's Complaint. The Estate of Dale Burlingame filed a cross-claim against the Canton City Fire Department, the City of Canton, and James R. Coombs, II seeking damages for the wrongful death of Dale Burlingame as a result of the accident of July 4, 2007. The City of Canton, James R. Coombs, II and the Canton City Fire Department filed an Answer to that cross-claim denying liability and also asserted that they were entitled to all the immunities, privileges and defenses granted to them pursuant to Chapter 2747 of the Ohio Revised Code. The City, Coombs and the Canton Fire Department cross-claimed

[1] Appellants, City of Canton and James R. Coombs, II will be collectively referred to throughout this Brief as "City" or "The City" except where logic and context requires that they be referred to separately as "The City" or "Coombs".

against the Estate of Dale Burlingame and claimed that they were entitled to be indemnified for his alleged negligence. The City also sought to recover damages for the loss it suffered to its fire truck. The Estate of Dale Burlingame denied that Mr. Burlingame had been negligent, denied that he was the cause of the accident of July 4, 2007 and further denied that the City of Canton was entitled to any affirmative relief.

Discovery ensued and the depositions of, among others, Coombs, Richard Sacco, Douglas E. Serban, Captain Michael Urich and Jerry Ward were all conducted. The parties also exchanged discovery in accord with Rule 34 of the Ohio Rules of Civil Procedure and responded to Interrogatories and Requests for Admissions. Thereafter, the City of Canton moved for summary judgment. That Motion was opposed by Grace Burlingame and the Estate of Dale Burlingame. In support of his Memorandum in Opposition to the Motion for Summary Judgment filed by the City, the Estate of Dale Burlingame relied upon the deposition testimony of Coombs, Sacco, Serban and Ward as well as the affidavit of Brooke James which had been filed by the City in support of its Motion for Summary Judgment. Grace Burlingame also filed a Memorandum and appropriate Rule 56 evidence in opposition to the City's Motion for Summary Judgment. On April 23, 2010 the trial Court granted the City's Motion[2] and determined that there was no genuine issue of fact whether the conduct of Coombs was wanton or willful and that, therefore, the City was entitled to the immunities afforded by R.C. Chapter 2744.02[3]. In ruling for the Defendants on their Motion, the trial Court included:

> ...Coombs believed that the preemptor would turn his light to green, allowing him to safely pass through the intersection. Ultimately, once Coombs realized that

[2] While the Motion for Summary Judgment was pending, Grace Burlingame died from the injuries she suffered in the accident of July 4, 2007. Thereafter, by Order of the Court, Joseph Burlingame became the representative of her estate and Eva Finley became the representative of the Estate of Dale Burlingame, deceased.

[3] The City of Canton's claim of immunity is based upon 2744.02(B)(1)(b); Coombs claim of immunity is based upon R.C. 2744.03(A)(6)(b).

> Dale Burlingame had driven into the intersection, he attempted to avoid hitting his vehicle by swerving left of center.[4]

An appeal from the judgment of the trial Court granting summary judgment was timely filed by the Estate of Grace Burlingame on May 18, 2010 and by the Estate of Dale Burlingame on May 20, 2010. On March 21, 2011, the Court of Appeals for Stark County (Fifth Appellate District) reversed the judgment of the lower court and held that there were genuine issues of fact whether the City and Coombs were entitled to immunity under Chapter 2744:

> In the case before us, we are asked to decide whether Appellees the City of Canton and its employee James R. Coombs, II are entitled to immunity from liability in the operation of a fire truck that was involved in an accident with the decedent's van. For the reasons that follow, we hold that based upon the record of the case before us, reasonable minds can differ regarding whether they are.[5]

Following the issuance of its decision, the City asked the Fifth District Court of Appeals to certify its decision to the Supreme Court of Ohio because, according to the City, its decision was in conflict with other decisions from the Seventh, Eighth, Ninth and Eleventh District Courts of Appeals. The Court of Appeals refused to certify the case as being in conflict with other appellate decisions because it had relied upon the Supreme Court's decision in *O'Toole v. Denihan*, (2008) 118 Ohio St. 3d 374 in reversing the Order granting summary judgment in favor of the City.

On May 4, 2011 the City timely filed its Notice of Appeal to the Supreme Court of Ohio along with its Memorandum in Support of Jurisdiction. On August 24, 2011, the Supreme Court agreed to accept jurisdiction of the City's Propositions of Law I and II:

---

[4] The trial Court gave Coombs "full credit" for blindly assuming, without any rational basis whatsoever, that the preemption system on the traffic light would be activated by an air horn. The preemption system is *only* activated by a siren. There was no evidence that Coombs had ever received any instruction during his training that it could be activated by an air horn. After all this, Coombs is generously forgiven for all of his gross errors of indifference to the well being of innocent users of the highway because he swerved to avoid a dangerous condition that *he* knowingly and recklessly created.

[5] Opinion of the Fifth Appellate District in Case Nos. 2010-CA-00124 and 2010-CA-00130.

I. 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.

II. A violation of the 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.[6]

B. The Relevant, Underlying Facts

On July 4, 2007, Dale and Grace Burlingame, husband and wife, were headed home after enjoying a family picnic at their granddaughter's house. Their route home required them to pass through the intersection of 18th Street, N.W. and Cleveland Avenue, N.W. in Canton, Ohio. When he came to the intersection of 18th Street and Cleveland Avenue, Mr. Burlingame brought his vehicle to a stop in obedience to a traffic light. When his light turned green, Mr. Burlingame slowly pulled his vehicle into the intersection to make a left hand turn so that he could proceed in a northerly direction on Cleveland Avenue. (Affidavit of Brooke James filed by the City in support of its Motion for Summary Judgment.) Almost immediately thereafter, the Burlingames' vehicle was violently struck by the City's 20 ton fire truck travelling at 40 mph from north to south on Cleveland Avenue. (Deposition of Coombs, p. 52.) Mr. Burlingame was killed instantly; Mrs. Burlingame sustained personal injuries and later died from those injuries.

The traffic signals in Canton, like in many other large cities, have a device ("preemption system") that, under emergency situations, can override the usual traffic light patterns. When properly initiated, the system affords an emergency vehicle a favored status (*viz.*, the green light) at an intersection. (Deposition of Douglas E. Serban, City of Canton electronic computer specialist, p. 12, ll. 21-25, p. 13, ll. 11-18; Coombs at pp. 32, 44, and 45). It is the siren of the

---

[6] The Supreme Court did not accept jurisdiction over Appellants' Proposition of Law No. III:

> A firefighter on an emergency call is entitled to immunity and not reckless despite driving through a red light, when lights and air horns are activated, and he is driving less than 5 mph over the speed limit, in daylight, on dry roads, and in light traffic.

fire truck, a police cruiser or an ambulance that initiates the preemption system, not a horn or other device. (Serban, p. 19, ll. 2-8). Unfortunately, the siren on the City's fire truck that plowed into the Burlingames' vehicle on July 4, 2007 had stopped working shortly after the fire truck left the station on Cleveland Avenue. Coombs, the driver of the City's fire engine, knew that the siren was not working (Coombs, p. 27, ll. 38-42 and p. 55, ll. 16-25) and had warned the captain on board that the siren was not working. (Coombs, p. 42; Sacco, pp. 34-36). Coombs used an air horn, in lieu of siren, as he proceeded south on Cleveland Avenue.

The City had trained its firefighters to stop at red lights even when responding to emergency calls. (Deposition of Jerry Ward, firefighter with the City of Canton, City employee for 21 years at p. 9, ll. 16-25). Moreover, the firefighters were trained that if, for example, a siren broke during a run, they were to convert an emergency response into a non-emergency run (Ward, p. 14, ll. 4-19). Nevertheless, Coombs ignored his training, his statutory obligations under R.C. 4511.03, the departmental policies and, most importantly, the obviously foreseeable risk to lawful drivers in the path of the 40,000 pound fire truck he was driving and continued to proceed, as if on an emergency run, through the red light at 18th Street. (Ward, p. 15, ll. 1-17). As Coombs approached the intersection of Cleveland Avenue and 18th Street, he was in a position to see the cross traffic stopped on 18th Street. (Sacco, p. 51, ll. 16-27; p. 52, ll. 1-16). Instead of stopping in obedience to the red light for southbound traffic on Cleveland Avenue, Coombs accelerated the 20 ton fire engine through the red light and into the intersection at a speed of 40 mph. (Coombs, p. 24, ll. 17-25; p. 42, ll. 1-10; pp. 46, 47 and 48, ll. 11-21).

Because its siren was not working, Coombs' fire truck could not trigger the preemption system (Serban, p. 19, ll. 2-18) and could not secure a green light[7] and the right-of-way for Coombs. As Coombs neared the intersection of Cleveland Avenue and 18th Street, the Burlingame vehicle was coming from Coombs' right. This meant that whether the Burlingame vehicle intended to go straight, or to turn to the right or to the left, (the direction was irrelevant), it would have to enter into the immediate path of the fire truck. This was an extraordinarily dangerous situation because the probability of injury to the occupants of the Burlingame vehicle, due to the conduct of Coombs, was so high.

---

[7] Interestingly, the City makes the following statement on page 2 of its Merit Brief:

> Mr. Coombs thought he saw his light at the 18th Street intersection turn green. But it didn't, it was red, and a van that had been stopped for the red light entered the intersection from the west.

This is an evolutionary position for the City. When the City filed its Motion for Summary Judgment, it made the following assertions in its Memorandum in Support of Summary Judgment:

> It is *uncontested* that Coombs' light was green when he [Coombs] entered the intersection and that the Burlingame's light was green when they entered the intersection a fraction of a second before. These facts can be reconciled by virtue of the preemptor, which likely changed the Burlingame to red immediately as they entered the intersection resulting in the Coombs' green light. This is consistent with the witness who saw the Burlingames' light turn green, but she did not testify if it stayed green or whether the preemptor might have immediately changed it back to red. [Emphasis added.]

In fact, as pointed out above, the testimony of the City's electronic computer specialist, Douglas Serban, established that *only a siren* can activate the preemption system in Canton. (Serban, p. 19, ll. 2-8). Moreover, Coombs admitted that the traffic light could not be green for both north and south bound traffic on Cleveland Avenue and for east and west bound traffic on 18th Street.

> A. In the normal operation of a traffic signal, both lights cannot be green, you are correct.
>
> Q. Do you know whether there was any investigation whether the light was operating properly at the time of the accident?
>
> A. I don't know, sir.
>
> Q. You're not aware of any evidence that the light was malfunctioning or not working, are you?
>
> A. No, I'm not aware of that.

(Depo. of Coombs, p. 51, ll. 17-25; p. 52, l. 1.)

Finally, the affidavit of Brooke James, who was following the Burlingame vehicle testified that she saw the light turn green and saw the van enter the intersection on the green. (Affidavit of Brooke James).

ARGUMENT

Appellants' Proposed Propositions of Law I and II

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

II. 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.

Appellants dispute the import of this Court's recent decisions in *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356 and *O'Toole v. Denihan* (2008) 188 Ohio St.3d 374, 390.

> ...Given our definition of "recklessness," a violation of various *policies* does not rise to the level of reckless conduct *unless* a claimant can establish that the violator acted with the perverse disregard of the risk (internal citations omitted)...*Without evidence of an accompanying knowledge that the violations "will in all probability result in injury," Fabrey, 70 Ohio St.3d at 356, 639 N.E.2d 31, evidence that policies have been violated demonstrates negligence at best.* Because the issue here is George-Munroe's *recklessness*, and the record reflects that George-Munroe did not perversely ignore the risk, the violations do not create a genuine issue of material fact regarding this issue of recklessness. (Emphasis added.)

O'Toole v. Denihan 118 Ohio St.3d 374, 390 (2008)

Certainly, if the totality of the evidence offered by the Burlingames only showed that the Coombs entered the intersection on a red light and nothing more, it might well be argued that the violations of R.C. 4511.03 and the City's policies were, at worst, negligence *per se*. However, that was not the case. The evidence of Coombs' wrongful conduct was qualitatively much more egregious than simple negligence. Therefore, the Court of Appeals correctly reversed the judgment of the trial Court and remanded the case to the trial Court for further proceedings.

According to the Court of Appeals, it is the duty of a jury to determine whether Coombs' conduct devolved to the level of recklessness or wanton misconduct.[8]

In light of the applicable law, the City's Propositions of Law I and II are overly simplistic and afford an unreasonably restrictive and unworkable framework. The following example may be instructive: Assume that a City fire truck enters a clearly marked school zone during restrictive school hours at a speed of 50 mph as young students are arriving for school on a weekday morning. The fire truck strikes several children and seriously injures them. According to the City's view of the law, such conduct by the driver of the fire truck is a mere violation of the traffic statute requiring a speed of 20 mph during restricted school hours (R.C. 4511.21(B)(1)(a)). The violation, according to the City, can *only* be evidence of negligence and, therefore, it could not possibly be relevant to the consideration of whether the driver's conduct in this hypothetical devolves to the level of recklessness, or wanton misconduct. Most assuredly, the City's position could not reflect the state of Ohio law. Under the facts of the hypothetical, a driver travelling at speed of 50 mph in a school zone could certainly be found liable on a claim of reckless misconduct by a jury. The 20 mph speed limit would be admissible and relevant. Yet, it is not the mere violation of the posted speed limit of 20 mph that allows a fact finder to conclude that the driver has engaged in reckless or wanton misconduct. Indeed, it is the totality of circumstances, the substantial probability of injury and the operator's appreciation of that probability, that permits the conclusion that the hypothetical operator engaged in reckless misconduct. That is precisely the result dictated by the Supreme Court's decisions in *Fabrey v. McDonald Police Dept., supra* and *O'Toole v. Denihan, supra.*

---

[8] See footnote 1 of *Thompson v. McNeill*, (1990) 53 Ohio St.3d 102, 104:

> *The term "reckless" is often used interchangeably with "willful" or "wanton." Our comments regarding recklessness apply to conduct characterized as willful and wanton as well.*

Or, assume another hypothetical scenario: a trucking company engaged in the business of transporting combustible liquids has an internal policy that prohibits its drivers from exceeding a speed limit of 50 mph (regardless of the posted speed limit). Assume further that one of the company's drivers, carrying a cargo of combustible liquids and travelling at a speed of 65 mph on a highway with a posted speed limit of 65 mph, violates the assured clear distance statute (R.C. 4511.21(A)) by striking vehicles in front of him. This event in turn causes a massive explosion and fatal injuries to innocent users of the highway. The City's two Propositions of Law, if adopted, would mean that neither the internal policies of the trucking company nor the assured clear distance statute would be relevant to the issue of recklessness or wanton misconduct on the part of the driver. It is respectfully submitted that this result is preposterous. The City's position, while zealously argued, leads to conclusions that are completely unwarranted. Its conclusions and its two Propositions of Law fly in the face of what the Ohio Supreme Court obviously intended in its decisions in *Fabrey, supra*, *O'Toole, supra* as well as *Thompson v. McNeill* (1990) 53 Ohio St.3d 102:

> "The actor's conduct is in reckless disregard of the safety of others 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."

Thompson, supra at 104 citing, with approval, The Restatement of Torts, Second at 587, Section 500.

As stated above, the evidence of Coombs' wrongful conduct is qualitatively more egregious than simple negligence. Not only did Coombs approach the intersection of Cleveland Avenue and 18th Street as the traffic light was red for southbound Cleveland Avenue traffic, but he plowed forward without any reasonable assurance that the City's preemption system would be

activated (and thereby turn his light green) by an air horn rather than a siren. Indeed, in the face of an impending collision between the City's fire truck and a slow moving van, Coombs had *no* reasonable basis for believing that 20th Century technology would save him from this callous indifference toward the wellbeing of others. And yet, Coombs should have stopped at the red light in accordance with the policies of the Canton City Fire Department and R.C. §4511.03.

Nor did Coombs creep into the intersection of 18th Street in the face of a red light. Certainly he did not approach the intersection and the red light with the trepidation of one who had concern for the wellbeing of others. Rather, he boldly accelerated into the intersection and steered to the left, knowing full well that he could not possibly stop the fire truck from crashing into the Burlingame van. All caution was thrown to the wind. Furthermore, given the height at which Coombs and his passenger were seated in the fire truck, they were able to see that traffic was poised to enter the intersection from their right. That scenario meant that the Burlingame vehicle, which had the green light, would necessarily be in the path of the 20,000 to 40,000 pound fire engine regardless of whether the Burlingame vehicle made a right hand turn, a left hand turn, or proceeded directly across Cleveland Avenue to the other side of 18th Street. A tragic collision was inevitable and the occupants of the fire truck knew it.

In the end, Coombs' recklessness created more human carnage at the intersection of Cleveland Avenue and 18th Street than he would have prevented had he arrived unimpeded at the site of the fire to which he was rushing. Moreover, the likelihood of serious personal injury was so high, given all of these circumstances, that a fact finder may well determine that his conduct was reckless or wanton. Given the totality of the evidence and the duty of the courts to construe the evidence most favorably toward a party against whom a Motion for Summary Judgment has been made, the Court of Appeals correctly reversed the Order of the trial Court which had

granted summary judgment in favor of the City. Of course, in its opinion, the Court of Appeals did not hold, as a matter of law, that Coombs' conduct was reckless or wanton. To the contrary, it held that there was evidence from which a fact finder may reasonably find that Coombs' conduct was wanton or reckless.[9] Therefore, it correctly remanded the case to the trial Court for further proceedings.

It is respectfully submitted that the City's analogy to cases brought under 42 USC §1983 is likewise unavailing. For example, in *Thompson v. City of Chicago*, (7th Cir. 2006) 472 F.3d 444, plaintiffs had brought an action for the wrongful death of their decedent under 42 USC §1983. There, the Seventh Circuit was required to address the issue of whether the court committed prejudicial error in refusing to allow evidence of the Chicago Police Department's General Orders pertaining to the appropriate use of force. The Seventh Circuit, affirming the decision of the district court, explained why the CPD General Orders were irrelevant:

> What's more, this court has consistently held that "42 USC §1983 protects plaintiffs from constitutional violations, not violations of state laws or, in this case, departmental regulations and police practices" (internal citations omitted).
>
> ...In other words, the violation of police regulations or even the state law is completely immaterial as to the question of whether the violation of the federal constitution has been established. *See id.* In *Scott*, the plaintiff in a Fourth Amendment excessive force action sought to defeat summary judgment based on affidavit testimony demonstrating that a police officer who shot into a moving vehicle breached a municipality's police procedures and thus violated the Fourth Amendment's excessive force prohibition. The district court granted summary judgment and we affirmed, holding that "whether [the officer's] conduct was

---

[9] Just as the Supreme Court did in *Hawkins v. Ivy*, 50 Ohio St.2d 114 (1977) where it reversed the decision of the Court of Appeals which affirmed the trial Court's Order directing a verdict in favor of Defendant at the close of Plaintiff's case in chief. The Court there did not rule, as a matter of law that the Defendants' conduct was wanton. The Supreme Court determined that a fact finder *could* determine that Defendants' conduct was wanton.

> Appellee's conduct was more than simple negligence. With full knowledge of the surrounding circumstances, his reckless and inexcusable disregard of the rights of other motorists, as evidenced by a record construed in accordance with Civ. R. 50(A)(4), *supra*, *would support* a finding of wanton misconduct. (Internal Citations omitted). (Emphasis added).

Hawkins, supra at 116.

> either good police practice or a violation of Illinois law" was immaterial to whether he violated the Fourth Amendment.

Thompson, supra, 454, 455.

As the *Thompson* court concisely explained, the Chicago Police Department's General Orders are irrelevant to the issue of whether there has been a violation of the Fourth Amendment's "objectively reasonable" standard by the allegedly offending State agents. The law to be applied in §1983 actions is the federal case law that has developed under the "objectively reasonable" standard that comports with the requirements of the Fourth Amendment of the Constitution of the United States. Neither State law nor local police policies have any relevance whatsoever to this standard and this body of law. Consequently, the City's argument is without merit. In the instant case, the policies and practices of the Canton Fire Department as well as the basic provisions of R.C. 4511.03 are all factors[10] that may be taken into account by fact finders in determining whether, under *Ohio* law, the actor is conscious that his conduct will, in all probability, result in an injury. See *Thompson v. McNeill* (1990) 53 Ohio St.3d 102.

CONCLUSION

As the Ohio Supreme Court observed in its decision in *O'Toole, supra*, the law cannot be changed or relaxed simply because there has been a tragedy[11] – or as in this case a double tragedy. The Burlingames' representatives must acknowledge that. But, by the same token, the law of recklessness and wanton misconduct cannot be changed merely because a political subdivision, or one of its employees, may lose the qualified immunities afforded by Revised Code §2744.02(B)(1)(b) and Revised Code §2744.03(A)(6)(b). Indeed, had the legislature intended for the political subdivisions and its employees to enjoy an absolute immunity in the

[10] For example, in *Fabrey, supra*, p. 356, this court carefully considered standards promulgated by the State Department of Rehabilitation in determining that Chief Tyree's conduct was, at worst, negligent and not wanton or willful.

[11] See *O'Toole, supra* at 391.

operation of a fire vehicle responding to emergencies, it could have done so. Indeed 2744.02(A) provides for an absolute immunity to political subdivisions for thousands of its activities with *only six* limited exceptions found at 2744.02(B). Furthermore, when the legislature enacted R.C. §2744.02 and §2744.03, it did not offer statutory definitions of recklessness, wanton misconduct, bad faith or willful misconduct. It may reasonably be assumed, therefore, that the legislature intended for the Courts to apply common law definitions of those terms as they have developed in the jurisprudence of the State over the past 200 years. Ultimately what the Appellants ask this Court to do is not just reverse itself on a variety of recently decided cases, but to accede to the City's request that it rewrite, as a super legislature, the language of R.C. §2744.02 and R.C. §2744.03.

Finally, a word must be said about the City's "threat" not to adopt safety policies because they may be used against the City or its employees. Of course, the City may do as it will. However, most citizens would believe that these policies exist for their safety on a day-to-day basis as well as for the safety of the employees who carry out the City's political and proprietary obligations to its citizens. Such a threat hardly comports with the City's duty of responsible stewardship.

For the foregoing reasons, the Estate of Dale Burlingame respectfully requests this Court to reject the City's Propositions of Law #1 and #2 and to affirm the judgment of the Fifth District Court of Appeals.

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP

By: _____

Orville L. Reed, III (#0023522)
3800 Embassy Parkway, Suite 300
Akron, Ohio 44333
(330) 376-5300

Thomas Lombardi (#0031189)
101 Central Plaza, S., Suite 900
Chase Tower
Canton, OH 44702
(330) 456-8389

Attorneys for Appellee,
Eva Finley, Administrator of the Estate of
Dale Burlingame, Deceased

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. mail to the following this 13th day of December, 2011:

Elizabeth Ann Burick
1428 Market Ave.
North Canton, OH 44714

Attorney for Appellant,
James Burlingame

Kevin L'Hommedieu
Kristen Lea Bates-Aylward
Canton Law Department
Canton City Hall
7th Floor, 218 Cleveland Ave., S.W.
Canton, OH 44702

Attorney for Defendants
Canton City Fire Dept., Canton City Hall and
James R. Combs

_____
Orville L. Reed, III

«AK3:1086686_1»

APPENDIX

Page's Ohio Revised Code Annotated:
Copyright (c) 2011 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 54
*** Annotations current through September 19, 2011 ***

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2744. POLITICAL SUBDIVISION TORT LIABILITY

Go to the Ohio Code Archive Directory

ORC Ann. 2744.02 (2011)

§ 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.

HISTORY:

141 v H 176 (Eff 11-20-85); 143 v H 381 (Eff 7-1-89); 145 v S 221 (Eff 9-28-94); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 149 v S 106. Eff 4-9-2003; 152 v H 119, § 101.01, eff. 9-29-07.

Page's Ohio Revised Code Annotated:
Copyright (c) 2011 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 54
*** Annotations current through September 19, 2011 ***

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2744. POLITICAL SUBDIVISION TORT LIABILITY

Go to the Ohio Code Archive Directory

ORC Ann. 2744.03 (2011)

§ 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.*

HISTORY:

141 v H 176 (Eff 11-20-85); 141 v S 297 (Eff 4-30-86); 145 v S 221 (Eff 9-28-94); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v S 108, § 2.03 (Eff 1-1-2002); 149 v S 106. Eff 4-9-2003.

Page's Ohio Revised Code Annotated:
Copyright (c) 2011 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 54
*** Annotations current through September 19, 2011 ***

TITLE 45. MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT
CHAPTER 4511. TRAFFIC LAWS -- OPERATION OF MOTOR VEHICLES
SPEED REGULATIONS

Go to the Ohio Code Archive Directory

ORC Ann. 4511.21 (2011)

§ 4511.21. Speed limits

(A) No person shall operate a motor vehicle, trackless trolley, or streetcar at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead.

(B) It is prima-facie lawful, in the absence of a lower limit declared or established pursuant to this section by the director of transportation or local authorities, for the operator of a motor vehicle, trackless trolley, or streetcar to operate the same at a speed not exceeding the following:

(1) (a) Twenty miles per hour in school zones during school recess and while children are going to or leaving school during the opening or closing hours, and when twenty miles per hour school speed limit signs are erected; except that, on controlled-access highways and expressways, if the right-of-way line fence has been erected without pedestrian opening, the speed shall be governed by division (B)(4) of this section and on freeways, if the right-of-way line fence has been erected without pedestrian opening, the speed shall be governed by divisions (B)(9) and (10) of this section. The end of every school zone may be marked by a sign indicating the end of the zone. Nothing in this section or in the manual and specifications for a uniform system of traffic control devices shall be construed to require school zones to be indicated by signs equipped with flashing or other lights, or giving other special notice of the hours in which the school zone speed limit is in effect.

(b) As used in this section and in *section 4511.212 [4511.21.2] of the Revised Code*, "school" means any school chartered under *section 3301.16 of the Revised Code* and any nonchartered school that during the preceding year filed with the department of education in compliance with rule *3301-35-08 of the Ohio Administrative Code*, a copy of the school's report for the parents of the school's pupils certifying that the school meets Ohio minimum standards for nonchartered, nontax-supported schools and presents evidence of this filing to the jurisdiction from which it is requesting the establishment of a school zone. "School" also includes a special elementary school that in writing requests the county engineer of the county in which the special elementary school is located to create a school zone at the location of that school. Upon receipt of such a written request, the county engineer shall create a school zone at that location by erecting the appropriate signs.

(c) As used in this section, "school zone" means that portion of a street or highway passing a school fronting

upon the street or highway that is encompassed by projecting the school property lines to the fronting street or highway, and also includes that portion of a state highway. Upon request from local authorities for streets and highways under their jurisdiction and that portion of a state highway under the jurisdiction of the director of transportation or a request from a county engineer in the case of a school zone for a special elementary school, the director may extend the traditional school zone boundaries. The distances in divisions (B)(1)(c)(i), (ii), and (iii) of this section shall not exceed three hundred feet per approach per direction and are bounded by whichever of the following distances or combinations thereof the director approves as most appropriate:

(i) The distance encompassed by projecting the school building lines normal to the fronting highway and extending a distance of three hundred feet on each approach direction;

(ii) The distance encompassed by projecting the school property lines intersecting the fronting highway and extending a distance of three hundred feet on each approach direction;

(iii) The distance encompassed by the special marking of the pavement for a principal school pupil crosswalk plus a distance of three hundred feet on each approach direction of the highway.

Nothing in this section shall be construed to invalidate the director's initial action on August 9, 1976, establishing all school zones at the traditional school zone boundaries defined by projecting school property lines, except when those boundaries are extended as provided in divisions (B)(1)(a) and (c) of this section.

(d) As used in this division, "crosswalk" has the meaning given that term in division (LL)(2) of *section 4511.01 of the Revised Code.*

The director may, upon request by resolution of the legislative authority of a municipal corporation, the board of trustees of a township, or a county board of developmental disabilities created pursuant to Chapter 5126. of the Revised Code, and upon submission by the municipal corporation, township, or county board of such engineering, traffic, and other information as the director considers necessary, designate a school zone on any portion of a state route lying within the municipal corporation, lying within the unincorporated territory of the township, or lying adjacent to the property of a school that is operated by such county board, that includes a crosswalk customarily used by children going to or leaving a school during recess and opening and closing hours, whenever the distance, as measured in a straight line, from the school property line nearest the crosswalk to the nearest point of the crosswalk is no more than one thousand three hundred twenty feet. Such a school zone shall include the distance encompassed by the crosswalk and extending three hundred feet on each approach direction of the state route.

(e) As used in this section, "special elementary school" means a school that meets all of the following criteria:

(i) It is not chartered and does not receive tax revenue from any source.

(ii) It does not educate children beyond the eighth grade.

(iii) It is located outside the limits of a municipal corporation.

(iv) A majority of the total number of students enrolled at the school are not related by blood.

(v) The principal or other person in charge of the special elementary school annually sends a report to the superintendent of the school district in which the special elementary school is located indicating the total number of students enrolled at the school, but otherwise the principal or other person in charge does not report any other information or data to the superintendent.

(2) Twenty-five miles per hour in all other portions of a municipal corporation, except on state routes outside business districts, through highways outside business districts, and alleys;

(3) Thirty-five miles per hour on all state routes or through highways within municipal corporations outside business districts, except as provided in divisions (B)(4) and (6) of this section;

(4) Fifty miles per hour on controlled-access highways and expressways within municipal corporations;

(5) Fifty-five miles per hour on highways outside municipal corporations, other than highways within island jurisdictions as provided in division (B)(8) of this section and freeways as provided in divisions (B)(13) and (14) of this section;

(6) Fifty miles per hour on state routes within municipal corporations outside urban districts unless a lower prima-facie speed is established as further provided in this section;

(7) Fifteen miles per hour on all alleys within the municipal corporation;

(8) Thirty-five miles per hour on highways outside municipal corporations that are within an island jurisdiction;

(9) Fifty-five miles per hour at all times on freeways with paved shoulders inside municipal corporations, other than freeways as provided in divisions (B)(13) and (14) of this section;

(10) Fifty-five miles per hour at all times on freeways outside municipal corporations, other than freeways as provided in divisions (B)(13) and (14) of this section;

(11) Fifty-five miles per hour at all times on all portions of freeways that are part of the interstate system and on all portions of freeways that are not part of the interstate system, but are built to the standards and specifications that are applicable to freeways that are part of the interstate system for operators of any motor vehicle weighing in excess of eight thousand pounds empty weight and any noncommercial bus, except as provided in division (B)(14) of this section;

(12) Fifty-five miles per hour for operators of any motor vehicle weighing eight thousand pounds or less empty weight and any commercial bus at all times on all portions of freeways that are part of the interstate system and that had such a speed limit established prior to October 1, 1995, and freeways that are not part of the interstate system, but are built to the standards and specifications that are applicable to freeways that are part of the interstate system and that had such a speed limit established prior to October 1, 1995, unless a higher speed limit is established under division (L) of this section;

(13) Sixty-five miles per hour for operators of any motor vehicle weighing eight thousand pounds or less empty weight and any commercial bus at all times on all portions of the following:

(a) Freeways that are part of the interstate system and that had such a speed limit established prior to October 1, 1995, and freeways that are not part of the interstate system, but are built to the standards and specifications that are applicable to freeways that are part of the interstate system and that had such a speed limit established prior to October 1, 1995;

(b) Freeways that are part of the interstate system and freeways that are not part of the interstate system but are built to the standards and specifications that are applicable to freeways that are part of the interstate system, and that had such a speed limit established under division (L) of this section;

(c) Rural, divided, multi-lane highways that are designated as part of the national highway system under the "National Highway System Designation Act of 1995," *109 Stat. 568, 23 U.S.C.A. 103,* and that had such a speed limit established under division (M) of this section.

(14) Sixty-five miles per hour at all times on all portions of freeways that are part of the interstate system and that had such a speed limit on the effective date of this amendment for operators of any motor vehicle weighing in excess of eight thousand pounds empty weight and any noncommercial bus.

(C) It is prima-facie unlawful for any person to exceed any of the speed limitations in divisions (B)(1)(a), (2), (3), (4), (6), (7), and (8) of this section, or any declared or established pursuant to this section by the director or local authorities and it is unlawful for any person to exceed any of the speed limitations in division (D) of this section. No person shall be convicted of more than one violation of this section for the same conduct, although violations of more than one provision of this section may be charged in the alternative in a single affidavit.

(D) No person shall operate a motor vehicle, trackless trolley, or streetcar upon a street or highway as follows:

(1) At a speed exceeding fifty-five miles per hour, except upon a freeway as provided in divisions (B)(13) and (14) of this section;

(2) At a speed exceeding sixty-five miles per hour upon a freeway as provided in divisions (B)(13) and (14) of this section;

(3) If a motor vehicle weighing in excess of eight thousand pounds empty weight or a noncommercial bus as prescribed in division (B)(11) of this section, at a speed exceeding fifty-five miles per hour upon a freeway as provided in that division;

(4) At a speed exceeding the posted speed limit upon a freeway for which the director has determined and declared a speed limit of not more than sixty-five miles per hour pursuant to division (L)(2) or (M) of this section;

(5) At a speed exceeding sixty-five miles per hour upon a freeway for which such a speed limit has been established through the operation of division (L)(3) of this section;

(6) At a speed exceeding the posted speed limit upon a freeway for which the director has determined and declared a speed limit pursuant to division (I)(2) of this section.

(E) In every charge of violation of this section the affidavit and warrant shall specify the time, place, and speed at which the defendant is alleged to have driven, and in charges made in reliance upon division (C) of this section also the speed which division (B)(1)(a), (2), (3), (4), (6), (7), or (8) of, or a limit declared or established pursuant to, this section declares is prima-facie lawful at the time and place of such alleged violation, except that in affidavits where a person is alleged to have driven at a greater speed than will permit the person to bring the vehicle to a stop within the assured clear distance ahead the affidavit and warrant need not specify the speed at which the defendant is alleged to have driven.

(F) When a speed in excess of both a prima-facie limitation and a limitation in division (D)(1), (2), (3), (4), (5), or (6) of this section is alleged, the defendant shall be charged in a single affidavit, alleging a single act, with a violation indicated of both division (B)(1)(a), (2), (3), (4), (6), (7), or (8) of this section, or of a limit declared or established pursuant to this section by the director or local authorities, and of the limitation in division (D)(1), (2), (3), (4), (5), or (6) of this section. If the court finds a violation of division (B)(1)(a), (2), (3), (4), (6), (7), or (8) of, or a limit declared or established pursuant to, this section has occurred, it shall enter a judgment of conviction under such division and dismiss the charge under division (D)(1), (2), (3), (4), (5), or (6) of this section. If it finds no violation of division (B)(1)(a), (2), (3), (4), (6), (7), or (8) of, or a limit declared or established pursuant to, this section, it shall then consider whether the evidence supports a conviction under division (D)(1), (2), (3), (4), (5), or (6) of this section.

(G) Points shall be assessed for violation of a limitation under division (D) of this section in accordance with *section 4510.036 [4510.03.6] of the Revised Code.*

(H) Whenever the director determines upon the basis of a geometric and traffic characteristic study that any speed limit set forth in divisions (B)(1)(a) to (D) of this section is greater or less than is reasonable or safe under the conditions found to exist at any portion of a street or highway under the jurisdiction of the director, the director shall determine and declare a reasonable and safe prima-facie speed limit, which shall be effective when appropriate signs

giving notice of it are erected at the location.

(I) (1) Except as provided in divisions (I)(2) and (K) of this section, whenever local authorities determine upon the basis of an engineering and traffic investigation that the speed permitted by divisions (B)(1)(a) to (D) of this section, on any part of a highway under their jurisdiction, is greater than is reasonable and safe under the conditions found to exist at such location, the local authorities may by resolution request the director to determine and declare a reasonable and safe prima-facie speed limit. Upon receipt of such request the director may determine and declare a reasonable and safe prima-facie speed limit at such location, and if the director does so, then such declared speed limit shall become effective only when appropriate signs giving notice thereof are erected at such location by the local authorities. The director may withdraw the declaration of a prima-facie speed limit whenever in the director's opinion the altered prima-facie speed becomes unreasonable. Upon such withdrawal, the declared prima-facie speed shall become ineffective and the signs relating thereto shall be immediately removed by the local authorities.

(2) A local authority may determine on the basis of a geometric and traffic characteristic study that the speed limit of sixty-five miles per hour on a portion of a freeway under its jurisdiction that was established through the operation of division (L)(3) of this section is greater than is reasonable or safe under the conditions found to exist at that portion of the freeway. If the local authority makes such a determination, the local authority by resolution may request the director to determine and declare a reasonable and safe speed limit of not less than fifty-five miles per hour for that portion of the freeway. If the director takes such action, the declared speed limit becomes effective only when appropriate signs giving notice of it are erected at such location by the local authority.

(J) Local authorities in their respective jurisdictions may authorize by ordinance higher prima-facie speeds than those stated in this section upon through highways, or upon highways or portions thereof where there are no intersections, or between widely spaced intersections, provided signs are erected giving notice of the authorized speed, but local authorities shall not modify or alter the basic rule set forth in division (A) of this section or in any event authorize by ordinance a speed in excess of fifty miles per hour.

Alteration of prima-facie limits on state routes by local authorities shall not be effective until the alteration has been approved by the director. The director may withdraw approval of any altered prima-facie speed limits whenever in the director's opinion any altered prima-facie speed becomes unreasonable, and upon such withdrawal, the altered prima-facie speed shall become ineffective and the signs relating thereto shall be immediately removed by the local authorities.

(K) (1) As used in divisions (K)(1), (2), (3), and (4) of this section, "unimproved highway" means a highway consisting of any of the following:

(a) Unimproved earth;

(b) Unimproved graded and drained earth;

(c) Gravel.

(2) Except as otherwise provided in divisions (K)(4) and (5) of this section, whenever a board of township trustees determines upon the basis of an engineering and traffic investigation that the speed permitted by division (B)(5) of this section on any part of an unimproved highway under its jurisdiction and in the unincorporated territory of the township is greater than is reasonable or safe under the conditions found to exist at the location, the board may by resolution declare a reasonable and safe prima-facie speed limit of fifty-five but not less than twenty-five miles per hour. An altered speed limit adopted by a board of township trustees under this division becomes effective when appropriate traffic control devices, as prescribed in *section 4511.11 of the Revised Code*, giving notice thereof are erected at the location, which shall be no sooner than sixty days after adoption of the resolution.

(3) (a) Whenever, in the opinion of a board of township trustees, any altered prima-facie speed limit established

by the board under this division becomes unreasonable, the board may adopt a resolution withdrawing the altered prima-facie speed limit. Upon the adoption of such a resolution, the altered prima-facie speed limit becomes ineffective and the traffic control devices relating thereto shall be immediately removed.

(b) Whenever a highway ceases to be an unimproved highway and the board has adopted an altered prima-facie speed limit pursuant to division (K)(2) of this section, the board shall, by resolution, withdraw the altered prima-facie speed limit as soon as the highway ceases to be unimproved. Upon the adoption of such a resolution, the altered prima-facie speed limit becomes ineffective and the traffic control devices relating thereto shall be immediately removed.

(4) (a) If the boundary of two townships rests on the centerline of an unimproved highway in unincorporated territory and both townships have jurisdiction over the highway, neither of the boards of township trustees of such townships may declare an altered prima-facie speed limit pursuant to division (K)(2) of this section on the part of the highway under their joint jurisdiction unless the boards of township trustees of both of the townships determine, upon the basis of an engineering and traffic investigation, that the speed permitted by division (B)(5) of this section is greater than is reasonable or safe under the conditions found to exist at the location and both boards agree upon a reasonable and safe prima-facie speed limit of less than fifty-five but not less than twenty-five miles per hour for that location. If both boards so agree, each shall follow the procedure specified in division (K)(2) of this section for altering the prima-facie speed limit on the highway. Except as otherwise provided in division (K)(4)(b) of this section, no speed limit altered pursuant to division (K)(4)(a) of this section may be withdrawn unless the boards of township trustees of both townships determine that the altered prima-facie speed limit previously adopted becomes unreasonable and each board adopts a resolution withdrawing the altered prima-facie speed limit pursuant to the procedure specified in division (K)(3)(a) of this section.

(b) Whenever a highway described in division (K)(4)(a) of this section ceases to be an unimproved highway and two boards of township trustees have adopted an altered prima-facie speed limit pursuant to division (K)(4)(a) of this section, both boards shall, by resolution, withdraw the altered prima-facie speed limit as soon as the highway ceases to be unimproved. Upon the adoption of the resolution, the altered prima-facie speed limit becomes ineffective and the traffic control devices relating thereto shall be immediately removed.

(5) As used in division (K)(5) of this section:

(a) "Commercial subdivision" means any platted territory outside the limits of a municipal corporation and fronting a highway where, for a distance of three hundred feet or more, the frontage is improved with buildings in use for commercial purposes, or where the entire length of the highway is less than three hundred feet long and the frontage is improved with buildings in use for commercial purposes.

(b) "Residential subdivision" means any platted territory outside the limits of a municipal corporation and fronting a highway, where, for a distance of three hundred feet or more, the frontage is improved with residences or residences and buildings in use for business, or where the entire length of the highway is less than three hundred feet long and the frontage is improved with residences or residences and buildings in use for business.

Whenever a board of township trustees finds upon the basis of an engineering and traffic investigation that the prima-facie speed permitted by division (B)(5) of this section on any part of a highway under its jurisdiction that is located in a commercial or residential subdivision, except on highways or portions thereof at the entrances to which vehicular traffic from the majority of intersecting highways is required to yield the right-of-way to vehicles on such highways in obedience to stop or yield signs or traffic control signals, is greater than is reasonable and safe under the conditions found to exist at the location, the board may by resolution declare a reasonable and safe prima-facie speed limit of less than fifty-five but not less than twenty-five miles per hour at the location. An altered speed limit adopted by a board of township trustees under this division shall become effective when appropriate signs giving notice thereof are erected at the location by the township. Whenever, in the opinion of a board of township trustees, any altered

prima-facie speed limit established by it under this division becomes unreasonable, it may adopt a resolution withdrawing the altered prima-facie speed, and upon such withdrawal, the altered prima-facie speed shall become ineffective, and the signs relating thereto shall be immediately removed by the township.

(L) (1) Within one hundred twenty days of February 29, 1996, the director of transportation, based upon a geometric and traffic characteristic study of a freeway that is part of the interstate system or that is not part of the interstate system, but is built to the standards and specifications that are applicable to freeways that are part of the interstate system, in consultation with the director of public safety and, if applicable, the local authority having jurisdiction over a portion of such freeway, may determine and declare that the speed limit of less than sixty-five miles per hour established on such freeway or portion of freeway either is reasonable and safe or is less than that which is reasonable and safe.

(2) If the established speed limit for such a freeway or portion of freeway is determined to be less than that which is reasonable and safe, the director of transportation, in consultation with the director of public safety and, if applicable, the local authority having jurisdiction over the portion of freeway, shall determine and declare a reasonable and safe speed limit of not more than sixty-five miles per hour for that freeway or portion of freeway.

The director of transportation or local authority having jurisdiction over the freeway or portion of freeway shall erect appropriate signs giving notice of the speed limit at such location within one hundred fifty days of February 29, 1996. Such speed limit becomes effective only when such signs are erected at the location.

(3) If, within one hundred twenty days of February 29, 1996, the director of transportation does not make a determination and declaration of a reasonable and safe speed limit for a freeway or portion of freeway that is part of the interstate system or that is not part of the interstate system, but is built to the standards and specifications that are applicable to freeways that are part of the interstate system and that has a speed limit of less than sixty-five miles per hour, the speed limit on that freeway or portion of a freeway shall be sixty-five miles per hour. The director of transportation or local authority having jurisdiction over the freeway or portion of the freeway shall erect appropriate signs giving notice of the speed limit of sixty-five miles per hour at such location within one hundred fifty days of February 29, 1996. Such speed limit becomes effective only when such signs are erected at the location. A speed limit established through the operation of division (L)(3) of this section is subject to reduction under division (I)(2) of this section.

(M) Within three hundred sixty days after February 29, 1996, the director of transportation, based upon a geometric and traffic characteristic study of a rural, divided, multi-lane highway that has been designated as part of the national highway system under the "National Highway System Designation Act of 1995," *109 Stat. 568, 23 U.S.C.A. 103,* in consultation with the director of public safety and, if applicable, the local authority having jurisdiction over a portion of the highway, may determine and declare that the speed limit of less than sixty-five miles per hour established on the highway or portion of highway either is reasonable and safe or is less than that which is reasonable and safe.

If the established speed limit for the highway or portion of highway is determined to be less than that which is reasonable and safe, the director of transportation, in consultation with the director of public safety and, if applicable, the local authority having jurisdiction over the portion of highway, shall determine and declare a reasonable and safe speed limit of not more than sixty-five miles per hour for that highway or portion of highway. The director of transportation or local authority having jurisdiction over the highway or portion of highway shall erect appropriate signs giving notice of the speed limit at such location within three hundred ninety days after February 29, 1996. The speed limit becomes effective only when such signs are erected at the location.

(N) (1) (a) If the boundary of two local authorities rests on the centerline of a highway and both authorities have jurisdiction over the highway, the speed limit for the part of the highway within their joint jurisdiction shall be either one of the following as agreed to by both authorities:

(i) Either prima-facie speed limit permitted by division (B) of this section;

(ii) An altered speed limit determined and posted in accordance with this section.

(b) If the local authorities are unable to reach an agreement, the speed limit shall remain as established and posted under this section.

(2) Neither local authority may declare an altered prima-facie speed limit pursuant to this section on the part of the highway under their joint jurisdiction unless both of the local authorities determine, upon the basis of an engineering and traffic investigation, that the speed permitted by this section is greater than is reasonable or safe under the conditions found to exist at the location and both authorities agree upon a uniform reasonable and safe prima-facie speed limit of less than fifty-five but not less than twenty-five miles per hour for that location. If both authorities so agree, each shall follow the procedure specified in this section for altering the prima-facie speed limit on the highway, and the speed limit for the part of the highway within their joint jurisdiction shall be uniformly altered. No altered speed limit may be withdrawn unless both local authorities determine that the altered prima-facie speed limit previously adopted becomes unreasonable and each adopts a resolution withdrawing the altered prima-facie speed limit pursuant to the procedure specified in this section.

(O) As used in this section:

(1) "Interstate system" has the same meaning as in *23 U.S.C.A. 101.*

(2) "Commercial bus" means a motor vehicle designed for carrying more than nine passengers and used for the transportation of persons for compensation.

(3) "Noncommercial bus" includes but is not limited to a school bus or a motor vehicle operated solely for the transportation of persons associated with a charitable or nonprofit organization.

(P) (1) A violation of any provision of this section is one of the following:

(a) Except as otherwise provided in divisions (P)(1)(b), (1)(c), (2), and (3) of this section, a minor misdemeanor;

(b) If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to two violations of any provision of this section or of any provision of a municipal ordinance that is substantially similar to any provision of this section, a misdemeanor of the fourth degree;

(c) If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to three or more violations of any provision of this section or of any provision of a municipal ordinance that is substantially similar to any provision of this section, a misdemeanor of the third degree.

(2) If the offender has not previously been convicted of or pleaded guilty to a violation of any provision of this section or of any provision of a municipal ordinance that is substantially similar to this section and operated a motor vehicle faster than thirty-five miles an hour in a business district of a municipal corporation, faster than fifty miles an hour in other portions of a municipal corporation, or faster than thirty-five miles an hour in a school zone during recess or while children are going to or leaving school during the school's opening or closing hours, a misdemeanor of the fourth degree.

(3) Notwithstanding division (P)(1) of this section, if the offender operated a motor vehicle in a construction zone where a sign was then posted in accordance with *section 4511.98 of the Revised Code*, the court, in addition to all other penalties provided by law, shall impose upon the offender a fine of two times the usual amount imposed for the violation. No court shall impose a fine of two times the usual amount imposed for the violation upon an offender if the

offender alleges, in an affidavit filed with the court prior to the offender's sentencing, that the offender is indigent and is unable to pay the fine imposed pursuant to this division and if the court determines that the offender is an indigent person and unable to pay the fine.

HISTORY:

GC § 6307-21; 119 v 766, § 21; 124 v 514; Bureau of Code Revision, 10-1-53; 126 v 115 (Eff 10-1-56); 127 v 931 (Eff 9-14-57); 128 v 1270 (Eff 11-4-59); 130 v 1083 (Eff 9-30-63); 130 v PtII, H 5 (Eff 12-16-64); 131 v 1101 (Eff 11-4-65); 132 v H 1 (Eff 2-21-67); 135 v H 200 (Eff 9-28-73); 136 v H 632 (Eff 6-27-75); 136 v H 1166 (Eff 8-9-76); 137 v H 587 (Eff 11-3-77); 138 v H 20 (Eff 8-29-79); 138 v H 32 (Eff 8-29-79); 138 v S 14 (Eff 10-25-79); 140 v S 37 (Eff 9-7-83); 141 v H 795 (Eff 8-29-86); 141 v S 356 (Eff 9-24-86); 141 v H 428 (Eff 12-23-86); 141 v H 666 (Eff 3-25-87); 142 v H 43 (Eff 7-31-87); 142 v H 493 (Eff 7-15-87); 143 v H 381 (Eff 7-1-89); 144 v H 96 (Eff 6-18-91); 144 v S 201 (Eff 8-19-92); 144 v S 301 (Eff 3-15-93); 146 v H 565. Eff 2-29-96; 149 v S 123, § 1, eff. 1-1-04; 151 v H 68, § 101.01, eff. 6-29-05; 151 v S 184, § 1, eff. 6-15-06; 152 v H 67, § 101.01, eff. 6-30-07; 153 v H 2, § 101.01, eff. 7-1-09; 153 v S 79, § 1, eff. 10-6-09.

Page's Ohio Revised Code Annotated:
Copyright (c) 2011 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 54
*** Annotations current through September 19, 2011 ***

TITLE 45. MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT
CHAPTER 4511. TRAFFIC LAWS -- OPERATION OF MOTOR VEHICLES

Go to the Ohio Code Archive Directory

ORC Ann. 4511.03 (2011)

§ 4511.03. Emergency vehicles to proceed cautiously past red or stop signal

(A) The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway.

(B) Except as otherwise provided in this division, whoever violates this section is guilty of a minor misdemeanor. If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one predicate motor vehicle or traffic offense, whoever violates this section is guilty of a misdemeanor of the fourth degree. If, within one year of the offense, the offender previously has been convicted of two or more predicate motor vehicle or traffic offenses, whoever violates this section is guilty of a misdemeanor of the third degree.

HISTORY:

GC § 6307-4; 119 v 766, § 4; Bureau of Code Revision, 10-1-53; 132 v H 378. Eff 12-14-67; 149 v S 123, § 1, eff. 1-1-04.