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Case No. 2011-0742

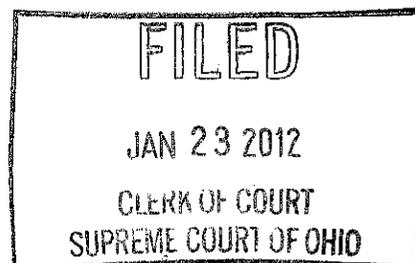
In The Supreme Court of Ohio

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

GRACE BURLINGAME, ET AL.,
Plaintiffs-Appellees,

v.

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

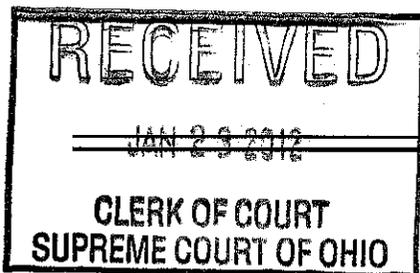


Reply Brief of the Appellants, City of Canton and James R. Coombs II

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Factual Rebuttal

The parties agree on most of the relevant facts. There are a few exceptions, however. For some reason the Burlingames insist on the existence of “facts” that are not in the record, while denying several others that are. For example:

- “There is no evidence that, as the fire truck entered the intersection, the air horn was sounded.” (Burlingame brief, p. 4, 8.) Actually, that was the *only* evidence. Coombs testified that as he approached the intersection that he was “pulling, activating the air horn,” which he confirmed as “rapid.” (Coombs dep., 49: 2–16.) Captain Sacco, in the passenger’s seat, confirmed this, testifying the “air horn was constant.” (Sacco dep., 36: 9–12.) Finally, Brooke James testified she heard an “audible signal” from the fire truck. (James’ affidavit.) Further, not a single witness testified the air horn was not activated.
- There is “no evidence that the brakes were ever applied.” (Burlingame brief, p. 8.) Again, that was the only evidence. Coombs testified that “I put on the brake and tried to move left to miss the van.” (Coombs dep., p. 71: 9.)
- The “business signs totally block the view of any driver at the 18th street intersection looking for oncoming southbound traffic.” (Burlingame brief, pp. 2-3.) For this, the Burlingames rely on pictures that the trial court and Fifth District ignored because they were never authenticated and properly made a part of the record. Moreover, they were taken from across the street and not from the view of a driver at the 18th Street intersection. And the only evidence left actually contradicts what the Burlingames represent in their brief: Captain Sacco testified they had a “pretty open view of the whole intersection,” that they could “see over the signs ... because the truck sits up higher.” (Sacco dep., p. 52: 1–12.)
- The house to which the firefighters were driving was “vacant.” (Burlingame brief, p. 2, 7.) Though Burlingame cites page 31 of Coombs’ deposition, there is nothing there, or anywhere else in his deposition, regarding the home’s occupancy. In fact, Canton

cannot find any part of the record that sheds light on whether the home was occupied.

- The Burlingames were “driving home from a picnic at their granddaughter’s home.” (Burlingame brief, p. 2; Finley brief, p. 4.) That evidence is not in the record. It was probably taken from the deposition of the Burlingames’ son, which was not made a part of the record. If it had been, his actual testimony was that Mr. Burlingame had left the picnic where he had been drinking, and gone to the American Legion, which he left just before the accident. His blood alcohol level was .07—a fact that *is* in the record.
- Mrs. Burlingame was “life-flighted from the scene,” (Burlingame brief, p. 3.) and she “later died from those injuries.” (Finley brief, p. 2, fn. 2, p. 4.) Neither claim refers to the record, and once again, Canton cannot find any evidence to support either one.

The Burlingames have gotten these “facts” wrong. The Burlingames cannot avoid these uncontested facts: Coombs was driving a firetruck on an emergency call to a house fire in daylight, in good weather, on clear, dry roads, with lights flashing and air horn “repeatedly” sounding, no faster than 35-40 miles per hour in a 35 mile-per-hour zone, through a red light that he thought was green,¹ hitting the Burlingames’ vehicle which he tried to avoid by braking and steering to the left.

¹ Finley claims that Canton’s concession that Coombs’ light was red represents an “evolutionary position” because Canton’s initial summary judgment motion asserted his light was green. Finley’s right, Canton did. But Finley has apparently forgotten that Canton had completed discovery and filed its motion on time, in accordance with the trial court’s order. Finley and Burlingame, however, failed to do the same. Instead, they asked the court for relief from the discovery deadlines, and for more time to respond to Canton’s motion, which Canton did not oppose. Only then did the Burlingames discover that the light might have been green. So Canton conceded for summary judgment purposes that the light was red, and devoted its reply to citing the trial court to the various cases throughout Ohio providing for immunity as a matter of law under similar facts.

Rebuttal Argument

- A. *The Fifth District and the Burlingames have misread this Court's decision in O'Toole v. Denihan, which does not support the use of departmental rules violations in considering whether a political subdivision was reckless under R.C. 2744 or in defeating a motion for summary judgment on that issue. To the contrary, O'Toole supports Canton to the extent that this Court considered the issue at all.*

Below, Canton cited four cases from four different appellate districts, all holding that violations of departmental rules are irrelevant to a determination of whether a political subdivision was reckless under R.C. 2744. But the Fifth District brushed those cases aside, declaring, “we do not agree.” Yet when Canton asked the court to certify a conflict to this Court, it demurred, explaining that the conflict cases were decided before this Court’s 2008 decision in *O’Toole v. Denihan*,² which, apparently according to the Fifth District, held that the violation of departmental policies was, in fact, relevant in a determination of recklessness under R.C. 2744 and could be used to defeat summary judgment.³ Of course, the Burlingames now cling to that interpretation. But the Burlingames and the Fifth District have somehow misread *O’Toole*, which, if anything, actually takes a contrary view—that is, to the extent this Court considered the issue at all.

² 118 Ohio St.3d 374, 889 N.E.2d 505, 2008-Ohio-2574.

³ (Judgment entry denying reconsideration, Apx., A-31.)

In *O'Toole*, the Cuyahoga County Department of Job and Family Services received a referral regarding possible child abuse.⁴ The Department investigated, finding a four-year-old girl had marks on her face, ear, back, and hands. The investigator believed some of the marks were the result of abuse.⁵ When questioning the child's mother and her boyfriend, the investigator did not press the mother on at least one inconsistent response and did not follow up the boyfriend's refusal to answer any questions.⁶

The Department's supervisor reviewed the case and determined that the mother could plausibly explain some of the marks on the child, but not others. He thought the marks on the girl's face looked like it had been made by a fist.⁷ Still, it appeared the mother was cooperating with the Department, and she agreed to a safety plan.⁸ So the Department did not attempt to immediately remove the child from her mother's custody.

The mother later asked the investigator if she could leave the state with her child to attend a funeral. Though this request raised a "red flag," the Department did not require proof of the trip, follow up with a home visit, or

⁴ *O'Toole* at ¶ 6.

⁵ *O'Toole*, 2008-Ohio-2574, at ¶¶ 15, 17.

⁶ *Id.* at ¶¶ 23, 30.

⁷ *Id.* at ¶¶ 31, 33.

⁸ *Id.* at ¶ 35.

even speak with the mother again.⁹ A few weeks later, the child was found dead. The mother was convicted for her murder.¹⁰

The administrator of the child's estate sued the Department and several of its employees. The administrator argued that two exceptions to immunity applied: first, the Department and its employees acted "with malicious purpose, in bad faith, or in a wanton or reckless manner" in investigating the case, and second, because liability was imposed expressly by R.C. 2151.421(A) (failure to report suspect abuse), and R.C. 2919.22 (child endangering).¹¹

The trial court granted summary judgment to all defendants, which the Eighth District reversed. But this Court reversed the Eighth District, finding that the reporting statute did not impose a duty on the department to report the suspected abuse to law enforcement, and that the child-endangering statute did not abrogate the immunity provided to political subdivisions and their employees.¹² This Court then examined two previous cases with similar facts and determined that, though the child's death was tragic, the supervisor was not reckless as a matter of law.¹³

⁹ *Id.* at ¶ 37.

¹⁰ *Id.* at ¶ 40.

¹¹ *O'Toole*, 2008-Ohio-2574, at ¶ 43.

¹² *Id.* at ¶¶ 61, 68-69.

¹³ *Id.* at ¶¶ 73-91.

This Court was nearly done, but devoted a single paragraph, near the end of its decision, to dispatching what this Court described as the plaintiff's "final attempt to maneuver around ... immunity."¹⁴ Specifically, the plaintiff claimed that the supervisor violated various portions of the Administrative Code as well as departmental policies governing investigations. For example, the investigator failed to complete the required safety assessment when she interviewed the child.¹⁵

But this Court held that "a violation of various policies does not rise to the level of reckless conduct unless a claimant can establish that the violator acted with a perverse disregard of the risk." Further, this Court continued, "without evidence of an accompanying knowledge that the violations 'will in all probability result in injury,' [citation omitted] evidence that policies have been violated demonstrates negligence at best." And, this Court concluded, because "the record reflects that [the supervisor] did not perversely ignore the risk, the violations do not create a genuine issue of material fact."¹⁶

It seemed clear to Canton that this Court was not impressed with the plaintiff's argument, calling it an "attempt to maneuver around" immunity. This Court observed that while a violation of a departmental policy might

¹⁴ *Id.* at ¶ 92.

¹⁵ *O'Toole*, 2008-Ohio-2574, at ¶¶ 11-12.

¹⁶ *Id.* at ¶92.

amount to negligence, the issue of political subdivision immunity involves a higher standard, recklessness. Therefore, a violation of departmental policy did not create a genuine issue of material fact on the issue of recklessness. To do that, a plaintiff would have to do more. They would have to present evidence that the political subdivision perversely disregarded a known risk.

Though this Court did not expressly make such a holding—and it was not included in the syllabus from the case—it seemed clear that this Court was implying that a violation of a departmental policy is not relevant in determining recklessness.¹⁷ Instead, the analysis focuses on the *facts* of defendant’s actual conduct and whether those *facts* show that the defendant “acted with a perverse disregard of the risk.” And if they do not, as in *O’Toole*, then the plaintiff cannot survive summary judgment by showing a violation of a departmental procedure.

Yet the Fifth District, and now the appellees, somehow interpreted this to mean that alleged policies were not just relevant in determining recklessness, but were apparently sufficient to create a genuine issue of fact and defeat summary judgment. This is yet another reason for this Court to clarify this issue once and for all, and make a bright-line holding that a violation of departmental policy is not relevant to whether a political subdivision or its employees are willful, wanton, or reckless under R.C. 2744.

¹⁷ In fact, this Court even relied on *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 51, 2002-Ohio-222, 772 N.E.2d 129 (9th Dist.), which held that “a violation of an internal departmental procedure is irrelevant to the issue of whether appellees’ conduct constituted willful or wanton misconduct.” *O’Toole* at ¶ 92.

B. After purging irrelevant violations of internal policy and traffic statutes from the Fifth District’s analysis, the undisputed facts of this case require immunity as a matter of law.

In *O’Toole*, even before rejecting the plaintiff’s argument regarding policy violations, this Court weighed the facts against the relevant facts in three previous cases. After a lengthy analysis, this Court determined that the Department supervisor’s conduct “more closely resemble[d] that of the agency employees” in the two cases that found they had not perversely disregarded a known risk.¹⁸

Likewise, Canton provided the Fifth District with several cases that were similar to this case—all involving safety vehicles proceeding against the red light before intersection crashes. In fact, most involved facts that came far closer to recklessness than this case. But again, the Fifth District tuned out those cases, refusing to analyze them or even mention them by name, writing, “The city cites situations where emergency vehicle drivers were not found to be driving in a wanton or reckless manner, but each situation must be evaluated on its own unique facts.”¹⁹

Yet for some reason the Fifth District had no reservation comparing this case to *Hunter v. Columbus*,²⁰ in which the court denied summary judgment

¹⁸ *O’Toole*, 2008-Ohio-2574, at ¶ 91.

¹⁹ *Burlingame v. Estate of Burlingame, et al.*, 5th Dist. Nos. 2010-CA-124 & 2010-CA-130, 2011-Ohio-1325, at ¶ 53.

²⁰ 139 Ohio App.3d 962, 746 N.E.2d 246 (10th Dist.2000).

and determined that the case should proceed to a jury.²¹ That case, however, bore no resemblance to this one. The fire truck in that case was traveling more than 25 miles-per-hour over the speed limit, 61 miles per hour in a 35 mile-per-hour zone, all while traveling left of center.²²

Then the court pointed to *Reynolds v. City of Oakwood*, which the Fifth District observed was a case that “dealt with a collision between a police car utilizing the siren and lights and a pedestrian vehicle” and demonstrated the “fine line” between negligence and reckless conduct that should proceed to a jury.²³ But that case had even less relevance to this case than *Hunter*. After all, the police car was traveling “in excess of seventy miles per hour in a twenty-five-mile-per-hour zone,” and “made no effort to slow down” through an intersection with limited visibility and a red light that he saw two blocks in advance.²⁴ In short, the Fifth District wrote that “each situation must be evaluated on its own unique facts” but then proceeded to compare the facts of this case to other cases that are not reasonably comparable.

But these cases, several of which Canton provided to the Fifth District, are:

²¹ *Id.* at 49.

²² *Hunter*, 139 Ohio App.3d at 966.

²³ 38 Ohio App.3d 125, 528 N.E.2d 578 (2nd Dist.1987).

²⁴ *Id.* at 127. (Emphasis added.)

- *Ybarra v. Vidra*, 6th Dist. No. WD-04-061, 2005-Ohio-2497 (Police officer driving 45 in a 35 m.p.h. zone with lights and sirens entered intersection against the red light, hitting a car, was entitled to summary judgment.)
- *Adams v. Ward*, 7th Dist. No. 09MA25, 2010-Ohio-4851 (Police officer pursued felon on a clear, dry day, with lights and sirens activated, driving 45 in a 35 m.p.h. zone and through an intersection, against the red light, with limited visibility, striking another motorist, was entitled to summary judgment.)
- *Byrd v. Kirby*, 10th Dist. No. 04AP-451, 2005-Ohio-1261 (Police officer driving up to 46 m.p.h. in a 35 mile-per-hour zone, with lights and sirens activated, and in clear weather and dry roads, looked for traffic before entering an intersection against the red light was entitled to summary judgment.)
- *Cunningham v. City of Akron*, 9th Dist. No. 22818, 2006-Ohio-519 (Police officer with lights and sirens activated and honking his horn, pursued a suspect while accelerating through an intersection, left of center, and against a red light, was entitled to summary judgment.)
- *Whitley v. Progressive Preferred Ins. Co.*, 1st Dist. No. C-090240, 2010-Ohio-356 (Sheriff deputy driving up to 30 m.p.h. through an intersection, against red light, without activating siren, or possibly even his overhead lights, collided with a motorcycle, did not rise to level of willful and wanton as a matter of law.)
- *Stevenson v. Prettyman*, 8th Dist. No. 94873, 2011-Ohio-718 (Police officer transporting a prisoner failed to activate lights or sirens and drove through intersection against the red light, striking another car, entitled to summary judgment.)
- *Toney v. City of Norwood*, 1st Dist. No. C-080642, (May 27, 2009) (Firefighter driving less than 30 m.p.h. did not slow as he proceeded through intersection against the red light with lights, sirens, and honking horn entitled to summary judgment.)

These are recent cases from varying districts. All are similar to this case, some are almost identical, and many involve evidence of less care than Coombs

exercised. They represent the continuum against which this case should have been evaluated. But they were not. If they had been, it is almost impossible to imagine how Coombs and Canton would not have been entitled to summary judgment. After all, had Coombs not *accidentally* run a red light—there is no dispute that he thought it was green²⁵—his actions would not even have amounted to negligence, let alone recklessness such that he perversely disregarded a known risk.

Instead, these cases were ignored and the analysis was muddled with irrelevant policy and traffic law violations. Immunity, as the General Assembly intended it, would be gutted if courts required political subdivisions and their employees to proceed to trial based on innocuous facts that happen to run afoul of a departmental rule. As this Court reasoned in *Summerville v. City of Forest Park*, in comparing immunity under R.C. 2744 to qualified immunity under federal law: “Qualified immunity is ‘an *immunity from suit* rather than a mere defense to liability; ... it is effectively lost if a case is erroneously permitted to go to trial.’”²⁶ In a similar vein, if internal rule violations in and of themselves allow plaintiffs to avoid summary judgment, it seems that the General

²⁵ “I saw the van after my light had changed to green.” (Coombs dep. 52: 11–12). Coombs further testified that he would have come to a “complete stop” if the light had been red. (53: 3–6). Further, Sacco testified that Coombs “believed he had the Green light.” (41: 19).

²⁶ 128 Ohio St.3d 221, 943 N.E.2d 522, 2010-Ohio-6280, at ¶ 40, citing *Mitchell v. Forsyth*, 472 U.S. 511, 525–530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Assembly's reasons for allowing political subdivisions interlocutory appeals under R.C. 2744.02(C) on immunity questions would also be compromised.

Conclusion

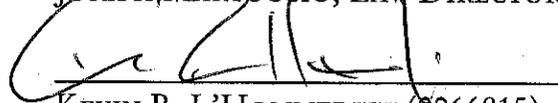
The Ohio General Assembly provides for immunity to political subdivisions and their employees unless they act in a willful, wanton, or reckless manner. This standard was designed to ensure the fiscal integrity of political subdivisions and allow first responders reasonable latitude in responding to emergencies. At the same time, Canton, like many political subdivisions, has also decided to impose internal policies to hold their employees to a higher standard, providing greater protection to its employees as well as the public they serve. Canton can use violations of those internal policies in making discipline, promotion, or salary determinations.

But under the Fifth District's decision, political subdivisions with strict policies like Canton are more likely to be held liable in damages than those with lax policies. This will force political subdivisions to choose between keeping heightened departmental policies that protect the public but invite liability, or eliminating them which will promote effective risk management but compromise public safety. Until now, Ohio's courts have refused to force this choice on political subdivisions. Likewise federal courts have refused to allow internal policy violations when considering violations of federal law.

This Court too should adopt a bright-line rule that violations of internal policy or of traffic law are irrelevant to a determination of whether a political subdivision or its employees are willful, wanton, or reckless under R.C. 2744. Doing so will ensure sound public policy, prevent political subdivisions from defining state law, and preserve the policy behind that law.

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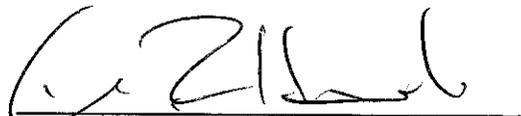
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