

ORIGINAL

Case No. 2011-0743

In the Supreme Court of Ohio

ON APPEAL FROM THE STARK COUNTY COURT OF APPEALS,
FIFTH APPELLATE DISTRICT,
CASE No. 2010 CA 00196

CYNTHIA ANDERSON, ADMINISTRATRIX,
Plaintiff-Appellee,

v.

THE CITY OF MASSILLON, et al.,
Defendants-Appellants.

MERIT BRIEF OF APPELLANT CYNTHIA ANDERSON, ADMINISTRATRIX OF THE ESTATES OF RONALD E. ANDERSON AND JAVARRE J. TATE

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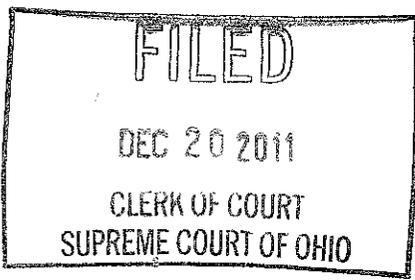


TABLE OF CONTENTS

	PAGE
I. STATEMENT OF THE FACTS	1
II. UNIQUE PROCEDURAL POSTURE OF CASE	17
III. APPELLANTS' INCORRECT STATEMENTS OF FACT	19
IV. ARGUMENT	23
<u>Counter Proposition of Law No. I:</u>	
Whether a member of a municipal police department, fire department, or emergency medical service operating a motor vehicle in response to an emergency engaged in wanton, reckless, or willful conduct so as to fall within the exceptions to political subdivision immunity set forth in R.C. §§ 2744.02(B)(1) and 2744.03(A)(6) is based upon the "totality of the circumstances" of each particular case. (<i>Brockman v. Bell</i> , 78 Ohio App.3d 508, 517, 605 N.E.2d 445 (1st Dist. 1992), approved in part).	23
<u>Counter Proposition of Law No. II:</u>	
"Wanton," "willful," and "reckless" misconduct as used in R.C. §§ 2744.02(B)(1) and 2744.03(A)(6) all generally refer to "recklessness," which is when one 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. (<i>Thompson v. McNeill</i> , 53 Ohio St.3d 102, 104-05, 559 N.E.2d 705 fn. 1 (1990), approved).	26
V. CONCLUSION	35
CERTIFICATE OF SERVICE.	36
APPENDIX	A-1
"A" Massillon Ord.	A-1

I. STATEMENT OF THE FACTS: APPELLANTS RECKLESSLY AND WANTONLY TOOK THE LIVES OF MR. ANDERSON AND JAVARRE.

Appellants' reckless and wanton conduct needlessly took the lives of two innocent persons. Without any regard for public safety, Appellants engaged in the following conduct:

- Drove a 22.5 ton, 75' aerial ladder truck left-of-center at a speed of at least 52 mph through a 25 mph residential neighborhood, *knowing* this speed caused the truck to outrun the effectiveness of its siren;
- Proceeded toward a blind obstructed intersection directly in front of a preschool without slowing down, *knowing* that the intersection is obstructed and contains visual hazards;
- Proceeded through the blind intersection without stopping or slowing at the clearly marked stop sign and a red flashing light *knowing* that intersections are where most collisions occur;
- Violated numerous Massillon Codified Ordinances, MFD Polices, and well accepted standards in the field of Emergency Vehicle Response when operating the fire truck, *knowing* that these rules exist for the safety of the motoring public; and
- Collided with the vehicle driven by Mr. Ronald Anderson as he was taking his grandson Javarre Tate to preschool, dragged it the length of three football fields, and crushed its occupants.

This conduct violated numerous Massillon Codified Ordinances, MFD Polices, and well accepted standards in the field of Emergency Vehicle Response. Despite these facts and damning opinions from well-respected professionals in the field (including Appellants' *own* expert witness), the trial court found that no rational juror could find that the Appellants' conduct was reckless and wanton when taking the lives of Mr. Anderson and Javarre. Because the record is replete with evidence from which a rational juror may find that Appellants' actions were indeed reckless and wanton, the Court of Appeals unanimously reversed the trial court's judgment. This Court should affirm the Court of Appeals' judgment in its entirety.

A. Appellants Operated the 22.5 Ton Ladder Truck Without *Any* Regard for Public Safety, Ultimately Causing the Deaths of Mr. Anderson and Javarre.

On the morning of May 6, 2008, Appellant Susan Toles, a MFD employee, had already worked a 24 hour shift at a different fire station when she reported to Station 1 to work overtime. Deposition of Susan Toles ("Toles Depo."), pp. 112-14 (Selected pages at SUPP. Appx. Tab 1). For her overtime shift at Station 1, Appellant Toles was assigned to drive Engine 211. Toles Depo., p. 130 (SUPP. Appx. Tab 1). Appellant Rich Annen was the assigned captain to Engine 211. Toles Depo., p. 130 (SUPP. Appx. Tab 1).

Engine 211 is an exceptionally large “quint” fire truck. Of all the trucks in the MFD fleet, Engine 211 is the second largest. Deposition of Tom Burgasser, Rule 30(B)(5) (“Burgasser 30(B)(5) Depo.”), p. 13 (Selected pages at SUPP. Appx. Tab 2). It has a 75’ aerial ladder, a water tank, a pump, and multiple hoses. Burgasser 30(B)(5) Depo., pp. 10-11 (SUPP. Appx. Tab 3). Without occupants, Engine 211 weighs approximately 45,909 lbs. See, Ohio State Highway Patrol Portable Scale Arrest and Weight Record, p. 2 (SUPP. Appx. Tab 3).¹ Because of this, Engine 211 is a very difficult fire truck to operate. Burgasser 30(B)(5) Depo., p. 14 (SUPP. Appx. Tab 3). One Massillon fire fighter remarked, “it’s hard enough to drive [Engine 211].” Deposition of Jason Castile (“Castile Depo.”), p. 25 (Selected pages at SUPP. Appx. Tab 4). In contrast, the minivan occupied by Mr. Anderson and Javarre Tate at the time of the collision weighed approximately 3,950 lbs. See, Ohio State Highway Patrol Portable Scale Arrest and Weight Record, p. 1 (SUPP. Appx. Tab 3).

That morning, dispatcher Lynne Joiner received a 911 call for a minor car fire at 1272 Huron Road in Massillon. Deposition of Lynn Joiner (“Joiner Depo.”) pp. 8-9 (SUPP. Appx. Tab 5). Engine 214, a smaller pumper truck, was “toned out” by a dispatcher Thomas Thornberry. Deposition of Thomas Thornberry (“Thornberry Depo.”), p. 11 (SUPP. Appx. Tab 6). Dispatcher Joiner called the complainant back to more precisely determine the location of the vehicle, and was told that the car fire was “near the house.” Joiner Depo., p. 11 (SUPP. Appx. Tab 5); Depo. Thornberry, p. 13 (SUPP. Appx. Tab 6). In response to this additional information, dispatcher Thornberry “toned out” Rescue 250, an ambulance, to respond to the car fire in conjunction with Engine 214. Thornberry Depo., p. 13 (SUPP. Appx. Tab 6). At no time did the complainant report that the vehicle was inside the house, that the house was in danger of catching fire, or that any lives were in danger. See, Deposition of Rich Annen (“Annen Depo.”), pp. 179-90 (Selected pages at SUPP. Appx. Tab 7).

¹ The parties have stipulated to the admissibility and authenticity of the data and results reflected by this document. See, Stipulation Regarding Authenticity and Admissibility of Certain Evidence, ¶7 (Mar. 18, 2010).

However, despite MFD's policy to the contrary, dispatcher Thornberry then took the *additional step* to dispatch Engine 211 to respond to the vehicle fire in conjunction with Engine 214. Thornberry Depo., pp. 13-14 (SUPP. Appx. Tab 6); Burgasser 30(B)(5) Depo., Pltf.'s Depo. Exh. 35. When asked why he did this, Mr. Thornberry testified:

"My thinking on that was that possibly that the crew of 250 was on 211 and somebody may have told me that, you know, that they're on the pump and they might have been coming back from another call."

Thornberry Depo., p. 14 (SUPP. Appx. Tab 6).

However, when the additional tone went to Engine 211, Rescue 250 had not yet left Station 1. Annen Depo., p. 89-90 (SUPP. Appx. Tab 7). Instead of inquiring as to the propriety of the dispatch of Engine 211, Appellant Annen decided for *Rescue 250* to not go to the scene at all. Annen Depo., p. 89-90 (SUPP. Appx. Tab 7). Instead, Appellant Annen ordered Firefighters Baird and Castile, who were supposed to go on Rescue 250, to go on Engine 211. Annen Depo., p. 89-90 (SUPP. Appx. Tab 7). The heavy Engine 211 ladder truck, instead of the more nimble ambulance Rescue 250, was now en route to the minor car fire.

At no time were the firefighters aboard Engine 211 told that the car fire was near a house. Annen Depo., p. 190-91 (SUPP. Appx. Tab 7). *At no time were the firefighters told that anyone was in danger of any physical harm.* Annen Depo., p. 190-91 (SUPP. Appx. Tab 7). The firefighters were only told they were responding to a vehicle fire. Annen Depo., pp. 190-91 (SUPP. Appx. Tab 7).

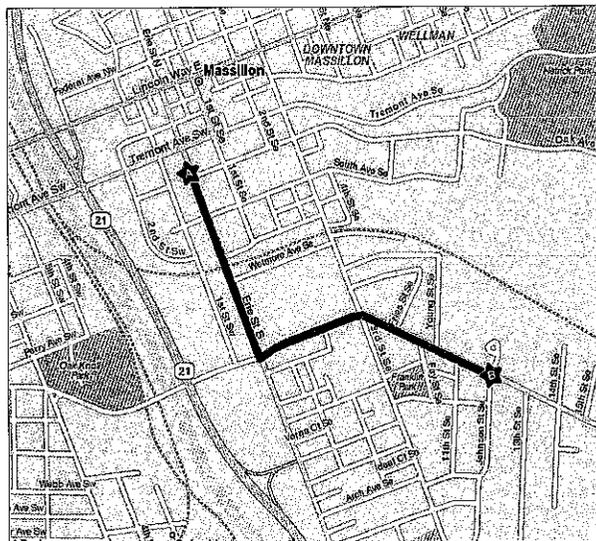
The vehicle fire was only a mile-and-a-half away from Station 1. Deposition of Donald Smith ("Smith Depo."), pp. 58-59 (SUPP. Appx. Tab 8). Engine 214 pulled out first, followed by Engine 211. Toles Depo., pp. 136-37 (SUPP. Appx. Tab 1). Both engines took the same route to get to the car fire. Toles Depo., pp. 141-42 (SUPP. Appx. Tab 1). The engines turned right out of Station 1 onto Erie Street, and then left onto Walnut Street. Toles Depo., p. 138 (SUPP. Appx. Tab 1).

Walnut Street is a narrow two-lane road. Smith Depo., p. 51 (SUPP. Appx. Tab 8). The houses on Walnut Street are relatively close to the street. Smith Depo., p. 51 (SUPP. Appx. Tab 8). The first part of

Walnut Street is up-hill, and after Third Street, it veers right. Toles Depo., p. 141 (SUPP. Appx. Tab 1). The speed limit is 25 mph, and it travels through a residential neighborhood. Depo. Toles, p. 164 (SUPP. Appx. Tab 13); Smith Depo., p. 51 (SUPP. Appx. Tab 8).

Engine 211 remained relatively close to Engine 214. Before Appellants turned left onto Walnut Street in Engine 211, Appellant Toles saw Engine 214 ahead of their engine on Walnut Street, at the top of the hill. Toles Depo., p. 141 (SUPP. Appx. Tab 1). Appellants then turned left and drove Engine 211, over the hill on Walnut Street. Depo. Toles, pp. 141-42 (SUPP. Appx. Tab 1). Heading eastbound and after following the veer to the right on Walnut Street, Appellant Toles again saw Engine 214, which was ahead of their vehicle at the intersection of Walnut Street and Johnson Street. Depo. Toles, pp. 141-42 (SUPP. Appx. Tab 1).²

The below map accurately illustrates the route taken by both Engines 214 and 211 to the vehicle fire:



Map of Route to Vehicle Fire, Pltf.'s Depo. Exh. 25 (SUPP. Appx. Tab 20).³

² For a map illustrating the route traveled by the vehicles, see Map of Route to Vehicle Fire, Pltf.'s Depo. Exh. 25 (SUPP. Appx. Tab 9).

³ This exhibit was properly authenticated during deposition. Annen Depo., p. 115 (Appx. Tab 7).

Appellants understand that the risk for a collision is highest at intersections. Annen Depo., p. 27 (SUPP. Appx. Tab 7); Castile Depo., pp. 50-51 (SUPP. Appx. Tab 4); Deposition of Ernest Baird ("Baird Depo."), p. 39 (SUPP. Appx. Tab 10). This recognized danger was particularly acute at the intersection of Johnson Street and Walnut Street. The intersection was controlled by a three-way stop and a three-way flashing red light. Expert Report of Choya Hawn ("Hawn Rpt."), p. 1 (SUPP. Appx. Tab 11).⁴ The presence of the red flashing light, in itself, indicates that the intersection is a dangerous intersection. Expert Deposition of Choya Hawn ("Hawn Exp. Depo."), p. 105 (SUPP. Appx. Tab 12). There is a preschool on the north side of the intersection. Toles Depo., p. 17 (SUPP. Appx. Tab 1). There is a church on the northwest side of the intersection. Toles Depo., p. 17 (SUPP. Appx. Tab 1). In addition, on May 6, 2008, the intersection had numerous blind spots and hazards preventing motorists from seeing vehicles going north on Johnson Street, such as:

- 1. Large Obstructing Tree.** On the day of the collision, there was a large tree with low hanging limbs on the south side of Walnut Street. Annen Depo., p. 83 (SUPP. Appx. Tab 7); Toles Depo., p. 149 (SUPP. Appx. Tab 13); Affidavit of Daniel Clark ("Clark Aff."), ¶9 (SUPP. Appx. Tab 13). Appellant Annen admitted that the large tree obstructed the intersection. Annen Depo., p. 83 (SUPP. Appx. Tab 7). Other MFD firefighters also confirmed that the tree restricts a driver's ability to see vehicles at an intersection. Castile Depo., p. 51 (SUPP. Appx. Tab 4).
- 2. Large Obstructing Utility Pole.** A utility pole was on the south side of Walnut Street. Annen Depo., p. 84 (SUPP. Appx. Tab 7); Clark Aff., ¶9 (SUPP. Appx. Tab 13). Appellant Annen admitted that the utility pole obstructed the intersection. Annen Depo., p. 84 (SUPP. Appx. Tab 7). This admission was confirmed by other MFD firefighters. Castile Depo., p. 51 (SUPP. Appx. Tab 4).
- 3. Houses Close to the Street.** Houses on the south side of Walnut Street, close to the street, likewise obstructed the view of oncoming traffic at the intersection. Clark Aff., ¶9 (SUPP. Appx. Tab 13).
- 4. Obstructing Fences and Bushes.** Fence and bushes on the south side of Walnut Street also obstructed the view of the intersection. Clark Aff., ¶9 (SUPP. Appx. Tab 13).
- 5. Several Obstructing Parked Cars.** At the time of the collision, there were two cars parked on the south side of Walnut Street, immediately prior to the intersection of Walnut Street and Johnson Street. Annen Depo., pp. 111, 114, 123 (SUPP. Appx. Tab 7).

⁴ The expert report of Mr. Hawn was authenticated during deposition. See, Exp. Hawn Depo., p. 129-30 (SUPP. Appx. 12), Pltf.'s Depo. Exh. 54.

These obstructions at Walnut and Johnson Streets are illustrated by the following photograph, taken of the intersection on the day of the collision looking toward the west (where Engines 214 and 211 originated).⁵



Based upon the presence of these hazards, the intersection of Johnson Street and Walnut Street was truly a “blind intersection” within the meaning of MFD Policies. Expert Deposition of Robert Krause (“Krause Exp. Depo.”), p. 44-45, 60-61 (SUPP. Appx. Tab 14); Expert Report of Robert Krause (“Krause Rpt.”)(SUPP. Appx. Tab 15).⁶ Both Appellants Toles and Annen had traveled through this intersection on “countless” occasions, and were thus fully aware of the tremendous risks it presented. Toles Depo., p. 17 (SUPP. Appx. Tab 1); Annen Depo., pp. 78 (SUPP. Appx. Tab 7).

B. Engine 214 Slowed Before Approaching the Dangerous Walnut / Johnson Intersection.

Engine 214 approached the blind intersection of Walnut Street and Johnson Street at a speed of approximately 35 mph. Smith Depo., p. 45 (SUPP. Appx. Tab 8). Unlike Appellant (discussed below), when Engine 214 approached the intersection, it slowed to a speed to where it could stop, if necessary.

⁵ The parties have stipulated to the authenticity and admissibility of this photograph and others produced by the Ohio State Highway Patrol. See, Stipulation Regarding Authenticity and Admissibility of Certain Evidence, ¶3 (Mar. 18, 2010). In addition, this photograph has been properly identified and authenticated during deposition. Annen Depo., p. 106 (SUPP. Appx. Tab 7), Plft.’s Depo. Exh. 23 (SUPP. Appx. Tab 28).

⁶ The expert report of Mr. Krause was authenticated during his deposition. See, Exp. Krause Depo., p. 109 (SUPP. Appx. Tab 14), Plft.’s Depo. Exh. 56.

Smith Depo., p. 45, 48 (SUPP. Appx. Tab 22). The captain of Engine 214 then audibly informed the driver “intersection clear,” after which point the driver resumed on the accelerator. Smith Depo., pp. 47-49 (SUPP. Appx. Tab 8). Engine 214 then proceeded through the intersection and continued toward the minor fire. Smith Depo., pp. 47-49, 59 (SUPP. Appx. Tab 8).

C. Engine 211 Approached the Dangerous Walnut / Johnson Intersection in a Reckless and Wanton Manner.

Engine 211’s approach to the blind intersection of Walnut Street and Johnson Street was exactly the opposite of Engine 214’s approach. Though the speed limit on Walnut Street was 25 mph, Appellants were operating the 22.5 ton fire truck at a speed of at least 52 mph as they approached the blind intersection. Hawn Exp. Depo., pp. 41-42 (SUPP. Appx. Tab 12); Hawn Rpt., p. 19 (SUPP. Appx. Tab 11).⁷ This is over double the posted speed limit, and near the top speed capable of Engine 211. Hawn Rpt., p. 15 (SUPP. Appx. Tab 11).

At least 150 feet before the intersection, Appellants brought the 22.5 ton fire truck left of center, straddling the centerline as they drove down the road at 52 mph. Annen Depo., p. 111, 114, 117-18, 123 (SUPP. Appx. Tab 7); Affidavit of Deanna Jackson (“Jackson Aff.”), ¶8 (SUPP. Appx. Tab 16); Clark Aff., ¶8 (SUPP. Appx. Tab 13). Even before the collision, one eye witness observed Appellants’ fire truck and stated to his companion, “man she’s rolling.” Clark Aff., ¶¶2-8 (SUPP. Appx. Tab 13). As confirmed by multiple eyewitnesses, Appellants made no attempt to slow the vehicle before barreling into the blind intersection—even with the presence of a stop sign, red flashing light, and preschool across the street. Clark Aff., ¶6 (SUPP. Appx. Tab 13); Jackson Aff., ¶9 (SUPP. Appx. Tab 16); Affidavit of Trent Green (“Green Aff.”), ¶8 (SUPP. Appx. Tab 17). See also, Affidavit of Anthony Maroon, (“Maroon Aff.”), ¶6 (SUPP. Appx. Tab 18). As recalled by one eyewitness, Appellants’ driving was particularly unusual:

⁷ Appellees do not contest that they were operating the 22.5 ton fire truck at a very high rate of speed. In fact, Appellee Toles testified that the State Highway Patrol’s estimate of 44 mph was “fairly close” to how fast she was going immediately prior to the point of impact. Toles Depo., p. 150 (SUPP. Appx. Tab 1).

"I have witnessed over thirty times emergency vehicles approach that same intersection coming east on Walnut Street, and all of them except the firetruck on May 6, 2008 slowed down while approaching the intersection and proceeding into the intersection."

Clark Aff., ¶17 (SUPP. Appx. Tab 1).

Unquestionably, driving in such a manner on a road like this is inherently reckless and wanton in any vehicle – particularly a 22.5 ton fire truck. The fact that Appellants Toles and Annen drove this intersection daily, and were thus very familiar with the obstructions and dangers at Johnson and Walnut Streets, makes their conduct that much more reckless and wanton. See, Toles Depo., p. 17 (SUPP. Appx. Tab 1); Annen Depo., pp. 78-79 (SUPP. Appx. Tab 7).

D. Mr. Anderson Approached the Intersection in a Careful and Prudent Manner, but Appellants' Conduct Caused Him to Not See or Hear Their Approaching Fire Truck.

While the Appellants were barreling toward the intersection, Mr. Anderson was taking his four-year-old grandson, Javarre, to preschool. Deposition of Cynthia Anderson ("Anderson Depo."), pp. 29-30 (SUPP. Appx. Tab 19). He took the same route he always did. Anderson Depo., pp. 30-32 (SUPP. Appx. Tab 19). He traveled north on Johnson Street. As he reached the intersection of Johnson Street and Walnut Street, he planned on traveling straight through the intersection to the preschool across the street. Anderson Depo., pp. 30-32 (SUPP. Appx. Tab 19).

When Mr. Anderson reached the intersection, the overwhelming eye witness testimony confirms that Mr. Anderson brought his vehicle to a complete stop at the stop sign. Jackson Aff., ¶8 (SUPP. Appx. Tab 16); Jefferson Aff., ¶5 (SUPP. Appx. Tab 20); Affidavit of Rebecca Butterfield ("Butterfield Aff."), ¶4 (SUPP. Appx. Tab 21); Affidavit of Michael Green, ("Green Aff."), ¶3 (SUPP. Appx. Tab 17). He waited at the stop sign for Engine 214 to clear the intersection. Jackson Aff., ¶3 (SUPP. Appx. Tab 15); Green Aff., ¶¶2-5 (SUPP. Appx. Tab 17). Mr. Anderson was not under the influence of alcohol or drugs, and the evidence suggests that he was alert and paying reasonable attention to the roadway. Hawn Rpt., p. 19

(SUPP. Appx. Tab 7); Expert Report of Dr. Anthony Perry (SUPP. Appx. Tab 22).⁸ Yet, several risk factors recognized by Appellants caused Mr. Anderson to not appreciate their rapidly approaching fire truck. Krause Rpt., p. 12 (SUPP. Appx. Tab 15).

First, even with sirens operating, traveling at a high rate of speed can cause an emergency vehicle to “outrun” the effect of its audible siren. Krause Rpt., p. 11-13 (SUPP. Appx. Tab 15). This was a risk that Appellant Toles appreciated, and stated that it could occur when traveling approximately 45 mph. Toles Depo., 120 (SUPP. Appx. Tab 1). Toles was driving at least 52 mph. Toles Depo., 120 (SUPP. Appx. Tab 13).

Obstructions, such as trees, houses, and bushes, also obstruct the effectiveness of an audible siren. (Krause Rpt., p. 11-13). Appellant Annen recognized that this is a limitation of audible sirens. Annen Depo., p. 73-75 (SUPP. Appx. Tab 7) (citing, Installation, Operating, and Maintenance for Q-Siren, p. 5, Plts. Depo. Exh. 22 (SUPP. Appx. Tab 23).

The audible limitation was also compounded by the masking effect that the siren of Engine 214 had upon the siren of Engine 211 as it proceeded through the intersection before it. Hawn Rpt., p. 16 (SUPP. Appx. Tab 11). Appellant Toles testified that she understood the hazards of persons not hearing sirens due to one siren masking another. Toles Depo., p. 103 (SUPP. Appx. Tab 1). Yet, Appellants chose to ignore these recognized risks when they proceeded into the obstructed intersection at speeds in excess of 52mph. The conclusion that Appellants’ disregard of known risks caused the audible effect of their siren to become compromised is buttressed by eyewitnesses in the area, who likewise stated that they did not hear the siren of Appellants’ fire engine as it entered the intersection of Johnson and Walnut. Jackson Aff., ¶5 (SUPP. Appx. Tab 16); Clark Aff., ¶10 (SUPP. Appx. Tab 13).⁹

⁸ Dr. Anthony Perry’s expert report was properly authenticated for purposes of Ohio R. Civ. P. 56 by his contemporaneously submitted affidavit, and his expert credentials and qualifications to render an opinion in this case are amply demonstrated by his *Curriculum Vitae*. Affidavit of Dr. Anthony Perry (SUPP. Appx. Tab 29).

⁹ It is anticipated that Appellees will attempt to remedy their disregard of the known limitations on their audible sirens by claiming that Appellee Annen operated the air horn on Engine 211 before Appellees entered the intersection of Walnut and Johnson. The

(Continued)

Second, the visual obstructions present at the intersection of Johnson and Walnut prevented Mr. Anderson from seeing the fire truck as it approached. After conducting an extensive analysis, accident reconstructionist Choya Hawn opined that the fire truck operated by Appellants was not visible to Mr. Anderson when he pulled into the intersection of Johnson and Walnut. Mr. Hawn stated:

“At the time Mr. Anderson was checking for conflicting traffic to the west and was making the decision to begin accelerating from the stop sign, the Quint fire apparatus was **NOT VISIBLE** from his location.”

Hawn Rpt., p. 20 (SUPP. Appx. Tab 11) [emphasis in original]. As discussed above, Appellants understood these visibility risks, yet continued to barrel towards the intersection.

E. Appellants’ Wanton and Reckless Conduct Took the Lives of Mr. Anderson and Javarre.

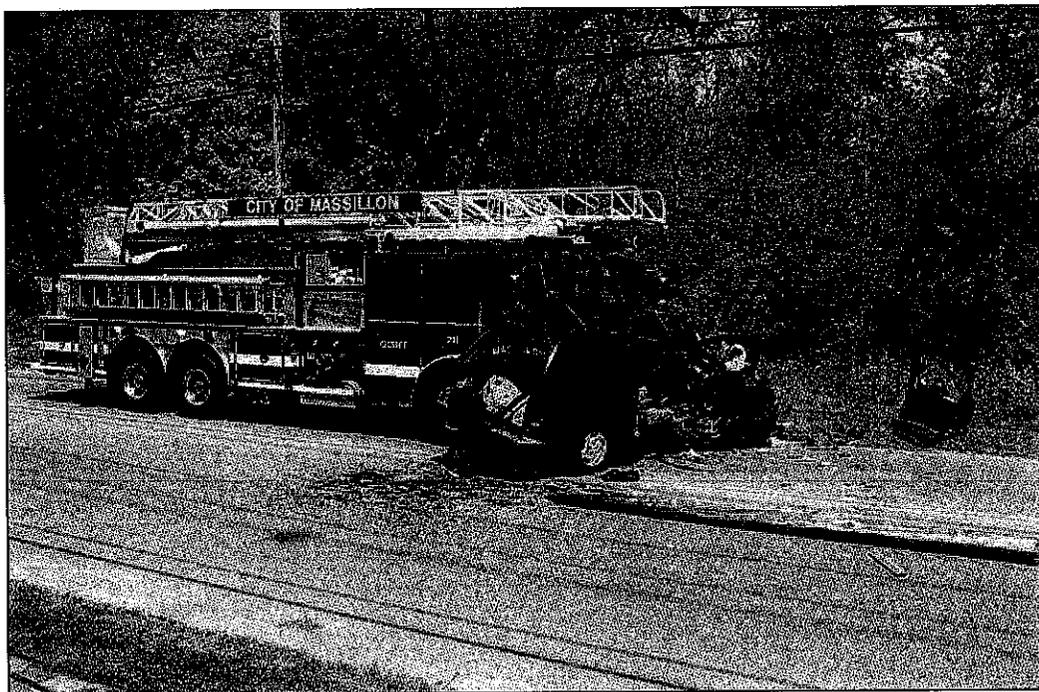
Not knowing a fire truck was barreling upon him, left of center and over twice the legal speed limit, Mr. Anderson proceeded into the intersection. Jackson Aff., ¶¶4-5 (SUPP. Appx. Tab 16); Jefferson Aff., ¶6 (SUPP. Appx. Tab 20), Green Aff., ¶7 (SUPP. Appx. Tab 17). Meanwhile, Appellant Toles approached the intersection of Walnut and Johnson, looking to her left toward the preschool. Toles Depo., pp. 155-56 (SUPP. Appx. Tab 1). Appellant Annen was busy looking through a map book. Maroon Aff., ¶4 (SUPP. Appx. Tab 18). Appellant Toles remained on the accelerator. Annen Depo., pp. 115-125 (SUPP. Appx. Tab 7). Though Mr. Anderson was sitting at the stop sign as the fire engine approached, Appellanta did not see Mr. Anderson’s vehicle until it was already in the intersection and approximately 129 feet in front of the engine. Toles Depo., pp. 155-56 (SUPP. Appx. Tab 13); Hawn Rpt., p. 18 (SUPP. Appx. Tab 11).

Remarkably, even after Appellant Toles observed Mr. Anderson’s vehicle, she still did not attempt to apply the pedal brakes of the fire truck. Annen Depo., p. 116 (SUPP. Appx. Tab 7); Maroon Aff., ¶6 (SUPP. Appx. Tab 18); Clark Aff., ¶6 (SUPP. Appx. Tab 13); Jackson Aff., ¶9 (SUPP. Appx. Tab 16); Green Aff., ¶8

trial court also adopted this fact. However, multiple eye witnesses refute this claim, and have affirmed that Appellees did not operate any air horn before entering the intersection. Clark Aff., ¶10 (SUPP. Appx. Tab 13); Green Aff., ¶9 (SUPP. Appx. Tab 17); Jackson Aff., ¶5 (SUPP. Appx. Tab 16).

(SUPP. Appx. Tab 17). To the contrary, she may have continued to accelerate, and began to veer to the *left*, toward the direction that Mr. Anderson was traveling. Toles Depo., p. 162 (SUPP. Appx. Tab 1). This purported “evasive” action ensured a direct collision was imminent.

Appellants’ 22.5 fire truck struck Mr. Anderson’s vehicle with devastating force. Jackson Aff., ¶10 (SUPP. Appx. Tab 16). With Mr. Anderson’s vehicle harpooned on its front grill, the fire truck slammed through a telephone pole. Jackson Aff., ¶10 (SUPP. Appx. Tab 16). The fire truck then continued to push the Anderson vehicle down the roadway for approximately 360 feet until the vehicles finally came to rest. Jackson Aff., ¶10 (SUPP. Appx. Tab 16); Butterfield Aff., ¶6 (SUPP. Appx. Tab 21). The following photograph taken by the Ohio State Highway Patrol captured the end result of this avoidable collision.¹⁰



Mr. Anderson’s body was crushed between the front of the fire truck and the interior of his own vehicle. Jackson Aff., ¶13 (SUPP. Appx. Tab 16). Javarre was ejected from the vehicle, dragged by his shirt, run over, and ultimately found lying in the roadway near the sheared telephone pole. Jackson Aff.,

¹⁰ The parties have stipulated to the authenticity and admissibility of this photograph. See, Stipulation Regarding Authenticity and Admissibility of Certain Evidence, ¶3 (Mar. 18, 2010).

¶¶10-12. (SUPP. Appx. Tab 16). Mr. Anderson was pronounced dead at the scene. Death Certificate of Ronald Anderson (SUPP. Appx. Tab 31). Javarre had a pulse, but was pronounced dead upon his arrival at a nearby hospital. Death Certificate of Javarre Tate (SUPP. Appx. Tab 24).

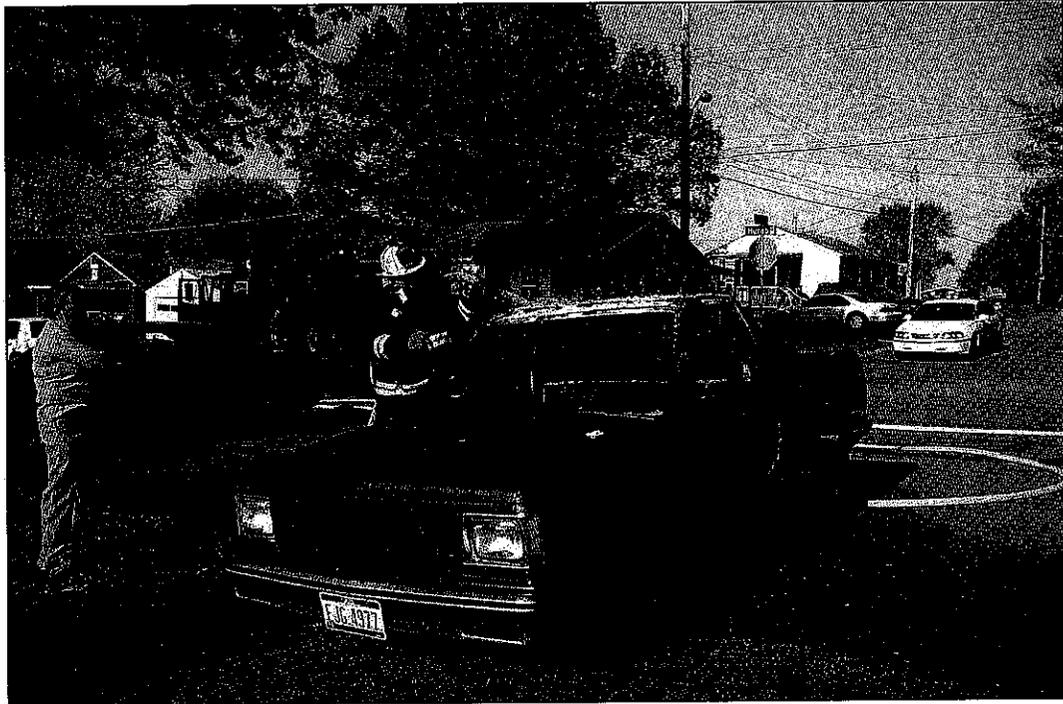
F. Appellants Knew They Were The Second Engine Responding to a Minor Vehicle Fire When they Took the Lives of Mr. Anderson and Javarre.

As mentioned above, Appellants were informed that they were responding to a minor vehicle fire. No life or other property was ever reported as being danger. Further, prior to the collision, Dispatcher Thomas Thornberry received a call regarding the same vehicle fire, and was notified that the car fire was in a parking lot. Joiner Depo., pp. 11-12 (SUPP. Appx. Tab 5). Dispatcher Thornberry radioed the responding firefighters, and confirmed that the vehicle fire was in a parking lot. Thornberry Depo., p. 17 (SUPP. Appx. Tab 6). Appellant Annen confirmed that this indicated Appellants “shouldn’t even been responding.” Annen Depo., p. 196 (SUPP. Appx. Tab 7) [emphasis added].¹¹

Ultimately, the minor vehicle fire which Appellants claim justify their inexcusable driving was easily put out singlehandedly by Engine 214, as illustrated by the following photograph.¹² The vehicle fire was not close to any buildings. Smith Depo. p. 59 (SUPP. Appx. Tab 8). No ladders were needed. No lives were in danger. Smith Depo. p. 59 (SUPP. Appx. Tab 8). The scope of the threat in no way justified Appellants’ conduct.

¹¹ While the parties agree that Appellees were only told that they were responding to a vehicle fire, and were never told the vehicle fire posed a threat to any or persons or property (See, Annen Depo., p. 190-91 (SUPP. Appx. Tab 7)), the parties dispute when Appellees were specifically informed that the vehicle fire was in a parking lot. Appellee Annen claims to have received this information as the collision occurred. However, the record evidence in this case reflects that Appellees could have received this transmission as early as 30 seconds before the collision occurred. Annen Depo., pp. 205-206 (SUPP. Appx. Tab 7); Ohio Traffic Crash Report Time Line of Events, Pltf.’s Depo. Exh. 33 (SUPP. Appx. Tab 30). Notwithstanding this dispute, this fact must be construed in Appellants’ favor. See, *Hounshell v. American States Insurance Co.* (1981), 67 Ohio St.2d 427, 433, 424 N.E.2d 311.

¹² The parties have stipulated to the authenticity and admissibility of this photograph and others taken by freelance photographer Lisa Beraducci. See, Stipulation Regarding Authenticity and Admissibility of Certain Evidence, ¶2 (Mar. 18, 2010). In addition, this photograph was also authenticated during deposition. Smith Depo. p. 59 (SUPP. Appx. Tab 8).



G. Appellants' Operation of the 75' Aerial Ladder Truck Violated Numerous Laws and Policies.

Unsurprisingly, Appellants' operation of the 22.5 ton ladder truck violated numerous traffic laws and internal policies of the MFD. These laws and policies include:

Massillon Ord. §331.20(a): Slow and Cautious Through Stop Signals. When approaching a stop signal or sign, Massillon Ord. §331.20(a) requires *all* emergency vehicles to slow down for the safety of traffic, and *only* proceed cautiously with due regard for public safety. Modeled after R.C. §4511.03, Massillon Ord. §331.20(a) provides:

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

Massillon Ord. §331.20(a), Pltf.'s Depo. Exh. 37 (SUPP. Appx. Tab 25) [emphasis added]. Appellant City of Massillon's firefighters know they must comply with this law. Burgasser 30(B)(5) Depo., pp. 63-64 (SUPP. Appx. Tab 2), Castile Depo., p. 43 (SUPP. Appx. Tab 4). Before proceeding through *any* stop sign, they must first, slow down, and second, proceed cautiously. Burgasser 30(B)(5) Depo., pp. 63-64 (SUPP.

Appx. Tab 2). Barreling through an obstructed intersection in front of a preschool, left of center, at a speed in excess of 50 mph, without applying the brakes at all, through a stop sign **and** a red flashing stop signal unequivocally violates Massillon Ord. §331.20(a).

Massillon Fire Dept. Policy §307.03(D): Stopping at Intersection Required. City of Massillon emergency vehicle operators are required by Massillon Fire Dept. Policy §307.03(D) to stop at all intersections which contain lanes that cannot be accounted for, blind spots, or other hazards. Massillon Fire Dept. Policy §307.03(D) provides in pertinent part:

During emergency response, *the driver shall bring the vehicle to a complete stop* for any of the following:

* * *

- blind intersections
- when the driver cannot account for all lanes of traffic in an intersection
- when other intersection hazards are present

Massillon Fire Dept. Policy Chapter 307, Pltf.'s Depo. Exh. 13 (SUPP. Appx. Tab 26) [emphasis added]. Appellants' failure to apply the brakes and/or stop the aerial ladder truck before entering the blind intersection, when Appellants appreciated the visual hazards presented by the intersection and clearly could not account for all lanes of traffic, is a plain violation of this policy. Krause Rpt., pp. 5-6 (SUPP. Appx. Tab 15).

Massillon Fire Dept. Policy §307.01: Forcing Right of Way Prohibited. City of Massillon emergency vehicle operators are prohibited by Massillon Fire Dept. Policy §307.01 from attempting to force the right of away against another vehicle. Massillon Fire Dept. Policy §307.01 provides in pertinent part:

[...] If another vehicle fails to yield the right of way to an emergency vehicle, the emergency vehicle operator cannot force the right of way. Drivers do not have the right of way until other vehicles yield it.

Massillon Fire Dept. Policy Chapter 307, Pltf.'s Depo. Exh. 13 (SUPP. Appx. Tab 26). At the time Appellants sped into the intersection of Johnson and Walnut, Mr. Anderson's vehicle had already begun crossing the intersection and therefore had the right of way. Appellants' failure to apply the brakes of the 75'

aerial ladder truck and attempt to force the right of way into the intersection constituted a violation of Massillon Fire Dept. Policy §307.01. Krause Rpt., pp. 12-14 (SUPP. Appx. Tab 15).

Massillon Ord. §303.041: Left of Center Only if Due Regard Given. Modeled after R.C. §4511.45, Massillon Ord. §393.041 provides that an emergency vehicle may travel left of center, notwithstanding the prohibitions set forth in Massillon Ord. §§331.01 (R.C. §4511.25) and 331.05 (R.C. §4511.29), only if the operators exercise “due regard” for all other persons on the roadway. *Semple v. Hope* (1984), 15 Ohio St.3d 372, 474 N.E.2d 314, syllabus (R.C. §§4511.25, 4511.29 and 4511.45, construed). Appellants plainly did not provide “due regard” for other persons in the roadway when disregarding known risks and proceeding into the blind intersection.

Massillon Fire Dept. Policy §307.04(C): Officer Must Issue Warnings. As part of his duties as Officer of the fire truck, Appellant Annen was required to warn Appellant Toles of the presence of Mr. Anderson’s vehicle. Massillon Fire Dept. Policy §307.04(C) provides:

The Officer shall issue warnings about road conditions and physical hazards to the driver when necessary.

Massillon Fire Dept. Policy Chapter 307, Pltf.’s Depo. Exh. 13 (SUPP. Appx. Tab 26). At no time did Appellant Annen warn Appellant Toles of the presence of Mr. Anderson’s vehicle or otherwise warn of the danger posed by the blind intersection. Appellant Annen’s omissions violated Massillon Fire Dept. Policy §307.04(C). Krause Rpt., pp. 17-19 (SUPP. Appx. Tab 15).

Massillon Fire Dept. Policy §307.04(D): Officer Must Assist with Intersections. Similarly, as the Officer of the fire truck, Appellant Annen was also required to assist Appellant Toles with crossing intersections. Massillon Fire Dept. Policy §307.04(D) states:

The Officer shall assist the driver with intersection crossing, locating the scene, backing and any other necessary safety practice.

Massillon Fire Dept. Policy Chapter 307, Pltf.’s Depo. Exh. 13 (SUPP. Appx. Tab 26). Appellant Annen failed to provide any assistance to Appellant Toles with respect to crossing the intersection of Johnson Street

and Walnut, and his omission is a violation of Massillon Fire Dept. Policy §307.04(D). Krause Rpt., pp. 17-19 (SUPP. Appx. Tab 15).

H. Appellants Violated Numerous Additional Recognized Safety Standards Within the MFD.

In addition to their violation of Massillon Codified Ordinances and MFD Polices, Appellants violated numerous additional safety standards recognized and adhered to within the MFD. By way of illustration:

Should Not Exceed Speed Limit by More than 10 MPH: The MFD required its drivers to not go faster than 10 miles per hour over the posted speed limit when responding to an emergency. Castile Depo., pp. 41, 42 (SUPP. Appx. Tab 4); Bard Depo., p. 30 (SUPP. Appx. Tab 10). One firefighter testified that he “heard a lot” at the MFD that drivers should not go more than 10 miles per hour over the speed limit. Bard Depo., pp. 28-29 (SUPP. Appx. Tab 10). Another firefighter, testified: “Every other fire department I’ve ever been on and every fire department that I’m on now adheres to that rule.” Castile Depo., p. 42 (SUPP. Appx. Tab 4). This is consistent with numerous national fire response safety standards, and is adhered to across the country. Krause Rpt., p. 9-10 (SUPP. Appx. Tab 15).¹³ Appellants unequivocally violated this standard when it operated Engine 211 in excess of 52mph in a 25mph zone while entering the blind intersection.

Should Not Enter Intersection at Speed Greater than 10MPH: It is undisputed that intersections are the most likely place for a collision. Castile Depo., pp. 50-51 (SUPP. Appx. Tab 4); Bard Depo., p. 39 (SUPP. Appx. Tab 10); Annen Depo., p. 27 (SUPP. Appx. Tab 7). In light of this inherent danger, Firefighter Baird testified that when responding to an emergency and approaching a stop sign, City of Massillon Firefighters should not go faster than 10 miles per hour through *any* intersection. Bard Depo., p. 39 (SUPP. Appx. Tab 10). This too is a recognized national safety standard. Krause Rpt., pp. 6-7 (SUPP.

¹³ See also, ASTM International, *Standard Guide for Training Emergency Medical Services Ambulance Operations*, 14.5.4.1 (“Under emergency response conditions, the speed shall not exceed that which is safe for road or environmental conditions. In no case shall the speed exceed 10 mph over the posted speed limit”), Annen Depo., Pltf.’s Depo. Exh. 31, *reproduced at*, Krause Rpt., p. 9 (SUPP. Appx. Tab 15).

Appx. Tab 15).¹⁴ Appellants violated this standard when they barreled Engine 211 at speeds in excess of 52mph into the intersection of Walnut and Johnson.

II. UNIQUE PROCEDURAL POSTURE OF CASE

Appellee Cynthia Anderson filed this wrongful death action as administratrix of the estates of her husband, Ronald E. Anderson, and her grandson, Javarre J. Tate on September 22, 2009. Appellee Anderson's Complaint asserts causes of action against Appellants Susan Toles, Rich Annen, and the City of Massillon for wrongful death. The action is based upon Appellants' reckless, willful, and wanton misconduct in the operation of a fire truck which resulted in the deaths of Mr. Anderson and Javarre as described above.

The trial court initially denied a Motion to Dismiss filed by Appellants pursuant to Ohio R. 12(B)(6) based upon the affirmative defense of sovereign immunity. Discovery thereafter ensued. Appellee Anderson filed a Motion for Partial Summary Judgment pursuant to Ohio R. Civ. P. 56 on the issue of liability on May 19, 2010. Appellants also filed a Motion for Summary Judgment, again asserting the affirmative defense of sovereign immunity. On July 15, 2010, the trial court granted Appellants' Motion for Summary Judgment, and denied Appellee Anderson's Motion. The case was dismissed in its entirety.

Appellee Anderson took a timely appeal to the Court of Appeals of the Fifth District. On March 21, 2011, the Court of Appeals unanimously reversed the trial court, and held that issues of fact exist as to Appellants' affirmative defense of sovereign immunity. *Anderson v Massillon*, 193 Ohio App 3d 297, 2011-Ohio-1328, 951 NE2d 1063. Appellants filed an Application for Reconsideration and En Banc Consideration with the Court of Appeals on March 31, 2011. This Application was unanimously denied on

¹⁴ See also, ASTM International, *Standard Guide for Training Emergency Medical Services Ambulance Operations*, 14.9.5 ("Look to the left, look to the right, then again to the left. The operator may then proceed through the intersection at a speed of under 10 mph if traffic is stopped in all lanes to the left, in front of, and to the right of the ambulance. After the operator has made eye contact with all stopped vehicle drivers, the ambulance may proceed through the intersection exercising the highest degree of care"), Annen Depo., Pltf.'s Depo. Exh. 31, reproduced at, Krause Rpt., p. 7 (SUPP. Appx. Tab 15).

April 20, 2011. Finally, Appellants sought review from this Court, and jurisdiction was granted on August 24, 2011.

This case is not before this Court after a trial to a jury. Though this case has been pending for 2 years and 3 months as of the writing of this brief, Appellant Anderson has yet to have her day in court. Rather, this case is before this Court upon a granting of a motion for summary judgment. This raises two legal standards that directly bear upon this Court's consideration of this matter.

A. Principles of Review Applicable to Summary Judgment.

Since a grant of summary judgment denies the non-moving party the right to try his or her claims to a jury, such motions must be viewed cautiously and sparingly allowed. *Osborne v. Lyles*, 63 Ohio St.3d 326, 333, 587 N.E.2d 825 (1992). But most pertinent to this appeal, *all facts and doubts must be construed in favor of the non movant*. *Welco Indus., Inc. v Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191, 617 N.E.2d 1129. "The requirements of the rule must be strictly enforced." *Murphy v. City of Reynoldsburg, et al.*, 65 Ohio St.3d 356, 360, 604 N.E.2d 138 (1992).

B. Principles of Review Applicable to Sovereign Immunity.

Unique to the issue of sovereign immunity, this Court has recognized that whether a person acted wantonly, willfully, or recklessly is almost always a question for the jury – not a question to be decided on motions. *Fabrey v McDonald Vil. Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, 639 N.E.2d 31; *Matkovich v. Penn Cent. Transp. Co.*, 69 Ohio St.2d 210, 431 N.E.2d 652 (1982). Lower courts have continued to adhere to this Court's direction.¹⁵ In explaining the rationale for this rule, the Tenth District Court of Appeals has observed:

¹⁵ *Hunter v. Columbus*, 139 Ohio App.3d 962, 970, 746 N.E.2d 246 (10th Dist. 2000) ("the issue of wanton misconduct is normally a jury question"); *Burlingame v Estate of Burlingame*, 5th Dist. No. Nos. 2010CA00124, 2011-Ohio-1325, ¶49 ("The question of whether a person has acted recklessly is almost always a question for the jury"); *Ruth v. Jennings*, 136 Ohio App.3d 370, 375, 736 N.E.2d 917 (12th Dist. 1999); *Brockman v. Bell*, 78 Ohio App.3d 508, 517, 605 N.E.2d 445 (1st Dist. 1992). *Thompson v. Smith*, 178 Ohio App.3d 656, 666, 2008-Ohio-5532, 899 N.E.2d 1040, ¶43; *Edinger v. Allen Cty. Bd. of Commrs.* (Apr. 26, 1995), 3rd Dist. No. 1-94-84, 1995 WL 243438 ("The issue of wanton misconduct is normally a jury question."); *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, ¶39 ("[W]hether particular acts demonstrate the presence of wantonness, recklessness, or merely negligence is normally a decision for the jury, based on the totality of the circumstances"); *Stickovich v.*

(Continued)

Because the line between willful or reckless misconduct, wanton misconduct, and ordinary negligence can be a fine one, the issue of whether conduct was willful or wanton should be submitted to the jury for consideration in light of the surrounding circumstances when reasonable minds might differ as to the import of the evidence.

Hunter, 139 Ohio App.3d at 970 (quoting, *Ruth*, 136 Ohio App.3d at 375).

III. APPELLANTS' MISSTATEMENTS OF FACT

In advocating their cause, Appellants present many facts as "undisputed," when in reality, they are hotly disputed. More pointedly, the story told by Appellants' brief is radically different than the story set forth above. The cause of this divergence is that Appellants' overlook the well-established principle that all facts must be construed in Appellee Anderson's favor. When construing the facts in a light most favorable to favorable to Appellee Anderson, as is required at this stage of the proceedings, the following clarifications (among others) are warranted:

- **Appellants Did not Utilize an Air Horn Prior to Entering the Intersection.** In their brief, Appellants claim that they utilized an air horn prior to entering the intersection at Johnson and Walnut. (Appellants' Brief, pp. 4, 6). This is a disputed issue of fact. Multiple eye witnesses refute this claim, and have affirmed that Appellants did not operate any air horn before entering the intersection. Clark Aff., ¶10 (SUPP. Appx. Tab 13); Green Aff., ¶9 (SUPP. Appx. Tab 17); Jackson Aff., ¶5 (SUPP. Appx. Tab 16).

- **Appellants Did Not Slow Before Entering the Intersection.** In their brief, Appellants suggest that they slowed the 22.5 ton fire truck as they approached the intersection of Johnson and Walnut. (Appellants' Brief, pp. 5-6). This is again contradicted by the record evidence in this case. To the contrary, the multiple eyewitnesses confirm that Appellants did not attempt to slow the massive vehicle before barreling into the blind intersection – even with the presence of a stop sign and red flashing light. Clark Aff., ¶6 (SUPP. Appx. Tab 13); Jackson Aff., ¶9 (SUPP. Appx. Tab 16); Affidavit of Trent Green ("Green Aff."), ¶8 (SUPP. Appx. Tab 17). See also, Affidavit of Anthony Maroon, ("Maroon Aff."), ¶6 (SUPP. Appx. Tab

City of Cleveland, Cuyahoga Cty. Ct. Cmn. Pleas No. CV-248365, 1997 WL 910801, *4 (June 20, 1997); 70 Ohio Jur. 3d Negligence § 208 (accord).

18). Instead, Appellants *entered* the intersection at 52 mph. This is seriously risky conduct by any standard. In fact, it is specifically prohibited by Ohio statutory law. See, R.C. § 4511.03. Appellants' disregard of this known risk is inexcusable.

- **Mr. Anderson Stopped at the Stop Sign at Walnut.** Appellants also claim that Mr. Anderson "ran the stop sign" at Walnut, and this was a cause of the collision. (Appellants' Brief, p. 7). Again, this is refuted by the eye witness testimony in this case. The evidence confirms that Mr. Anderson did indeed stop at the stop sign before proceeding across Walnut. (Jackson Aff., ¶9).

- **Appellants Did not have a Clear View of the Intersection.** Appellants also claim that they had a clear view of the intersection they were entering (Appellants' Brief, p. 5). This is obviously inconsistent with the facts set forth above. But it is also inconsistent with the facts as set forth by Appellants. To illustrate, Appellants claim that "Toles never saw the Anderson vehicle stopped at the stop sign." (Appellants Brief, p. 6). Yet, the facts of this case establish that Mr. Anderson was indeed stopped at the stop sign as Appellants approached. Jackson Aff., ¶9 (SUPP. Appx. Tab 16). Thus, Appellants' view must have been obstructed, or else Appellant Toles would have seen Mr. Anderson. Otherwise, Appellant Toles was not looking where she was driving.

It bears further noting that Appellants' claim that the intersection was unobstructed is also contradicted by Appellant Annen's testimony, where he stated:

Q: You said you could see the intersection?

A: Yes.

Q: What do you mean by that?

A: You can see clear through to the white building with the patio on it.

Q: Would you agree that the large tree would obstruct some of your view of the intersection?

A: Well, it would have to obstruct some. Can't see through a tree.

Q: Right, exactly. So it would obstruct some of your ability to see the intersection, correct?

A: Some, yes, if you want to go with.

Q: And same thing with the utility pole, correct?

A: Correct.

Annen Depo., p. 84 (SUPP. Appx. Tab 7).

- **Mr. Anderson Could not see the Fire Truck Before he Entered the Intersection.**

Appellants claim that, “[a]ccording to the State Patrol calculations, if Mr. Anderson would have stopped at the intersection before entering, Engine 211 would have been visible if Mr. Anderson looked to the west before pulling into the Engine’s path.” (Appellants’ Brief, p. 8). This is not only incorrect,¹⁶ but contradicted but the opinion of another expert, who as set forth above, stated the approaching fire truck was not visible.

- **Mr. Anderson’ did not “Fail to Yield” to the Fire Truck.** Without any evidentiary support, Appellants claim that had “Mr. Anderson simply looked to the west, at any time, he would have been able to stop and avoid the collision.” (Appellants’ Brief, p. 8). Appellants advance this misguided argument by claiming that Mr. Anderson did not look toward the direction of the fire truck before proceeding into the intersection, and if he had, he would have been able to stop his vehicle, thereby avoiding the collision. Appellants even go as far as to say that Mr. Anderson’s failure to look was the *sole* cause of the collision in this case, notwithstanding Appellants’ reckless conduct. These arguments are both legally and factually insufficient.

Appellants’ assertion is based entirely upon Appellants Toles and Annen’s claims that, before the collision, they observed Mr. Anderson looking toward the west. However, Appellants did not observe Mr. Anderson’s vehicle until 1.5 seconds from impact. Mr. Anderson’s vehicle did not proceed into the intersection until Appellants’ vehicle was 4.4 seconds from impact. Hawn Rpt., p. 17 (SUPP. Appx. Tab 11). Appellants have no evidence to establish that, before Mr. Anderson proceeded into the intersection, he failed to look into the direction of the oncoming fire truck *and saw nothing* because, as previously established, the fire truck was not visible as he proceeded into the intersection. Further, it is just as likely

¹⁶ In reality, Trooper Cook of the Ohio State Highway Patrol opined that if Engine 211 was operating in excess of 50 mph, and Mr. Anderson proceeded into the intersection at normal acceleration, Mr. Anderson *would not* be able to see the approaching fire truck. Deposition of Trooper Fred Cook, pp. 73-74, Report of Trooper Fred Cook, Depo. Exh. No. 52, p. 9. This is exactly what happened in this case.

that, after he entered the intersection, he noticed the fire truck, realized it was too late due to Appellants' traveling left of center and the narrowness of the road, then turned away from the truck to brace for the collision or warn Javarre. Stated simply, it is entirely improper to base any decision on such speculation. *See, Sparks v. Blanchard Valley Hosp.* (1991), 72 Ohio App.3d 830, 834, 596 N.E.2d 541 ("The trial court must take the facts as they are ... without speculation about what the injured party should have done.")

Similarly, Appellants claim that, even if Mr. Anderson had looked to the left, verified the intersection was clear, and proceeded into the intersection, his failure to look again to the left a second time prevented him from stopping his vehicle, which would have avoided the collision altogether. Again, Appellants have no evidence, expert or otherwise, to support this speculative assertion. Nevertheless, it must fail as a matter of logic. First, Appellants were *straddling the centerline* as they proceeded into the intersection at 52mph. Considering that Walnut Street is a narrow road, regardless of whether Mr. Anderson would have stopped in the intersection, his vehicle would have been stricken. Further, Appellants' theory assumes (wrongfully) that, upon looking at the fire truck, Mr. Anderson would have had sufficient time to react by pressing his brakes. Based upon the circumstances, it would have taken Mr. Anderson a minimum of 1.5 seconds, *if not more*, to react after observing the approaching fire truck. Hawn Rpt., p. 16 (SUPP. Appx. Tab 11). There is no reason to believe, and Appellants have no evidence to suggest, that Mr. Anderson could have observed the fire truck, understood the significance of the situation, and applied his brakes in sufficient time to avoid being stricken by Appellants.

As a last ditch effort, Appellants claim "Even if Mr. Anderson did not hear the emergency sirens and air horn, he had an absolute duty to yield and not pull into the path." (Appellants' Brief, p. 8). This is an incorrect statement of the law. This Court has recognized that a motorist cannot be blamed for failing to yield the right of way when he or she did not see the emergency lights or appreciate the siren of the approaching vehicle. *Parton v. Weilnau* (1959), 169 Ohio St. 145, 158 N.E.2d 719, paragraph two of the

syllabus. Consequently, Appellants efforts to blame Mr. Anderson for their own conduct fails to pass scrutiny.

- **Other Vehicles Failed to Appreciate the Approaching Firetruck.** Finally, Appellants claim that “[e]very other vehicle in the vicinity responded to the approach of the fire engine.” (Appellants’ Brief, p. 8). Appellants provide no citation to the record evidence in this case to support these assertions. This failure is likely because it is wholly unsupported in fact. To the contrary, the other eyewitnesses confirmed that, like Mr. Anderson, they were completely unaware of the presence of the 22.5 ton fire truck until it was too late. Ms. Deanna Jackson, who was immediately behind Mr. Anderson on Johnson at the time the collision occurred, affirmed:

Mr. Anderson came to a complete stop at the intersection of Walnut and Johnson. I stopped immediately behind him. I looked left then right, up and down Johnson. As my eyes came back straight ahead, I saw Mr. Anderson proceed into the intersection at normal acceleration.

At that moment, while looking straight ahead, I saw a second fire truck proceeding through the intersection of Walnut and Johnson. That is when I was first aware of the second truck. It was in my view for less than a second before it collided into the vehicle operated by Mr. Anderson. I was not aware of this fire truck before Mr. Anderson proceeded into the intersection.

(Affidavit of Deanna Jackson, ¶¶4-5 (SUPP. Appx. Tab 16)). Like Mr. Anderson, Ms. Jackson’s failure to appreciate the approaching 22.5 ton fire truck was caused by Appellants’ reckless and wanton driving.

IV. ARGUMENT

Counter Proposition of Law No. I:

Whether a member of a municipal police department, fire department, or emergency medical service operating a motor vehicle in response to an emergency engaged in wanton, reckless, or willful conduct so as to fall within the exceptions to political subdivision immunity set forth in R.C. §§ 2744.02(B)(1) and 2744.03(A)(6) is based upon the “totality of the circumstances” of each particular case. (*Brockman v. Bell*, 78 Ohio App.3d 508, 517, 605 N.E.2d 445 (1st Dist. 1992), approved in part).

For the first accepted proposition of law, Appellants advocate that this Court accept the proposition that excessive speed while entering an intersection can never amount to reckless and wanton conduct for

purposes of R.C. §§ 2744.02(B)(1) and 2744.03(A)(6). This dangerous proposition of law should be rejected for two distinct reasons.

A. Appellants' Reckless and Wanton Conduct is Illustrated by the Disregard of Several Appreciated Risks, Making this Case Far from a "Speed Equals Recklessness" Matter.

First, from a purely factual perspective, this case is not based upon the speed of the Appellants' fire truck alone. To the contrary, while Appellants' speed of 52mph in a residential zone indeed shocks the conscience, Appellants' egregious conduct includes much more than excessive speed, such as: (a) knowingly failing to slow before driving through a traffic signal, (b) knowingly failing to slow or stop before entering a blind intersection adjacent to a preschool, ignoring the risks presented by intersections (c) dangerously traveling left of center without appropriately accounting for other vehicles, (d) improperly attempting to force the right of way through an intersection; (e) failing to evaluate the need for excessive speed considering minor emergency reported; (f) ignoring the risk that an emergency siren may be outrun and masked by another fire truck in close proximity; and (g) numerous violations of ordinances, internal emergency driving procedures, and recognized safety standards. Thus, as explained in detail below, the notion that this is a "speed equals recklessness" case is a complete misnomer. When applied to the appropriate definitions, it is readily apparent that a rational juror may find reckless and wanton conduct from these facts.

B. Whether an Emergency Vehicle Operator has engaged in "Reckless" or "Wanton" Conduct Should be Based upon the "Totality of the Circumstances."

Appellants' first proposition of law is also flawed from a legal perspective. Nearly every appellate district in this state has held that reckless and wanton conduct is not determined by facts considered in

isolation, but rather, by the “totality of the circumstances.”¹⁷ Speed of an approaching emergency vehicle into an intersection, as many districts have recognized, is one of many factors that should be considered.¹⁸

In some cases, speed alone may not evidence reckless or wanton conduct. However, in some cases it may be informative. For example, if a police officer kills a pedestrian in a crosswalk while running a stop sign at 200 mph in a 25 mph residential neighborhood, it should be up to the trier of fact to determine whether, based upon the complete totality of the circumstances, such conduct amounts to reckless or wanton conduct. There is no reason to adopt a bright line rule that excessive speed while entering an intersection can never be so fast so as to amount to reckless and wanton conduct. Indeed, Appellants do not offer any reason as to why such a bright line rule makes sense.

It bears further noting that there are specific statutory provisions that speak to the exact issue Appellants claim is irrelevant. More specifically, and as mentioned above, both R.C. §4511.03 and Massillon Ord. §331.20(a) require all emergency vehicles to slow down for the safety of traffic when entering an intersection against a stop signal or sign, and only proceed cautiously with due regard for public safety. If excessive speed when entering an intersection is relevant to both the State of Ohio and City of Massillon when legislating the conduct of emergency vehicle operators, there is no reason why these same considerations would not be relevant to a court or jury when evaluating the conduct of emergency vehicle operators. This conclusion is confirmed by the decision in *Neely v. Mifflin Tp.*, 10th Dist. No. 96APE03-283, 1996 WL 550170, *6 (Sept. 30, 1996), which recognized:

¹⁷ See, e.g., *Brockman v. Bell*, 78 Ohio App.3d 508, 517, 605 N.E.2d 445 (1st Dist. 1992); *Reynolds v. Oakwood*, 38 Ohio App.3d 125, 127, 528 N.E.2d 578 (2nd Dist. 1987); *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, ¶39; *Anderson v Massillon*, 193 Ohio App.3d 297, 2011-Ohio-1328 951 N.E.2d 1063, ¶55; *Douglas v Green*, 8th Dist. No. 63507, 1992 WL 388864 (Dec. 17, 1992); *Peoples v. Willoughby*, 70 Ohio App.3d 848, 851, 592 N.E.2d 901 (11th Dist. 1990).

¹⁸ See, e.g., *Whitfield*, 167 Ohio App.3d 172 at ¶¶12, 40 (finding the fact that an officer caused a collision after running a stop sign while traveling 25 mph over the speed limit in a residential area supported presenting the issue of “wantonness” to jury); *Peoples*, 70 Ohio App.3d at 849-850 (finding an emergency vehicle driver’s act of traveling left of center before proceeding into an intersection at 15 mph over the speed limit supported the jury’s finding of wanton conduct).

“While we recognize that violation of R.C. §4511.03 through minor deviation from its requirements may rise only to the level of negligence, more serious deviation may rise to the level of recklessness.”

To say that entering an intersection at excessive speed is irrelevant, as Appellants advocate, is simply unsupported. This Court should not adopt a bright line rule that excludes excessive speed when entering an a relevant factor when evaluating reckless and wanton conduct pursuant to R.C. §§ 2744.02(B)(1) and 2744.03(A)(6). Instead, this Court should affirm the law followed by the vast majority of the districts in this state, and hold that reckless and willful conduct is not determined by facts considered in isolation, but rather the totality of the circumstances surrounding each case.

Counter Proposition of Law No. II:

“Wanton,” “willful,” and “reckless” misconduct as used in R.C. §§ 2744.02(B)(1) and 2744.03(A)(6) all generally refer to “recklessness,” which is when one 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 v. McNeill*, 53 Ohio St.3d 102, 104-05, 559 N.E.2d 705 fn. 1 (1990), approved).

A. In Accordance with this Court’s Prior Holdings and the Restatement of Torts, “Wanton” and “Willful” Misconduct All Generally Refer to Recklessness.

In *Thompson v. McNeill*, this Court adopted the definition of “recklessness” set forth in Restatement (Second) of Torts § 500 (1965). 53 Ohio St.3d 102, 104-05, 559 N.E.2d 705 (1990). In this decision, this Court further held as follows:

“The term ‘reckless’ is often used interchangeably with ‘willful’ and ‘wanton.’ Our comments regarding recklessness apply to conduct characterized as willful and wanton as well.”

Thompson, 53 Ohio St.3d at 104-05 fn. 1. This holding is supported by the Comments to § 500 of the Restatement, which indicate that “wanton” and “willful” are included in the “recklessness” category. The Restatement reads, “the conduct described in this Section is often called ‘wanton or wilful misconduct’ both in statutes and judicial opinions.” Restatement (Second) of Torts § 500, Special Note.

In the political subdivision immunity context, if a jury determines that a member of a municipal fire department operates a fire truck in a “wanton or willful” manner, the subdivision itself is liable and is not entitled to sovereign immunity pursuant R.C. §2744.02(B)(1)(b). Relatedly, if a jury finds that Appellants Toles and Annen operated the ladder fire truck in a wanton or reckless manner, Appellants Toles and Annen must be held personally liable, and are not entitled to employee immunity pursuant to R.C. §2744.03(A)(6). The terms “wanton,” “reckless,” and “willful” are not defined in the Political Subdivision Immunity Act, R.C. Chapter 2744. However, consistent with this Court’s pronouncement in *Thompson*, as bolstered by the comments to § 500 to the Restatement, the proper approach is to apply the concept of “recklessness” to the words “reckless,” “wanton,” and “willful” as used in R.C. §§ 2744.02(B)(1) and 2744.03(A)(6).

This approach makes sense for several reasons. First, it is consistent with prior Ohio decisional law. Scores of lower appellate courts are already expressly applying this Court’s holding in *Thompson*, and recognizing that the phrase “recklessness” as defined in the § 500 of the Restatement includes the concepts of “reckless,” “wanton,” and “willful” as used in R.C. §§ 2744.02(B)(1) and 2744.03(A)(6). *See, e.g., Minnick v Springfield Local Schools Bd. of Edn.*, 81 Ohio App. 3d 545, 550, 611 N.E.2d 926, 929-30 (6th Dist. 1992).¹⁹ This approach appears to likewise have been implicitly adopted by this Court in two decisions. In *Fabrey v. McDonald*, this Court used the words “recklessness” and “wanton” misconduct interchangeably when evaluating the liability of a municipal employee. 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994). Similarly, in *O’Toole v Denihan*, this Court evaluated the conduct of a public employee under R.C. § 2744.03(A)(6) while only applying the definition of “recklessness” set forth in § 500 of the Restatement, and no separate analysis was performed with respect to “wantonness,” though this word is also used in R.C. § 2744.03(A)(6). 118 Ohio St 3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶¶ 70-91.

¹⁹ *Johnson v Baldrick*, 12th Dist. No. 2008-Ohio-1794, ¶ 31; *Jackson v Butler Cty. Bd. of Cty. Commrs.*, 76 Ohio App 3d 448, 454, 602 N.E.2d 363 (12th Dist. 1991); *Carter v. City of Columbus and Curtis Drummond* (Aug. 15, 1996), 10th Dist. No. 96APE01-103, 1996 WL 465252; *Behrens v Springfield City Bd. of Educ.*, 2nd Dist. No. 94-CA-92, 1995 WL 386914 (June 28, 1995); *Rose v Haubner*, 10th Dist. No. 96APE11-1488, 1997 WL 301916 (June 5, 1997).

Second, and most importantly, this is likely what the General Assembly intended when it enacted R.C. Chapter 2744. As stated previously, the General Assembly did not define “willful” or “wanton.” However, what was likely intended by the General Assembly of a degree of misconduct simply above that of “negligence,” as set forth in § 500 of the Restatement. See, Byrd, Edwin H., *Comment: Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 La. L. Rev. 1383, 1386 (1988). This is illustrated by the practical consequences of recognizing such a distinction. If this Court were to adopt a standard where “recklessness” as a lesser standard of “wantonness,” as Appellants advocate, this would lead to many situations where the municipal employee is liable for tortious conduct caused during the course and scope of his or her duties, but the public employer is not. This would completely do away with the doctrine of *respondeat superior* in the emergency vehicle operation context. There is no evidence that this the General Assembly intended such a drastic result.

In sum, in accordance with this Court’s decision in *Thompson* and Restatement (Second) of Torts § 500, this Court should affirm that “Wanton,” “willful,” and “reckless” misconduct as used in R.C. §§ 2744.02(B)(1) and 2744.03(A)(6) all generally refer to “recklessness.”

B. A “Perverse Disregard” is Not Required to Demonstrate Recklessness.

As adopted by this Court from Restatement (Second) of Torts § 500, “recklessness” is defined as follows:

“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.”

In *Thompson*, 53 Ohio St.3d at 105. Yet, recently, this Court added the notion that “Distilled to its essence, and in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk.” *O’Toole*, 118 Ohio St 3d at 386. This additional element, a “*perverse*” disregard of a known risk, has caused a significant degree of confusion.

The “perverse disregard” language is not set forth in the Section 500 of the Restatement. Rather, it was first set forth in *Poe v Hamilton*, 56 Ohio App 3d 137, 138, 565 NE2d 887 (1990), which borrowed this language from the definition of recklessness found in the criminal code. R.C. § 2901.22(C). This statute reads:

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

As recognized by Ohio Judicial Conference, this is hardly a workable definition:

Instructions on recklessness and negligence under the criminal code may be the subject of extensive litigation. Any suggestion by the committee is subject to the usual caveat, that your guess can be as good as that of anyone else.

2-CR 417 OJI CR 417.17. But most importantly, the Ohio General Assembly did not intend to use the definition of criminal recklessness when defining recklessness for purposes of R.C. 2744.03(A)(6)(b).

As recognized by this Court, such cross utilization of definitions should not be avoided unless expressly stated by the General Assembly:

“It must be noted, however, that the definition of a word in a civil statute does not necessarily import the same meaning to the same word in interpreting a criminal statute. The result may be desirable, but criminal statutes, unlike civil statutes, must be construed strictly against the state. Thus, where two statutes do not expressly state that the word has the same meaning in both, it is apparent that it might have different meanings.”

State v Dickinson, 28 Ohio St 2d 65, 70, 275 NE2d 599 (1971).

Consequently, this Court should clarify that “perversity” is not an element of establishing recklessness, and that the appropriate definition of recklessness is set forth in Restatement (Second) of Torts § 500.

C. Genuine Issues of Fact Exist as to Whether Appellants Operated the Aerial Ladder Fire Truck in a Reckless, Willful, or Wanton Manner Pursuant to R.C. §§ 2744.02(B)(1)(b) and 2744.03(A)(6).

Turning to the facts of this case, it is readily apparent that the Court of Appeals was correct in holding a rational juror could find both “reckless” conduct as that word is defined in *Thompson*, and “wanton” conduct, as that word is defined in *Hawkins v. Ivy*.²⁰ First, the facts in this case establish that Appellants operated the ladder fire truck in a wanton and reckless manner when they took the lives of Mr. Anderson and his grandson, Javarre. They proceeded through a blind intersection, left of center, at over double the speed limit, and against a stop sign and red flashing light right in front of a preschool. Second, based upon these facts, three independent experts, *including Appellants own expert*, agree that Appellants conduct was reckless.

1. The Record Evidence Contains Ample Facts From Which a Jury Could Find That Appellants Acted Wanton and Recklessly, Therefore the Trial Court’s Decision Should be Reversed.

The record evidence in this case is more than sufficient to enable a jury to infer that Appellants acted in a wanton, willful, and reckless manner. *Taken in their totality*, these facts include, but are not limited to:

Failing to Stop or Slow at Stop Sign. Appellants’ complete failure to apply the brakes of the ladder truck before proceeding against the stop sign and red flashing lights before entering the intersection at Johnson and Walnut, though specifically required by Massillon Ord. §331.20(a) (R.C. §4511.03) weighs heavily in favor of finding that the Appellants acted wantonly and recklessly.²¹

Failing to Stop or Slow at Intersection with Limited Visibility. As appreciated by Appellants’ themselves, the intersection at Johnson and Walnut had limited visibility due to the presence of a large tree,

²⁰ Wanton conduct involves the failure to exercise “any care whatsoever toward those to whom he owes a duty of care, and his failure occurs under the circumstances in which there is great probability that harm will result.” *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 4 O.O.3d 243, 363 N.E.2d 367, syllabus. “Perversity” is likewise not an element of “wantonness.” *Id.* at 117.

²¹ See, e.g., *Peoples v. Willoughby* (1990), 70 Ohio App.3d 848, 853, 592 N.E.2d 901 (finding the fact that an emergency vehicle driver “did not touch his brakes as he started through the intersection” in violation of R.C. §4511.03 supported a finding of wanton or reckless conduct); *Zivich v. Village of Northfield*, 9th Dist. No. 24836, 2010-Ohio-1039 (accord); *Campbell*, 11th Dist. No. 2009-A-0040, 2010-Ohio-4084, ¶68 (accord). See also, *Carter v. Simpson* (7th Cir. 2003), 328 F.3d 948, 952 (reversing summary judgment, holding entering intersection against red light with excessive speed supports finding that “reasonable jury could find such conduct willful and wanton.”)

houses, and shrubbery. Moreover, on the day of the accident, several vehicles were pulled to the side of the road at this location, further obscuring the view of the intersection. The obstructed view of the intersection at Johnson and Walnut should have caused Appellants to proceed at a much slower speed. In fact, Appellants were specifically required to stop the fire truck pursuant to Massillon Fire Dept. Policy §307.03(D). Appellants' failure to exercise any degree of care in this regard further indicates wanton and reckless conduct.²²

Speed in Excess of 50 mph in 25 MPH Zone. Appellants' speed in this instance, which was at least 25 mph above the posted speed limit, is evidence of wanton and reckless conduct. It is important to note that this case does not concern a nimble police cruiser. This case concerns a 22.5 ton ladder fire truck that was operated at or near its top speed in a residential area, in front of a preschool, into a blind intersection through a stop sign. Appellants should have been traveling at a much slower speed, and the failure to do so was wanton and reckless.²³

Traveling Left of Center Without Due Regard for Other Cars. Appellants travelled left of the center line at 25 mph over the speed limit, through the blind intersection and without appropriately accounting for all cars in the intersection or otherwise exercising due care. This is further evidence of wanton and reckless conduct.²⁴

²² See, e.g., *Carder v. Kettering*, 2nd Dist. No. 20219, 2004-Ohio-4260, ¶24 (reversing summary judgment when emergency vehicle entered an intersection at an excessive speed while "traveling up a hill that limited his visibility and, more importantly, the visibility of motorists"); *Robertson v. Dept. of Public Safety*, Ohio Ct.Cl. No. 2001-09214, 2005-Ohio-5069, ¶39-42 (finding that an officer acted wantonly in a pursuit where the effectiveness of his warning lights and sirens was minimized by a hill that led up to the intersection where the collision occurred).

²³ See, e.g., *Whitfield*, 167 Ohio App.3d 172 at ¶¶12, 40 (finding the fact that an officer caused a collision after running a stop sign while traveling 25 mph over the speed limit in a residential area supported presenting the issue of "wantonness" to jury); *Campbell*, 11th Dist. No. 2009-A-0040, 2010-Ohio-4084, ¶68 (speed of 16 mph over the limit factor that supported a finding of willful or wantonness).

²⁴ See, e.g., *Hunter*, 139 Ohio App.3d at 970-71 (finding the fact that the driver of an emergency vehicle was traveling left of center and 26 mph over the speed limit indicated wanton or reckless conduct); *Peoples*, 70 Ohio App.3d at 849-850 (finding an emergency vehicle driver's act of traveling left of center before proceeding into an intersection at 15 mph over the speed limit supported the jury's finding of wanton conduct); *Campbell*, 11th Dist. No. 2009-A-0040, 2010-Ohio-4084, ¶68 (accord).

Failing to Decrease Speed, Even After Mr. Anderson's Vehicle Observed. Appellants failed to apply the pedal breaks, even *after* Appellants observed Mr. Anderson's vehicle. This is further evidence of reckless and wanton conduct.²⁵ It is hard to imagine how such conduct could result in anything other than tragedy.

Proceeding Recklessly to Minor Fire as Second Vehicle on Scene. Appellants were the second engine dispatched to a minor vehicle fire. Appellants were not told that it was a structure fire. No lives were reported as being in danger. The fire reported to Appellants did not pose a substantial threat. Before the collision, it was reported that the fire was in a parking lot. This all should have caused Appellants to evaluate the need to proceed in such a reckless manner. Their failure to do so further evidences Appellants' wanton and reckless conduct.²⁶

Failing to Account For Limitations of Audible Siren. Appellants recognized that the speed they were traveling could cause them to "outrun" the effect of their audible siren. Further, Appellants recognized that the sirens of the two fire trucks traveling in close proximity may mask the sound of each other's sirens. Appellants' failure to take the necessary steps to account for this known risk and proceed in a more cautious manner demonstrates that they failed to exercise *any* care for the safety of Mr. Anderson and Javarre, and illustrates Appellants' wanton and reckless conduct.²⁷

Multiple Violations of Massillon Ordinances and Policies. Finally, as explained in detail above, Appellants' actions were in violation of numerous Massillon Ordinances, MFD policies, and recognized safety standards. The violations range from failing to stop at an obstructed intersection to failing to warn the

²⁵ See, e.g., *Douglas v. Green* (Dec. 17, 1992), 8th Dist. Nos. 63507, 64106, 1992 WL 388864, *3 (finding the fact that an emergency vehicle operator failed to apply breaks after noticing the victim's vehicle supported a finding of wanton and reckless conduct).

²⁶ See, e.g., *Alliance v. Bush*, 5th Dist. No. 2007CA00309, 2008-Ohio-3750, ¶38 (finding the fact that the officer was one of several officers responding to an incident should have caused the officer to "evaluate[] the need to use excessive speed in a residential area"); *Brown v. Cuyahoga Falls*, 9th Dist. No. 24914, 2010-Ohio-4330, ¶24 (summary judgment inappropriate when officer was third car to respond to reported incident and admitted it was unnecessary to "run hot").

²⁷ See, e.g., *Robertson*, 2005-Ohio-5069 at ¶41 (finding an officer's failure to appreciate that the sound of his own siren may have been masked by the police car being followed supported a finding of wanton or reckless conduct).

driver of potential hazards. *See, e.g.*, Massillon Ord. §331.20(a); Massillon Fire Dept. Policy §§307.03(D), 307.04(C). These laws and policies were enacted to ensure public safety during emergency responses. Appellants' complete disregard for these laws and policies illustrates the recklessness and wantonness of their conduct.²⁸

Based upon the totality of the circumstances, the facts of this case are more than sufficient to allow a reasonable juror to conclude that Appellants engaged in reckless and wanton conduct. Human experience teaches us that operating double the posted speed limit left of center through a stop sign causes a significant risk of bodily harm to other motorists. As trained fire fighters, Appellants should have appreciated this significant risk when operating the 22.5 ton ladder fire truck. Moreover, Appellants knew that most collisions involving emergency vehicles occur at intersections, that the intersection at Johnson and Walnut was a blind intersection, and that circumstances under which they operated the fire truck diminished the effectiveness of their siren. Appellants disregarded these risks when taking the lives of Mr. Anderson and Javarre. Each of these failures by Appellants, by themselves, may cause a substantial likelihood of harm to the motoring public. Taken together, the conclusion is inescapable. The trial court should be reversed.

2. After a Thorough Review of the Record of this Case, Three Independent Experts, Including Appellants' Own Expert, Agree that Appellants' Conduct was Reckless.

Pursuant to the trial court's Pretrial Orders, on March 19, 2010, Appellants filed their "Disclosure of Experts," wherein they represented to the trial court that investigating officer Trooper Anthony Maroon of the Ohio State Highway Patrol was a qualified expert who would be testifying on their behalf.²⁹ Based upon his own observations at the scene of the collision, an interview with Appellant Annen, and the record affidavits of several eyewitnesses, Appellants' own expert has opined:

²⁸ *See, e.g., Hunter*, 139 Ohio App.3d at 970 (finding that a violation of or compliance with municipality guidelines or policies for emergency responders may be "taken into consideration in determining what a reasonable speed is to protect the safety of all concerned"); *Whitfield*, 167 Ohio App.3d 172 at ¶¶38-40 (finding an officer's violation of internal pursuit policy supported a finding of wantonness); *Robertson*, 2005-Ohio-5069 at ¶42 (finding a violation of State Highway Patrol policies and Ohio law supported a finding of wantonness); *Campbell*, 2010-Ohio-4084 at ¶47 (after examining internal policies, stating, "[i]t is with this standard of care in mind that we will analyze this case.")

²⁹ *See*, Defendants' Disclosure of Experts, ¶2 (March 19, 2010).

“In my opinion, it unreasonable and reckless for a firefighter to drive a large fire truck approximately 50 mph in a 25 mph residential neighborhood, through an intersection with blind spots in which she has a negative right of way, while left of center when there is already a fire truck ahead of her responding to the same fire.”

(Maroon Aff., ¶9 (SUPP. Appx. 27)). Trooper Maroon has been a police officer for nearly 20 years, and based upon this experience, is well qualified to offer his expert opinions in this matter. *State v. Overstreet* (June 22, 1989) 8th Dist. No. 55328, 1989 WL 69399, *4. Notwithstanding this devastating testimony, Appellants have never sought to withdraw Trooper Maroon as their expert witness.

It will come as no surprise to this Court that Appellants wish to disassociate themselves with Trooper Maroon’s opinions. Courts are rarely faced with the situation where a party attempts to disavow the opinions of their own expert witnesses simply because the testimony is favorable to their opponent. Unsurprisingly, the courts that have considered this have not allowed it. This is because the testimony of a party’s own expert amounts to a party admission within the meaning of Ohio R. Evid. 801(D)(2). On this point, the court *In re the Chicago Flood Litigation* (July 21, 1995), N.D. Ill. 93 C 1214, 1995 WL 437501 held:

“A party’s pleadings and expert reports often constitute party admissions pursuant to Fed. R. Evid. 801(d)(2). Evidence that plaintiffs or their experts themselves agree with aspects of the city’s case is strongly probative.”

Id. at *10 (citing, *Collins v. Wayne Crop.* (5th Cir. 1980), 621 F.2d 777, 781).³⁰ In other words, “[parties] cannot simply suppress testimony of experts who testify in contravention to [their] theory of the case.” *Sure-Safe Industries, Inc. v. C & R Pier Mfg.* (S.D.Cal. 1993), 851 F.Supp. 1469, 1474 .

Pressing further, the record also reveals that Trooper Maroon is not alone in his conclusions. His opinions are corroborated by both Mr. Robert Krause, standard of care expert and current Battalion Chief with the Toledo Fire Department, and Mr. Choya Hawn, a retired police officer and experienced accident

³⁰ See also, *Dean v. Watson* (Feb. 28, 1996), N.D.Ill. No. 93 C 1846, 1996 WL 88861, *5 (accord); *Samaritan Health Center v. Simplicity Health Care Plan* (E.D.Wis. 2006), 459 F.Supp.2d 786, 799 (“because [the defendant] proffers its opponent’s expert report against that opponent, the report can be considered an admission by a party-opponent”); *Glendale Fed. Bank, FSB v. United States* (1997), 39 Fed.Cl. 422, 423-425 (“When an expert is put forward as a testifying expert at the beginning of trial, the prior deposition testimony of that expert in the same case is an admission against the party that retained him.”)

reconstructionist. Appellants have not challenged the expert qualifications of Mr. Krause or Mr. Hawn before the trial court. After exhausting analyses, both experts agree that Appellants operated the 22.5 ton fire truck in a reckless manner. Krause Rpt., pp. 4, 24 (SUPP. Appx. Tab 15); Hawn Rpt., p. 21 (SUPP. Appx. Tab 11).

It is appropriate to consult standard of care testimony when evaluating the reckless conduct of a defendant. *Harkcom v. Ohio Power Co.* (June 18, 1990), 5th Dist. No. CA-8004, 1990 WL 84106, *3; *Gregory*, 2009-Ohio-4854 at ¶11 (affirming denial of summary judgment brought pursuant to R.C. § 2744.03(A)(6) based in part upon expert standard of care opinion by state trooper that defendants' conduct was reckless). In fact, district courts have also relied upon standard of care expert testimony as to whether a defendant's conduct was reckless in emergency vehicle accident cases. *See, Thompson*, 178 Ohio App.3d 656 at ¶43 (relying upon "an affidavit by plaintiff's expert, Officer Glenn McHenry, who opined that Officer Smith willfully and wantonly operated his vehicle by traveling at an excessive speed without using his emergency equipment"). Based upon the expert opinion of Appellants' own expert, as corroborated by the expert opinions of Mr. Krause and Mr. Hawn, it is apparent that the trial court erred in granting summary judgment to Appellants, and the Court of Appeals should be affirmed.

V. CONCLUSION

Ohio's doctrine of sovereign immunity has come a long way from the antedated English common-law concept that "the king can do no wrong." *See, Butler v. Jordan* (2001), 92 Ohio St.3d 354, 358, 750 N.E.2d 554. To prohibit the jury from determining the liability of Appellants City of Massillon, Susan Toles, and Rich Annen would be a significant step backward. Appellee Cynthia Anderson deserves her day in court. This Court should affirm the Court of Appeals' decision, and allow Appellee this opportunity.

DATED: December 20, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was sent by regular U.S. Mail this 20th day of

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APPENDIX

Massillon Ord. §331.20

A

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331.20 EMERGENCY OR PUBLIC SAFETY VEHICLES AT STOP SIGNALS OR SIGNS.

(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 subsection, 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.
(ORC 4511.03)

