ORIGINAL

# IN THE SUPREME COURT OF OHIO

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

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


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## APPELLANTS' REPLY BRIEF

INTRODUCTION

The record in this case is thoroughly documented, and there has been no misstatement of the facts borne out by that record. For instance, utilization of the air horn on engine 211, by its operators, is corroborated by the evidence in the record. (Toles depo., p. 103 – Supp. p. 164). Cpt. Annen, seated in the front passenger seat of the fire engine, sounded the air horn at intersections as the emergency vehicle proceeded. (Toles depo., pp. 103, 151-152 – Supp. pp. 164, 179-180). See also, (Annen depo., p. 124 – Supp. p. 201). (Opinion, ¶15). In addition, the operator of the engine, appellant Toles, testified to slowing the speed of the emergency vehicle when approaching the Johnson and Walnut intersection. (Toles depo., p. 150 – Supp. p. 178). Further, the intersection of Johnson and Walnut itself was unobstructed, for the operator, as the engine approached. (Toles depo., p. 149 – Supp. p. 177). To the extent any tree or utility pole located along the roadway were "obstructions," as appellee contends, they could not have obstructed the intersection itself but, instead, only conditions outside of the area where the engine was actually traveling. (Opinion, ¶16).

Otherwise, while the appellee continues to stress that the fire engine was driven left of center, prior to the accident, as the appellate court observed: "In this case, we do not find the fact that [the engine] was left of center contributed to the accident. This is not a situation where the accident was a head-on collision where the emergency vehicle was in the lane of travel of oncoming traffic resulting in a collision." (Opinion, ¶66).

Moreover, the appellee's continued reliance upon internal, departmental policies is not properly presented in this case. See, Elsass v. Crockett (May 4, 2005), Summit App. No. 22282, 2005 Ohio 2142, ¶25. Accord, Shalkauser v. Medina, 148 Ohio App. 3d 41, 2002 Ohio 222, ¶41;

Jackson v. Poland Twp. (Sept. 29, 1999), Mahoning App. Nos. 96-261, 97-13, 98-105; Sanders v. Stover (Nov. 21, 2007), Cuyahoga App. No. 89241, 2007 Ohio 6202, ¶¶13-17; and Rogers v. DeRue (1991), 75 Ohio App. 3d 200, 205. Local internal regulations may have some bearing on internal disciplinary procedures, but they should not be used to alter the immunity standards fixed and governed by Ohio law. "[A] violation of an internal departmental procedure is irrelevant to the issue of whether appellees' conduct constituted willful or wanton misconduct." O'Toole, infra, ¶92, citing Shalkauser, supra, p. 51.

Equally irrelevant is the appellee's reliance upon any traffic rules, R.C. 4511.03 and others. Violation of a traffic rule is not listed among the exceptions from immunity set forth in R.C. 2744.02(B)(1)(b) or R.C. 2744. 03(A)(6)(b), and thus such rules cannot be read into the applicable statutes involved in this case. See, Sarmiento, infra. While R.C. 4511.03 is specifically referenced in R.C. 2744.02(B)(1)(c), relating to emergency medical technician emergency responses, it is not incorporated as part of either immunity section implicated in this case. Any alleged violation of a traffic statute by appellant Toles is irrelevant to the application of the immunity rules, in the absence of any express imposition of civil liability in the statutes themselves. See, Estate of Ridley v. Hamilton County Bd. of Mental Retardation & Dev. Dis., 102 Ohio St. 3d 230, 2004 Ohio 2629, ¶24.

While the appellee otherwise contends that conclusory affidavits from expert witnesses support appellee's theory of "recklessness," "[I]t is improper for an expert's affidavit to set forth conclusory statements and legal conclusions without sufficient supporting facts." Wall v. Firelands Radiology, Inc. (1995), 106 Ohio App. 3d 313, 335. The stated legal conclusions relating to "reckless" conduct are, thus, entitled to no deference or weight in this case. That is why even the

appellate court refused to give the self-serving affidavits any deference. (Opinion, ¶59). See also, VanDyke v. City of Columbus, infra at ¶15.

LAW AND ARGUMENT

**Proposition of Law No. I:**

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

The cases relied upon by the appellee largely pre-date this Court's decision in O'Toole. O'Toole v. Denihan, 118 Ohio St. 3d 374, 2008 Ohio 2574. In O'Toole, the Court specifically recognized the heightened standard for "reckless conduct," for purposes of R.C. 2744.03(A)(6). "[D]istilled to its essence, in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk." Id., 118 Ohio St. 3d 374, ¶73. The authority cited by appellee did not have the benefit of this Court's analysis from O'Toole. E.g., Neely v. Mifflin Twp. (Sept. 30, 1996), Franklin App. No. 96 APE 03-283, 1996 WL 550170; Brockman v. Bell (1992), 78 Ohio App. 3d 508; Reynolds v. Oakwood (1987), 38 Ohio App. 3d 125; Whitfield v. Dayton, 167 Ohio App. 3d 172, 2006 Ohio 2917; Douglas v. Green (Dec. 17, 1992), Cuyahoga App. Nos. 63507, 64106, 1992 WL 38864; Peoples v. Willoughby (1990), 70 Ohio App. 3d 848. If these cases were determined through the application of O'Toole, they may well have been concluded differently. A "totality of the circumstances" approach to assessing the defense of immunity under R.C. 2744.03(A)(6)(b) still requires consideration of whether the evidence demonstrates a perverse disregard of a known risk. The evidence does not in this case.

The O'Toole standard requires evidence that the employee was conscious that his or her conduct "will in all probability result in injury," to reach the level of perverse disregard for a known risk. O'Toole, ¶73. The material facts in this case, no matter how many times they are repeated or characterized, do not rise to this level.

Conspicuously absent from any discussion in the appellee's brief is the case of Marchant v. Gouge, Richland County App. No. 2009 CA 1043, 2010 Ohio 4542. As addressed more-fully in the appellants' brief, Marchant v. Gouge, involved a wrongful death action filed against a Sheriff's Deputy and department following an accident. The deputy had been dispatched to an emergency call, and was driving with lights and siren activated. Marchant v. Gouge, supra at ¶5. The decedent, a pedestrian, entered an intersection in front of the cruiser, leading to the accident. Among the facts relied upon by the plaintiff to undermine the immunity defenses asserted was evidence that the cruiser was driving "at 67 miles per hour in a 35 mile per hour zone." Id. at ¶39. "Appellant argues reasonable minds could find the deputy was going too fast for conditions and did not slow appreciably before he struck [decedent]." Id. at ¶40. The court concluded that "the solitary fact of Gouge's speed [– considered, by the way, in relation to conditions –] is not sufficient to establish an issue of whether his conduct rose to the level of recklessness." Id. at ¶46. Thus, summary judgment was affirmed. This Court declined review of Marchant v. Gouge, 2010 Ohio 4542. Given the parallel issues presented under the evidence in this case, the result should also be the same, as a matter of law. The appellants are entitled to recognition of their immunity from liability in this case.

The Marchant v. Gouge court cited to Hewitt v. City of Columbus, Franklin App. No. 08AP-1087, 2009 Ohio 4486, another case in which speed and traffic condition were the key facts. In that case, the officer was driving 67 miles per hour in a 45 mile per hour zone, *without* lights or siren.

A car turned in front of the officer, resulting in an accident. The appellate court in Hewitt affirmed summary judgment, finding that the evidence did not rise to the level of recklessness. Regardless of the speed argument advanced by the claimant, the motorist was not deprived of his opportunity to yield the right of way to the emergency vehicle. See, Marchant v. Gouge, supra at ¶¶ 44, 45. Similarly, the appellee's decedent was not deprived of the opportunity to yield the right of way to the Massillon fire engine, under the record of this case. See also, Byrd v. Kirby (July 22, 1999), Franklin App. No. 04 AP 451, 2005 Ohio 1261; Cunningham v. Akron (Feb. 8, 2006), Summit App. No. 22818, 2006 Ohio 519; and Ybarra v. Vidra (May 20, 2005), Wood App. No. WD-04-061, 2005 Ohio 2497.

**Proposition of Law No. II.**

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

It remains clear that the General Assembly did not include reckless conduct as part of the "full defense to . . . liability" set forth in R.C. 2744.02(B)(1)(b). Instead, the exception contained in this portion of the Revised Code is tied to a "willful or wanton" standard. Under these circumstances, and settled rules of statutory construction, we must resist the urge to simply group all terms along the continuum of conduct together. Concluding that "willful or wanton" means "reckless," or something else, may be an easy way out when addressing R.C. 2744.02(B)(1(b) in relation to R.C. 2744.03(A)(6)(b), but that is not the result called for as a matter of law.

The appellee relies upon Thompson v. McNeill (1965), 53 Ohio St. 3d 102 for the proposition that there is effectively one standard of conduct between ordinary negligence and intent. Contrary to appellate authority which has developed, these standards should not be viewed as the "functional equivalent" of one another. E.g., DeMartino v. Poland Local School Dist. (Mar. 24, 2011), Mahoning App. No. 10-MA-19, 2011 Ohio 1466; Whitfield v. Dayton, 167 Ohio App. 3d 172, 2006 Ohio 2917, ¶34. As observed by the amicus Ohio Association for Justice, "there are differences in this Court's definitions in the terms reckless, wanton, and willful which render the exceptions to immunity in the Act nonequivalent; . . . ." (OAJ Brief, p. 7).

In Blair v. Columbus Division of Fire (July 26, 2011), Franklin App. No. 10 AP 575, 2011 Ohio 3648, the court recently addressed immunity defenses for a political subdivision and its employees. In Blair, the court noted that "[w]illful misconduct 'involves a more positive mental state prompting the injurious act than does wanton misconduct.'" Id., at ¶30. "Willful misconduct is performed with 'the intent, purpose, or design to injure.'" Id. See also, VanDyke v. City of Columbus (June 3, 2008), Franklin App. No. 07 AP 0918, 2008 Ohio 2652, ¶11. "In Gladon v. Greater Cleveland Regional Transit Authority (1996), 75 Ohio St.3d 312, . . . the Supreme Court defined the term 'willful misconduct' as 'the intent, purpose, or design to injure." (Opinion, ¶48). Otherwise, "'Wanton' conduct is the complete failure to exercise any care whatsoever." (Opinion, ¶45). "[W]anton misconduct is a degree of reprehensible or miscalculated action that rises well above negligence." VanDyke v. City of Columbus, supra. Given that "reckless" conduct has most-recently been defined (in the immunity context) as "a perverse disregard of a known risk," it is obvious that the terms along the continuum are not interchangeable.

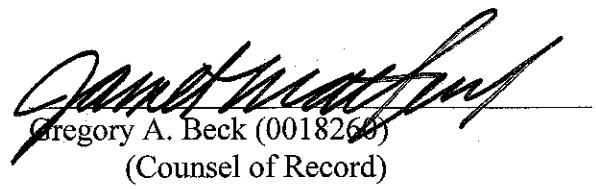
The judiciary, in the construction of a statute, "cannot extend the statute beyond that which is written, for '[i]t is the duty of this court to give effect to the words used [in the statute], not to delete words used or to insert words not used.'" Sarmiento v. Grange Mut. Cas. Co., 106 Ohio St. 3d 403, 408, 2005 Ohio 5410. While the continuum from negligence to intent may be "nebulous," it serves a function and must be preserved. Hanson v. Kynast (1987), 38 Ohio App. 3d 58, 63. A determination that one's conduct may satisfy the reckless standard does not translate to a conclusion that such conduct is otherwise wanton, willful or intentional. Thus, the appellate court's conclusion (although itself unsupported, as addressed under Proposition of Law No. I), that a question of fact existed as to the "reckless" standard does not itself implicate the even higher willful or wanton standards required in R.C. 2744.02(B). Contrary to the statements of the amicus OAJ, the court of appeals did not conclude that reasonable minds could infer the conduct of appellant Toles was reckless or wanton. The appellate court specifically references reckless only. (Opinion, ¶73).

**CONCLUSION**

The evidence in this case fully supported the entry of summary judgment in favor of the appellants as ordered by the trial court. The emergency vehicle involved in the accident at issue in this case was not operated in a willful, wanton or reckless manner – there was no perverse disregard for safety. Accordingly, the appellants were entitled to immunity and to judgment as a matter of law.

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

Respectfully submitted,



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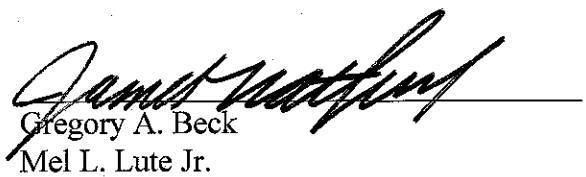

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