IN THE SUPREME COURT OF OHIO

RENEE McCONNELL, et al., Appellees, v. DONALD C. DUDLEY, JR., *et al.*, Appellants.	Case No.: 2018-0377 On Appeal From the Mahoning County Court of Appeals, Seventh Appellate District, Case No. 17 MA 0045

MERIT BRIEF OF AMICUS CURIAE, THE OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF APPELLEES, RENEE McCONNELL, ET AL.

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IDENTIFICATION OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The Ohio Association for Justice ("OAJ") is a statewide association of lawyers whose mission is to preserve Constitutional rights and to protect access to the civil justice system for all Ohioans. OAJ is devoted to strengthening the civil justice system to ensure that deserving individuals receive justice and wrongdoers are held accountable.

The decision reached by the Mahoning County Court of Common Pleas in this matter correctly applied the law in determining that Appellants failed to establish that there was no evidence that Appellant Donald A. Dudley was driving in a wanton or willful manner at the time of the collision with Appellee Renee McConnell's vehicle. Ohio's political immunity statute is clear: "a political subdivision is liable in damages in a civil action for injury, death or loss to person or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function, as follows: (1) Excepted as otherwise provided in this division, political subdivision are liable for injury, death, or loss to person or property caused by the negligent operation of a motor vehicle by their employees when the employees are engaged within the scope of their employment and authority." R.C. 2744.02(B)(1).

Although the political subdivision may have a full defense to liability if "a member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call," the operation of that motor vehicle must "not constitute willful or wanton misconduct." R.C. 2744.02(B)(1)(a). The hiring criteria, training, and supervision of police officers have been examined by Ohio courts to bolster decisions as to whether the conduct in question was willful or wanton.

STATEMENT OF FACTS

OAJ adopts the statement of facts as delineated by Appellees, Renee McConnell, Paul McConnell, Ryann Heller, Rachel McConnell, Leah McConnell and Emily McConnell. OAJ highlights several salient facts for the purpose of this brief.

Officer Dudley was following a car that swerved which may have contained the suspects. (R. 26, Dep. of D.Dudley, 05/19/2016, p. 112). Dudley did not know and could not confirm the model of the suspects' car. (R. 26, *Id.* at pp. 130, 157-58). Dudley did not check the traffic light color before entering the subject intersection, did not look to his left, could not see to his right, did not activate his enhanced siren, and drive not below or at the speed limit despite the visual impediments. (R. 26, *Id.* at pp. 192-93). The collision with Appellee Renee McConnell occurred ninety-nine seconds of the time Dudley began chasing the other vehicle. (R. 28, Report of the Ohio State Highway Patrol, p. 32, Exhibit A to Appellants' Motion for Summary Judgment). For sixty of those ninety-nine seconds, Dudley could not even see the suspects' car. *Id.*

ARGUMENT

I. Proposition of Law: A political subdivision is immune from liability for allegations of negligent hiring, or failure to train or supervise police officers, as such allegations do not fall within any of the exceptions found within R.C. 2744.02(B)(1) through (B)(5).

A. Standard of Review

In this case, the trial court denied Appellants' motion for summary judgment pursuant to Civ.R. 56. "[B]efore summary judgment may be granted, it must be determined that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party

against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). There is no dispute as to the underlying facts. "This Court reviews a ruling on summary judgment de novo." *City of Dayton v. State*, 151 Ohio St. 3d 168, 2017-Ohio-6909, 87 N.E.2d 176, ¶ 12; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

B. Issue on Appeal: The Negligent Hiring, Training and Supervision by Appellants.

At the time of the collision, Appellants concede that Officer Dudley was acting within the scope of his employment and engaged in a governmental function. (Appellants' Merit Brief, p. 9). Appellants also concede that the issue of whether the conduct of Dudley was willful or wanton as that phrase is used in R.C. 2744.02(B)(1)(a) is not at issue in this appeal. *Id.* Had the issue been whether Dudley was acting willfully or wantonly, it would be an issue for a jury. *Fabrey v. McDonald Village Police Dep't*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, 639, N.E.2d 31; *Adams v. Ward*, 7th Dist. Mahoning No. 09MA 25, 2010-Ohio-4851, ¶ 27; *Cunningham v. City of Akron*, 9th Dist. Summit No. 22818, 2006-Ohio-519, ¶ 24; *Shadoan v. Summit County Children Servs. Bd.*, 9th Dist. Summit No. 21486, 2003-Ohio-5775, ¶ 14.

Appellants contend that the sole issue before the Court is "whether a claim of negligent hiring, training or supervision by [Appellant] Coitsville Township is an independent exception to immunity, or whether the negligent hiring, training or supervision by [Appellant] Coitsville Township can be encompassed within the 'operation' of a motor vehicle as evidence relevant to [Appellant] Officer Dudley's state of mind at the time of the accident." (Appellants' Merit Brief, pp. 9-10). The issue as phrased by Appellants in the merit brief is not the same as that proposition of law accepted for review by this Court. The issue as phrased by the Appellants is ***not*** whether Appellants are immune from liability for these allegations but rather whether such

allegations are an independent exception to immunity ***or*** whether such evidence may be included as part of the operation of the vehicle by the police officer at the time of the collision. *Id.*

"[E]vidence of a violation of a departmental policy does not create a genuine issue of material fact as to whether the violator acted with malicious purpose, in bad faith or in a wanton or [reckless] manner without evidence that the violator was aware that his 'conduct [would] in all probability result in injury.'" *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-8374, 75 N.E.3d 161, ¶ 25. "The violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct." *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph five of the syllabus. Accordingly, where there is evidence that the police officer was aware that his or her conduct would "in all probability result in injury," the evidence of violation of departmental policy may be admitted as support for or against claims of willful or wanton conduct.

Further, Appellants are not challenging whether they may bear liability for the actions of Officer Dudley pursuant to R.C. 2744.03, regardless of how their liability is characterized. In other words, the proposition of law as posited by Appellants is not whether R.C. Chapter 2744 permits the torts of negligent hiring, training or supervision in an action against a municipality. Appellants restricted the argument to those provisions of ***R.C. 2744.02(B)*** and whether they are immune from liability for allegations of negligent hiring, training or supervising police officers pursuant to that subsection.

Ohio courts already frequently address departmental policy in evaluating officers' conduct. "Courts have identified several factors that may be relevant when determining if a law enforcement officer operated a motor vehicle willfully, wantonly, recklessly, or simply

negligently. The factors include the following: (1) the officer's speed; (2) whether the officer was traveling in the correct lane of travel; (3) whether the officer had the right-of-way; (4) the time of day; (5) the weather; (6) the officer's familiarity with the road; (7) the road contour and terrain; (8) whether traffic was light or heavy; (9) whether the officer made invasive maneuvers (i.e., attempting to force the vehicle from the road) or evasive maneuvers (i.e., attempting to avoid a collision); (10) the nature and seriousness of the offense that prompted the emergency; (11) whether the officer possessed a safer alternative; (12) whether the officer admitted to disregarding the consequences of his actions; (13) whether the officer activated the vehicle's lights and sirens; and (14) whether the officer violated any applicable departmental policy." *Hoffman v. Gallia Cty. Sheriff's Office*, 4th Dist. Gallia No. 17CA2, 2017-Ohio-9192, 103 N.E.3d 1, ¶ 49; *Gates v. Leonbruno*, 8th Dist. Cuyahoga No. 103738, 2016-Ohio-5627, 70 N.E.3d 1110; *Adams* at ¶ 28.

Training and department policy also assist the trier of fact in reviewing an officer's conduct holistically. "A principle to be applied generally however is that in judging the reasonableness of the actions of the officers the circumstances before him are not to be dissected and viewed singly; rather they must be considered as a whole. So considered they are to be viewed through the eyes of a reasonable and cautious police officer on the scene, **guided by his experience and training.**" (Emphasis added.) *U.S. v. Hall*, 525 F.2d 857, 859 (D.C. Cir. Ct. 1976), quoted, in part, with approval, in *State v. Bobo*, 37 Ohio St.3d 177, 179, 524 N.E.2d 489 (1988); s*ee also Hayes v. City of Columbus*, 10th Dist. Franklin No. 13AP-695, 2014-Ohio-2076, ¶ 29 (departmental policy was relevant to determine whether the actions of the officer were objectively reasonable); *Kendzierski v. Carney*, 9th Dist. Summit No. 22739, 2005-Ohio-6735, ¶

14, 16, 24 (whether a police officer was acting within the course and scope of his employment was determined by comparing the departmental policy to his actions).

1. Positive Impact of the Hiring, Training and Supervision by Political Subdivisions.

Given the narrow focus of this appeal, it bears examining those instances in which Ohio courts have considered the hiring, training and/or supervision by political subdivisions to bolster defenses that employees were not acting in a willful or wanton manner. In determining that an officer was not acting wantonly in view of R.C. 2744.02(B)(1)(a), the court considered whether a police officer's conduct in a police chase was done "so in a manner consistent with his training as a police officer." *Hewitt v. City of Columbus*, 10th Dist. Franklin No. 08AP-1087, 2009-Ohio-4486, ¶ 29. The *Hewitt* court found that speed in excess of the speed limit without activation of lights or siren "does not rise to the level of wanton misconduct, ***especially where that conduct is expressly permitted or required by police department protocol***." (Emphasis added.) *Id.* Even where an officer routinely traveled over 100 M.P.H., it was relevant that no "definite rule of conduct" was violated by the officer. *Hoffman* at ¶ 82. Likewise, the court considered a municipality fire department rule "in determining what a reasonable speed is to protect the safety of all concerned." *Hunter v. City of Columbus*, 139 Ohio App.3d 962, 970, 746 N.E.2d 246 (10th Dist.2000).

2. Negative Impact of the Hiring, Training and Supervision by Political Subdivisions.

In the same vein, instances in which Ohio courts have considered the hiring, training and/or supervision by political subdivisions to support claims that police officers were acting in a willful or wanton manner also bears examination. "[A] political subdivision is potentially liable for its own acts or omissions in connection with the negligent operations of a motor vehicle by

one of its employees." *Wagner v. Heavlin*, 136 Ohio App.3d 719, 737, 737 N.E.2d 989 (7th Dist. 2000). The Seventh Appellate District noted in *Wagner* that "there was persuasive evidence that a pursuit policy could have prevented the accident." *Id.* See, also, *Burchard v. Ashland Cty. Bd. of Developmental Disabilities*, 5th Dist. Ashland No. 17-COA-041, 2018-Ohio-4408, ¶ 30-32 (finding that the hiring and retention of employees was a governmental function in defense to a claim against the political subdivision based on R.C. 2744.02(B)(2)); *Schmitt v. Educ. Serv. Ctr.*, 8th Dist. Cuyahoga No. 97623, 2012-Ohio-2210, ¶ 18 (holding that hiring personnel is a fundamental governmental function in defense to a claim against a political subdivision based on promissory estoppel).

In this case, Officer Dudley conceded that when approaching an intersection with an obstructed view, he should have slowed to a speed to see traffic and to have sufficient reaction time. (R. 26, Dep. of D.Dudley, 05/19/2016, p. 91). The officer knew he was approaching an intersection where he could not see vehicles approaching from the right. *Id.* at pp. 194-95. He testified further that by the time he saw the vehicle approaching from the right, he was driving too fast to avoid the collision. *Id.* Dudley understood that there was a risk of collision when he entered an intersection in which he could not say whether the traffic light was green or red and in which his visibility to traffic approaching from the right was limited. *Id.* at pp. 195-99. Officer Dudley understood these risks to the extent that they were presented to him in the limited training he received from the Ohio Peace Officer Training Academy.

Evidence of Appellants' hiring, training, and supervision policies serves to reveal the bounds of Dudley's understanding of these risks, as well as the extent to which he exercised or deviated from his duty of care to the public under the circumstances. Further, evidence regarding police pursuit training departmental policies will inevitably be necessary to present to the jury so

that it may appreciate what risk is acceptable during an emergency call. The Seventh District was correct in considering this evidence in its decision that there remained genuine issues of material fact precluding summary judgment in Appellants' favor. Information regarding Appellants' hiring, training, and supervision policies, as well as its availability to Dudley, is relevant and will assist a jury in determining the fact question of whether Dudley acted willfully or wantonly when he caused the crash. At the very least, such evidence bolsters the evidence of willful or wanton conduct already in the record.

CONCLUSION

For these reasons and those articulated in Appellee's brief, OAJ respectfully recommends that the decision of the Seventh Appellate District be affirmed.

Respectfully submitted,

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