Case No. 2011-0743

IN THE SUPREME COURT OF OHIO

On Appeal from the Court of Appeals
Fifth Appellate District
Stark County, Ohio
Case No. 2010-CA-00196

CYNTHIA ANDERSON, ADM. OF THE ESTATES OF RONALD ANDERSON & JAVARRE TATE,
Plaintiff-Appellee

v.

CITY OF MASSILLON, ET AL.,
Defendants-Appellants

BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEE CYNTHIA ANDERSON

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STATEMENT OF INTEREST

"The right of trial by jury shall be inviolate." Ohio Constitution, Article I, Section 5. So penned the Framers of Ohio's Constitution when they enshrined this fundamental protection in the Bill of Rights. The Ohio Association for Justice (OAJ) is a group of practicing attorneys who seek to preserve the jury trial as the foundation of our civil justice system and the guarantee of our liberty from interest groups that would lobby the legislature to excuse them from taking responsibility for their actions. Moreover, OAJ counsels against the brand of judicial activism that would, *ex cathedra,* diminish citizens' rights to bring tort claims before a jury of their peers for the resolution of disputes. And OAJ advocates against the interpretation of legislation that would shift the burdens of harmful conduct from a wrongdoer—and, in many cases, its profitable insurer—to the public. That is, in many instances, when the courthouse doors are closed to an injured party, he or she must turn to the assistance of Medicaid and other welfare programs, at the cost of the taxpayer.

The present appeal involves the interpretation and application of an immunity statute, as well as summary judgment jurisprudence. The appellants' propositions of law would undermine the rights of Ohio citizens to bring legitimate claims. The court of appeals in this case recognized this. Therefore, its judgment should be affirmed and the appellants' propositions rejected in favor of the proposition respectfully offered by this *amicus curiae.*

ARGUMENT

I. INTRODUCTION

"The right to trial by jury is one of the most fundamentally democratic institutions in the history of the human race ... considered the crown jewel of our liberty ... the most cherished institution of free and intelligent government that the world has ever seen." *Butler v. Jordan,* 92 Ohio St.3d 354, 371, 2001-Ohio-204, 750 N.E.2d 554; *accord Arrington v. DaimlerChrysler*

Corp., 1090 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, at ¶ 22. The right to put before a jury a legal dispute is substantive, "not a mere procedural privilege." *Id.* In contrast, "[s]ummary judgment is a procedural device to terminate litigation ... It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion." *Murphy v. Reynoldsburg,* 65 Ohio St.3d 356, 359, 1992-Ohio-95, 604 N.E.2d 138, *accord Norris v. Ohio Std. Oil Co.,* 70 Ohio st.2d 1, 2, 433 N.E.2d 615, 616; *Osborne v. Lyles,* 63 Ohio St.3d 326, 333, 587 N.E.2d 825, 831.

Thus, only where the record is devoid of facts from which reasonable minds could find for the plaintiff can a judge enter summary judgment and deny the plaintiff his or her right to place the dispute before a jury. Civ.R. 56. To determine whether a genuine issue of material fact exists for trial, the judge must construe all facts in a light most favorable to the plaintiff, and draw all reasonable inferences to support the plaintiff's claims. *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *accord Turner v. Turner,* 67 Ohio St.3d 337, 341, 617 N.E.2d 1123, 1127 (1993).

Here, the issue before the lower courts was whether there were facts in the record, or inferences which could be drawn from those facts, from which reasonable minds could find for the plaintiff. *Anderson v. Massillon,* 5th Dist. No. 2010-CA-00196, 193 Ohio App.3d 297, 2011-Ohio-1328, at ¶¶ 26-27, 60. Cynthia Anderson is the administrator of the estates of Ronald Anderson and Javarre Tate (the "plaintiff" or "appellee"). She has brought claims against a political subdivision, the City of Massillon, and two of its employees, Susan Toles and Rick Annen (the "defendants" or "appellants"). Toles drove (Annen rode) a ladder fire-truck to a minor car fire, speeding at 52 m.p.h., during rush hour, into an obstructed intersection in a

residential area, without stopping at a stop sign, traveling left-of-center, striking the vehicle Ronald Anderson was driving with Javarre Tate as his passenger. *Id.* at ¶¶ 58, 61, 72.

Under R.C. Title 2744, the Political Subdivision Tort Liability Act (the "Act"), the City will be immune from the plaintiff's claims, except if the jury finds that Toles' conduct was "willful or wanton." R.C. 2744.02(B)(1)(b). Toles herself will be immune, except if the jury finds her conduct was "wanton or reckless." R.C. 2744.03(A)(6)(b). This appeal raises the issues of how the mental states of *reckless, wanton,* and *willful* are defined and related, as well as how a plaintiff may show that a defendant had a culpable mental state.

II. DEFENDANTS' 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 first two parts of the defendants' proposition, that there is a presumption of immunity for the driver of a municipal fire-truck and that the exception to that immunity is *recklessness,* are not in dispute. It is the third part, whether speeding is a fact from which reasonable minds could conclude that the driver was *reckless,* that is at issue. The defendants propose that "the mere fact that a fire truck enters an intersection at a rate of speed in excess of the posted limit for the roadway cannot satisfy the high standard for reckless conduct applicable to the immunity exception found at R.C. 2744.03(A)(6)(b)." Defendants' Merit Brief, p. 11. This proposition raises three questions: First, what is the definition of *recklessness*? Second, can speed *alone* potentially meet that definition? Third, in this instance, did the court of appeals deny summary judgment based on speed *alone*?

As to the first question, this Court has already provided an answer. An actor is reckless when he knows or has 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 that the risk created is greater than that which would be caused by his mere negligence or inadvertence. *Marchetti v. Kalish,* 53 Ohio St.3d 95, 100, 559 N.E.2d 699 (1990), fn. 2. It is highly unlikely that the tortfeasor will admit to having had a culpable mental state, disregard for safety, or appreciation of a substantial risk. *See, e.g., Ochsenbine v. Village of Cadiz,* 166 Ohio App.3d 719, 2005-Ohio-6781, 853 N.E.2d 314 (7th Dist.), at ¶ 31 (summary judgment should not be granted based on a defendant's self-serving affidavit attesting to his mental state). Thus, "recklessness is a mental state that the trier of fact must infer from the totality of the circumstances." *State v. Neville,* 11th Dist. Case No. 1998-CA-235, 1998 Ohio App. Lexis 5519, at *10. "The question of whether a person has acted recklessly is almost always a question for the jury." *Hunter v. Columbus,* 139 Ohio App.3d 962, 746 N.E.2d 246 (10th Dist.2000).

As to the second question—whether speed *alone* could lead reasonable minds to infer the driver of a fire-truck was reckless—the *Hunter* decision is instructive. In that case, the court of appeals found that "there was evidence from which a trier of fact could reasonably find" a culpable mental state: "the emergency vehicle was traveling sixty-one miles per hour, left of center, on a street where the speed limit is thirty-five miles per hour." *Id.* at 968. So the Tenth District placed emphasis on the extreme speed, but also found it significant that the vehicle had gone left of center, declining to hold that speed alone was sufficient.

There is good reason for this. In some cases, speed alone may not suggest recklessness. For example, if the vehicle is traveling down a straight highway, with little traffic and good visibility, speed, perhaps even excessive speed, would not be reckless because the risk of harm is so low. On the other hand, speed alone could strongly suggest recklessness. For example, if the vehicle is driving 100 m.p.h. in the city during rush hour, this excessive speed is probably

enough, on its own, that reasonable minds could infer recklessness because of the high risk such speed creates. Given these two different scenarios, courts have adopted a "totality of the circumstances" test to determine whether there are facts in the record—including speed, travel left of center, visual obstructions, and other factors—that could lead reasonable jurors to infer recklessness. *Anderson,* 2011-Ohio-1328 at ¶ 55, citing *Ybarra v. Vidra,* 6th Dist. No. WD-04-061, 2005-Ohio-2497, at ¶ 10, and *Reynolds v. Oakwood,* 38 Ohio App.3d 125, 127, 528 N.E.2d 578 (2nd Dist.1987). Thus, this Court need not answer the question of whether speeding *alone* creates a genuine issue of material fact regarding the driver's mental state, unless, of course, that was the holding of the court of appeals in this case.

As to this third question, the court of appeals did *not* hold that speed alone was a basis from which jurors could find Toles was reckless. To the contrary, the Fifth District applied the totality of the circumstances test and found that the following facts in the record, among others, taken together, could lead reasonable minds to infer that Toles knew or should have known that she was creating a substantial risk of causing physical harm: (1) Toles did not slow or stop at a stop sign; (2) the speed was in excess of 50 m.p.h. in a 25-m.p.h. zone; (3) there was a genuine issue as to whether there were visibility obstructions near the intersection, which had to be construed in the plaintiff's favor for summary judgment purposes; (4) Toles was traveling left of center; (5) Toles did not apply the brakes prior to impact; (6) Toles was the second vehicle responding to a minor car fire; (7) there was a genuine issue as to whether Toles' speed rendered the siren to be ineffective. *Anderson,* 2011-Ohio-1328, at ¶¶ 55, 58.

Given the answers to the three questions raised by the defendants' proposition, that proposition should be rejected as calling for an advisory opinion and an extension of the law unwarranted by prior decisions or the issues in this case. Hypothetically, in some cases speed

alone may not be enough from which to infer recklessness; in others, speed could be so excessive as to "shock the conscience" and serve as a basis for such an inference all on its own. But here, the court of appeals considered the totality of the circumstances and found that there were a number of facts from which jurors could infer recklessness. This Court should not discard the "totality of the circumstances" test nor replace it with some one-size-fits-all rule regarding speed.

II. DEFENDANTS' 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.

The defendants correctly observe that the exception to immunity for political subdivisions is different than the exception to immunity for their fire-truck driver-employees.[1] As discussed above, employees are not immune if the jury finds they were *reckless*. R.C. 2744.03(A)(6)(b). But the subdivision itself only loses its immunity if the driver's conduct was "willful or wanton." R.C. 2744(B)(1)(b). This raises two questions: First, what are the definitions of *willful* and *wanton*? Second, how do these definitions relate to that of *recklessness*?

As to the first question, this Court has clearly defined the terms employed by the Act. "Willful conduct 'involves an intent, purpose or design to injury.' Wanton conduct involves the failure to exercise 'any care whatsoever toward those to whom he owed a duty of care, and this failure occurs under circumstances in which there is a great probability that harm will result.'" (Citations omitted.) *Gladon v. Greater Cleveland RTA*, 75 Ohio St.3d 312, 319, 1996-Ohio-137,

[1] OAJ admits to some bewilderment as to why the General Assembly chose to impose a different standard for holding a political subdivision liable than for holding its employees liable. Perhaps it was not a choice, but an unintentional confusion of terms, resulting from the exceptions having been drafted at different times by different people. It would be helpful if the legislature re-visited these exceptions and eliminated this confusion.

662 N.E.2d 287 (finding that reasonable minds could infer that a train operator's conduct was wanton "in light of the operator's duty to adjust the train's speed to her range of vision and to the known track conditions"). Since both wantonness and willfulness are states of mind, "[w]hether an automobile driver's alleged unlawful conduct was wanton of willful is a question of fact for the jury to consider in light of all the surrounding facts and circumstances." *Osler v. Lorain,* 28 Ohio St.3d 345, 350, 504 N.E.2d 19 (1986), citing *Hawkins v. Ivy,* 50 Ohio St.3d 114, 117 (1977), and *Tighe v. Diamond,* 149 Ohio St. 520, 528-530 (1948).

Turning to the second question, the defendants' fault the Fifth District for finding that "wanton or willful" and "reckless or wanton" to be functional equivalents. Defendants' Merit Brief at 20; *contra Anderson,* 2011-Ohio-1328, at ¶ 46, citing *Whitfield v. Dayton,* 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, at ¶ 34. OAJ agrees with the defendants that there are differences in this Court's definitions of the terms *reckless, wanton,* and *willful* which render the exceptions to immunity in the Act nonequivalent; but disagrees that those differences disrupt the essential holding of the court of appeals—that there are questions for trial. What, then, are the consequences of the Fifth District's decision to evaluate the record in this instance under equivalent standards? There are three.

First, *wanton* misconduct is an exception to immunity under both of the standards. Since the court of appeals found evidence in the record from which reasonable minds could infer Toles' conduct was "reckless or wanton," it would also have found, if it had evaluated the exceptions separately, that Toles' conduct was "wanton or willful." That is, since wantonness overlaps, and the court of appeals evaluated that definition, the result under either standard would be the same. Moreover, as discussed below, the definitions of reckless and wanton are close to each other, both representing something more than mere negligence. At the summary

judgment stage, the factual analysis under the two separate definitions will not differ in a meaningful way.

Second, to the extent the court of appeals' analysis of the "wanton or willful" standard was incomplete, since it treated that standard as equivalent to "reckless or wanton," which it discussed more thoroughly, the question of the City of Massillon's immunity should be remanded for further proceedings to determine whether there is evidence in the record from which reasonable minds could infer that the "wanton or willful" standard is satisfied. The court of appeals' decision regarding Toles' potential liability and non-immunity, however, would stand. More important, there *is* evidence in the record from which reasonable minds could infer Toles's conduct was wanton. The circumstances relevant to this evaluation are that she was driving a massive fire-truck into an intersection without stopping; she did not slow or apply the brakes. She failed to exercise any care whatsoever to prevent the danger that her entering the intersection at a high rate of speed caused. The appellants will argue that she exercised *some* care in that she had lights and sirens on. This is an erroneous argument: emergency vehicles are not immune simply because they have lights and sirens on; more important, lights and sirens are irrelevant to the actions Toles took when entering the intersection—she did not slow or brake, but kept her foot on the gas pedal, failing to exercise any care whatsoever in driving the truck.

Third, although OAJ agrees that the statutory exceptions to immunity are not functional equivalents, they may be practically equivalent. That is, political subdivisions must indemnify and defend their employees in actions for damages arising from acts or omissions within the course and scope of employment. R.C. 2744.07(A)(2). Thus, even if the subdivision itself is immune because the conduct at issue does not rise to the level of "willful or wanton," the subdivision will be liable to defend and indemnify its employee, if his or her acts are found to be

"wanton or reckless." In the end, if a plaintiff can show that the employee's conduct was *reckless, wanton,* or *willful,* the subdivision (or, more often, its insurer) will be liable to pay any judgment.

If the statutory exceptions to immunity set forth in the Act are not functionally equivalent, how are the courts of this state to understand the use of the terms reckless, wanton, and willful? The defendants have implicitly endorsed the idea of a continuum, arranging the terms "from negligence to intentional (willful) conduct." *See* Defendants' Merit Brief at 20. OAJ believes that such a continuum is the appropriate resolution of this issue.

III. OAJ'S PROPOSITION OF LAW

To resolve the question of the negligence-to-intentional misconduct spectrum, OAJ offers the following comprehensive proposition, which reinforces this Court's prior definition of each term, and arranges them in a logical and understandable continuum that will provide consistency, predictability, and clear direction to lower courts:

> **The terms "reckless," "wanton," and "willful," as used to describe tortious conduct, are points on a continuum between negligence, which conveys the idea of inadvertence, and intentional misconduct. *See Pariseau v. Wedge Prods., Inc.*, 36 Ohio St. 124, 136, 522 N.E.2d 511 (1988), fn. 1, *superseded by statute on other grounds.***
>
> **An actor is "reckless" when he knows or has 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 that the risk is greater than that which would be caused by his mere negligence. *Marchetti v. Kalish*, 53 Ohio St.3d 95, 100, 559 N.E.2d 699 (1990), fn. 2. "Reckless" conduct is a degree greater than negligence.**
>
> **"Wanton" conduct is the failure to exercise any care whatsoever under circumstances in which there is a great probability of harm. *Gladon v. Greater Cleveland RTA*, 75 Ohio St.3d 312, 319, 1996-Ohio-137, 662 N.E.2d 287. It is a degree greater than reckless conduct.**
>
> **"Willful" conduct involves an intent, purpose or design to injure. *Id.* It is a degree greater than wanton conduct.**

Civil liability is predicated upon injury caused by the failure to discharge a duty; the existence of a duty depends on the foreseeability of the injury. The test for foreseeability is whether a reasonable prudent person, under the same or similar circumstances, should have anticipated that injury to another was the probable result of his conduct. *Commerce & Industry Ins. Co. v. Toledo,* 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989). "As the probability increases that certain consequences will flow from certain conduct, the actor's conduct acquires the character of intent and moves from negligence toward intentional wrongdoing." *Brockman v. Bell,* 78 Ohio App.3d 508, 514, 605 N.E.2d 445 (1st Dist.1992).

Negligence is the failure to exercise due care to avoid causing injury, when the actor knew or should have known that his conduct caused a risk of harm to a foreseeable person. *Menifee v. Ohio Welding Prods., Inc.,* 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). When the actor "should realize that there is a ***strong*** probability that harm may result, even though he hopes or even expects that his conduct will prove harmless," his conduct is reckless. (Emphasis added.) *Marchetti,* 53 Ohio St.3d at 100, fn. 3. That is, "[t]he difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligence is a difference in the ***degree of risk***" to foreseeable persons. (Emphasis added.) *Id.* Although at least one court has struggled to place recklessness on a spectrum between negligence and intentional conduct, *see Brockman v. Bell,* 78 Ohio App.3d 508, 516, 605 N.E.2d 445 (1st Dist.1992), it seems crystal clear under this Court's precedent that recklessness is immediately adjacent to negligence on the spectrum. The difference between the two standards is the likelihood that injury will result. If there is a strong probability that harm will result, rather than a merely foreseeable one, then the conduct is potentially reckless. Restatement of Torts 2d, Section 500.

The next point on the continuum is wanton misconduct, which is a "the failure to exercise '***any*** care whatsoever toward those to whom he owed a duty of care, [despite] circumstances in which there is a ***great*** probability that harm will result.'" (Emphasis added; citations omitted.) *Gladon v. Greater Cleveland RTA,* 75 Ohio St.3d at 319. Thus, there are two differences between reckless and wanton conduct. The first is that while a reckless actor may exhibit some care, a wanton actor does not exhibit any care whatsoever under circumstances that call upon him to exercise due care. The second difference is the likelihood of resulting harm. For negligence, the probability must be merely foreseeable; for recklessness, the probability must be strong; and for wantonness, the probability must be greater still.

The last point on the continuum is willful misconduct, which manifests "an intent, purpose, or design to injure." *Zivich v. Mentor Soccer Club, Inc.,* 82 Ohio St.3d 367, 375, 696 N.E.2d 201 (1998), quoting *McKinney v. Hartz & Restle Realtors, Inc.,* 31 Ohio St.3d 244, 246, 510 N.E.2d 386 (1987). An act is willful or intentional when "the actor ***desires*** to cause the consequences of his act, or that he believes that the consequences are ***substantially certain*** to result from it." (Citations omitted.) *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 191, 532 N.E.2d 753 (1988). Thus, the difference between willful misconduct and wanton (or reckless or negligent) conduct can be either qualitative or quantitative. In some cases, there may be a difference in quality between an intentional tort and those torts that are a species of negligence, namely, when the actor's plan is to cause harm. *Id.* In other cases, the difference is once again a matter of degree: under the "willful" standard, the probability of harm must be substantially certain, the highest along the continuum.

In *Mitchell,* this Court strongly suggested the very continuum now proposed by this *amicus*: "When the [actor] acts despite the knowledge of ***some risk***, the [actor's] conduct may be

negligent. When the ***risk is great*** and the ***probability increases*** that certain consequences may follow, the [actor's] conduct may be reckless. As the probability that certain consequences will follow ***further increases*** and the [actor] knows that injury [to another] is certain, or ***substantially certain***, to result from his act, and he still proceeds," this is willful misconduct partaking of intent. *Id.* at 191-192. Admittedly, neither this Court nor the Restatement have factored wanton into the equation. Based upon the definition of that term in prior case law, however, this continuum,

negligence → recklessness → wanton → willful

is logical, firmly rooted in the repeated annunciations of the terms by this Court, and will provide clear guidance to lower courts otherwise struggling to interpret these standards, both in the immunity context and in others.

The potential exception taken to this continuum is that it might render portions of the Act redundant. That is, since R.C. 2744.02(B)(1)(b) and R.C. 2744.03(A)(6)(b) are ***exceptions*** to immunity, a plaintiff would only ever have to meet the 'lower' standard on the spectrum to satisfy the exception. Thus, the legislature need not have included a second 'higher' standard. So, if *reckless* is a lower standard that *wanton,* the General Assembly need not have included both in R.C. 2744.03(A)(6)(b). And there is a rule of statutory construction against reading such redundancy. *See E. Ohio Gas Co. v. Pub. Util. Comm.,* 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (1988).

The response to this argument is self-evident: The Act was written before the present discussion regarding a continuum. The drafters of the Act selected the definitions from this Court's prior case law which they saw fit to include as exceptions to immunity. Since the relationship between these terms was unclear at the time of the drafting, the legislature employed

the terms according to an understanding not made manifest in the language of the statutes. This should operate as no barrier to the proper and formal arrangement of these common law terms on a continuum as set forth in OAJ's proposition at this time. If hereafter, the General Assembly deems it necessary to re-write or re-organize the exceptions in the Act in response to a continuum, it is free to do so. Moreover, if the legislature intends for the definitions of *reckless, wanton,* and *willful* to be other than those already cemented in this Court's common law precedents, the legislature may draft definitions particular to the Act into the statutory framework. *E.g.,* R.C. 2745.01(B) (defining intent and "substantially certain" in the employer intentional-tort context differently than the definition which previously existed at common law).

CONCLUSION

If a political subdivision follows the rules, "then actions they take that cause injury would not be negligence and, accordingly, there would be no liability." *Butler,* 92 Ohio St.3d at 374. But if the rules are ignored and injury results, "then the political subdivision can (and most now do) insure itself to compensate those who have suffered as a result" of the rule-breaking. *Id.* "This is no different from what, in many instances, the political subdivision requires of its citizens." *Id.* Most important, "applying such broad immunity to governmental wrongdoers gives no encouragement to do right, and no liability [ ] for doing wrong. When there is no accountability for failure, failure is sure to follow." *Id.*

This Court's precedent supports the arrangement of the definitions of *reckless, wanton,* and *willful* conduct on a continuum. If, under the totality of the circumstances analysis, which may include excessive speed, a court finds that reasonable minds could reach different conclusions as to whether a fire-truck driver met one or more of those definitions, summary judgment must be denied and the issue of the driver's mental state tried to a jury. Here, the Fifth

District reached such a result: "[R]easonable minds could find that [Toles'] actions in this case were reckless. This ruling should not be interpreted to mean that we find the conduct herein was, in fact, reckless. Rather, we are holding that [the plaintiff] should have an opportunity to present her case to a jury to make such a determination." *Anderson,* 2011-Ohio-1328, at ¶¶ 73-74. This Court should affirm that judgment.

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