ORIGINAL

Case No. 2011-0742

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
Fifth Appellate District
Stark County, Ohio
Case Nos. 02010-CA-124 & 2010-CA-130

GRACE BURLINGAME, *ET AL.*
Plaintiffs-Appellees

v.

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

BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF GRACE BURLINGAME

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STATEMENT OF INTEREST

The Ohio Association for Justice (OAJ) is a group of practicing attorneys who believe the Framers of Ohio's Constitution meant what they wrote in the Bill of Rights: ***The right of trial by jury shall be inviolate.*** Ohio Constitution, Article I, Section 5. The members of OAJ seek to preserve the jury trial as the foundation of our civil justice system and the guarantee of our liberty from interest groups that lobby the legislature to excuse them from taking responsibility for their actions. To that end, OAJ counsels against the brand of judicial activism that would diminish citizens' rights to bring tort claims before a jury. And it advocates against legislation and the interpretation thereof that would shift the burdens of harmful conduct from a private wrongdoer—and its profitable insurer—to the public assistance of Medicaid and other welfare programs, to whom the tort victim will often turn if the courthouse doors are closed.

ARGUMENT

I. INTRODUCTION

The Ohio Bill of Rights preserves the right to a jury trial in civil actions, which existed at common law prior to the framing of the Constitution. This Court has observed,

> The right to a trial by jury is a venerable one derived from the Magna Carta, embodied first in the federal constitution, then in the Northwest Ordinance of 1787, and thereafter in the Ohio Constitution. Designed to prevent government oppression and to promote the fair resolution of factual issues, trial by jury is the crown jewel of our liberty, the most cherished institution of free and intelligent government, and the best institution for the administration of justice. It is well understood that the right is fundamental, substantial, and inviolate.

Arrington v. DaimlerChrysler Corp., 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, at ¶ 22 (internal citations omitted).

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 a jury. OHIO R. CIV. P. 56. Since summary judgment is a procedural device that terminates litigation and deprives the plaintiff of his or her day in court, it must be used cautiously with any doubts resolved in the plaintiff's favor. *Murphy v. Reynoldsburg,* 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138. 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); *Turner v. Turner,* 67 Ohio St.3d 337, 341, 617 N.E.2d 1123, 1127 (1993).

Here, the issue before the trial court (and the court of appeals) 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. *Burlingame v. Canton,* 5th Dist. Nos. 2010-CA-124 & 2010-CA-130, 2011-Ohio-1325, at ¶ 16. The plaintiff had brought a claim against a political subdivision, the City of Canton, and one of its employees, James Coombs, who drove a 20-ton fire-truck at 40 mph, without an active siren, through a red light, into an intersection, killing Dale Burlingame and injuring Grace Burlingame, the plaintiff below. *Id.* at ¶¶ 6-13.

Under the Political Subdivision Tort Liability Act, the City of Canton will be immune from the plaintiff's claims, except if the jury finds Coombs' conduct was "willful or wanton." R.C. 2744.02(B)(1)(b). "Willful conduct 'involves an intent, purpose or design to injure.' Wanton conduct involves the failure to exercise 'any care whatsoever toward those to whom he owed a duty of care, and his failure occurs under the circumstances in which there is a great probability that harm will result." *Gladon v. Greater Cleveland RTA,* 75 Ohio St.3d 312, 319, 1996-Ohio-137, 662 N.E.2d 287 (internal citations omitted) (finding that reasonable minds could

have reached different conclusions as to whether the operator's conduct met the wanton or willful standard "in light of the operator's duty to adjust the train's speed to her range of vision and to the known track conditions").

And Coombs himself will be immune, except if the jury finds his conduct was "wanton or reckless." R.C. 2744.03(A)(6)(b). 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 inadvertence. *Marchetti v. Kalish,* 53 Ohio St.3d 95, 100, 559 N.E.2d 699 (1990), fn. 2.

Whether an actor is reckless, wanton, or willful necessarily inquires as to his subjective mental state: did he appreciate the unreasonable risk he was creating; did he disregard all consequences; did he have an intent to injure? Rarely, if ever, would a defendant admit to having had a culpable mental state. Thus, plaintiffs must prove the defendant's reckless, wanton, or willful state of mind through other facts and the inferences to be drawn from those facts. As one court of appeals put it, "[r]ecklessness is a mental state that the trier of fact must infer from the totality of the circumstances." *State v. Neville,* 11th Dist. Case No. 235, 1998 Ohio App. Lexis 5519, at *10.

II. OAJ'S PROPOSITION OF LAW

To determine whether reasonable minds could conclude that an employee of a political subdivision was reckless, wanton, or willful, the court must look at the totality of the circumstances and construe all relevant evidence in the record in a light most favorable to the non-moving party.

This Proposition is firmly grounded in the precedent of this Court: "Whether an automobile driver's alleged unlawful conduct was wanton or willful ***is a question of fact for the jury to consider in light of all the surrounding facts and circumstances.***" *Osler v. City of*

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)) (emphasis added). The Defendants-Appellants' Propositions of Law would run afoul of this precedent by arbitrarily limiting the evidence a plaintiff can use (both at summary judgment and at trial) to prove the employee's mental state was reckless, wanton, or willful. The Appellants would have this Court render inadmissible state traffic safety laws and departmental safety policies. But the employee's decisions to violate law and/or policy are essential facts to the jury's determining (through inference) whether he had a culpable mental state or an honest one. OHIO R. EVID. 401 (relevant evidence is that which has "any tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

Indeed, the violation of a traffic safety statute is relevant for proving a driver's liability: "In situations where a statutory violation constitutes negligence *per se,* the plaintiff will be considered to have 'conclusively established that the defendant breached the duty owed to the plaintiff ... [because] the statute 'serves as a legislative declaration of the standard of care of a reasonable prudent person." *Sikora v. Wenzel,* 88 Ohio St.3d 493, 496, 2000-Ohio-406, 727 N.E.2d 1277. If, as in this case, a fire-truck driver (who knows the law prohibits him from entering an intersection at high speed under a red light without a siren) violates a traffic safety statute, it is evidence from which a jury may infer that he was doing so with a culpable mental state: that is, that he was aware he was creating a substantial risk of causing physical harm. At the summary judgment stage, the trial court must draw this inference in the plaintiff's favor.

The same goes for violating an internal policy—this is precisely the evidence from which the jury can infer mental state. Here, for example, the Canton policy was to convert emergency

responses into non-emergency modes when a siren is malfunctioning. *Burlingame,* 2011-Ohio-1325 at ¶ 11. Coombs chose to proceed in emergency mode anyway. From this evidence, reasonable minds could conclude that Coombs was reckless in his disregard for the safety rules, and thus had a culpable state of mind for which the legislature determined he should not be immune.

The Appellants' arguments suggest that they believe the standards for—and for proving—an actor's state of mind are different simply because that actor is an employee of a political subdivision. To the contrary, the method of proving mental states (reckless, wanton, or willful conduct) does not vary depending on who the defendant is. The jury will always draw inferences based on the totality of the circumstances to determine the defendant's state of mind; and the judge must draw such inferences in the plaintiff's favor when deciding summary judgment. Whether the defendant knowingly violated state law or governing safety policy is relevant to this determination. The Political Subdivision Tort Liability Act does not alter this analysis.

A. Discussion of Relevant Immunity Law

"[P]olitical subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority." R.C. 2744.02(B)(1). A fire department member's operation of a motor vehicle "while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm," is a "full defense" to liability *unless* the operation of the vehicle constitutes "willful or wanton misconduct." R.C. 2744.02(B)(1)(b).

The mental state required to show willful misconduct is "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)). The mental state required to show wanton misconduct is a "disposition to perversity on the part of the tortfeasor." *Fabrey v. McDonald Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994) (quoting *Rotszman v. Sammett*, 26 Ohio St.2d 94, 269 N.E.2d 420 (1971), syllabus).

The question of a city or county employee's immunity is a separate matter. "[T]he employee is immune from liability unless ... [t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(b). The mental state of wantonness has been defined above. As for recklessness, this Court adopted the definition set forth in Restatement of Torts 2d, Section 500:

> The actor's conduct is in reckless disregard of the safety of another 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.

Marchetti, 53 Ohio St.3d at 100, fn. 2. The Court endorsed the Restatement's comments that an actor is reckless when he "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," and that "[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 the risk." *Id.* at fn. 3.

Some courts have sought to arrange these standards (negligence, reckless, wanton, willful) on a continuum, but have reached confused and unclear results. *See, e.g., Brockman v. Bell* (1992), 78 Ohio App.3d 508, 516, 605 N.E.2d 445 (1st Dist.1992) (struggling to place recklessness on the spectrum). But such a method would impermissibly read redundancy into

the statutes.[1] Other courts have suggested that the mixed combinations of the terms in Chapter 2744 (*i.e.*, "willful or wanton" and "wanton or reckless") are functionally equivalent. *See, e.g., DeMartino v. Poland Local School Dist.*, 2011-Ohio-1466, 2011 Ohio App. Lexis 1259 (7th Dist.), at ¶ 54. But given the marked differences in the definitions of the terms in this Court's precedents, this method does not withstand scrutiny.[2] Whether (and how) the standards should be arranged on a spectrum and whether the statutory exceptions are functional equivalents of each other are not at issue in this appeal. The only issue is what evidence the plaintiff may use to prove that one of the exceptions applies; that is, whether the definition or reckless, wanton, or willful can be met.

B. Proving Recklessness

"Recklessness" means the tortfeasor knew or had reason to know of facts which would lead a reasonable man to realize that his conduct created an unreasonable risk of physical harm to

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1 It is "a basic rule of statutory construction that words in statutes should not be construed to be redundant, nor should any words be ignored." *E. Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (1988). Here, a continuum would render redundant portions of R.C. 2744.02(B)(1)(b) and R.C. 2744.03(A)(6)(b). That is, if *wanton* is considered a less exacting standard that *willful,* a plaintiff need only ever satisfy the 'lower' wanton standard to trigger the exception to immunity; thus, the inclusion of "or willful" in the statute would be superfluous. Similarly, if *reckless* is less (or more) exacting a standard than *wanton*, a plaintiff need only ever satisfy the standard which is closer to *negligence,* and the inclusion of "or wanton" in the statutory exception would be superfluous. And if reckless and wanton have the same meaning, then the inclusion of both terms, and the use of "or," is redundant.

The definitions of reckless, wanton, and willful misconduct, however, are not at issue in this appeal, nor are the questions of whether and where they should be placed on a spectrum between negligence and criminal intent.

2 This method may, however, work in practice. Political subdivisions must indemnify and defend their employees in actions for damages "if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities." R.C. 2744.07(A)(2). Thus, the subdivision itself is liable if the employee's acts are "willful or wanton" and the subdivision is liable to indemnify and defend the employee for acts that are "wanton or reckless." In the end, if the plaintiff can show that any of the three standards are met, the subdivision (or, more often, its insurer) will be liable to pay any judgment.

another. *Marchetti,* 53 Ohio St.3d at 100, fn. 2. The plaintiff will rarely, if ever, have access to the subjective thoughts of the tortfeasor. And it is highly unlikely that the tortfeasor will admit to having a culpable mental state. *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 (for this reason, courts should not render summary judgment based on the defendant's self-serving affidavit attesting to his mental state).

"The question of whether a person has acted recklessly is almost always a question for the jury." *Hunter v. Columbus,* 139 Ohio App. 926, 446 N.E.2d 269 (10th Dist.2000). Indeed, when ruling on a motion for summary judgment, the trial court is not permitted to weigh the evidence or choose among reasonable inferences; rather, the court must evaluate the evidence, taking all permissible inferences and resolving questions of credibility in favor of the non-moving party. *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980). *Dupler* is a good example of this rule in practice. There, the trial court improperly accepted the seller's assertion that he did not intend to conceal a house's defects from a buyer. This Court held that, given the totality of the circumstances (which included the seller's painting of ceiling tiles during the course of repairs, which had the effect of preventing the buyer from discovering a leaking roof), there were two competing reasonable inferences a juror could draw from the facts in the record: the first was that the seller had honest intent and was painting simply to beautify the house; the second was that the seller had a culpable mental state and was concealing the defect. Under Ohio Rule of Civil Procedure 56, of course, this Court held that, since there were facts in the record from which a reasonable mind could infer that the defendant had a culpable mental state (in this case, intent to deceive), the matter should have proceeded to trial.

The question in this appeal is whether, to prove a culpable mental state under the statutory exceptions to political subdivision immunity (here, recklessness, wanton, or willful misconduct), the trial court must consider the totality of the circumstances, or something less than the totality. The Appellants propose that this Court change the Rules of Evidence, the law of summary judgment, and fashion from whole cloth novel evidentiary exclusions in cases where the defendant is an employee of a political subdivision. Their arguments do not withstand scrutiny.

III. APPELLANTS' FIRST PROPOSITION OF LAW

A violation of an internal department policy is not relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless under R.C. 2744.

Apparently, the Appellants believe their proposed special evidentiary exclusion has been endorsed by several courts of appeals. Appellants' Brief, p. 5 (citing *Shalkhouser v. Medina,* 148 Ohio App.3d 41, 2002-Ohio-222 (9th Dist.), at ¶ 41; *Jackson v. Poland Township,* 7th Dist. Nos. 96 CA 261, 97 CA 13, 98 CA 105; *Sanders v. Stover,* 8th Dist. No. 89241, 2007-Ohio-6202, at ¶¶ 13-17; and *Rogers v. DeRue,* 75 Ohio App.3d 200, 205 (11th Dist.1991). But they overlook *this* Court's *more recent* statement that a violation of internal policy *may* be relevant to determining whether conduct rises to the level of recklessness, if the plaintiff "can establish that the violator acted with a perverse disregard of the risk." *O'Toole v. Denihan,* 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, at ¶ 73. Thus, *O'Toole* implicitly rejected the earlier notions that internal policies were *excluded* as a matter of law from being considered in the immunity context. Instead, their violation is not 'recklessness *per se,*' but requires the plaintiff to prove "accompanying knowledge that the violations 'will in all probability result in injury.'" *Id.* at ¶ 92 (quoting *Fabrey,* 70 Ohio St.3d at 356).

In some cases, the violation of a policy will be relevant to determining mental state, and thus recklessness. For example, if the policy is a 'base-line' policy, or a 'never rule,' or a 'minimum guideline'—and is intended to protect the physical safety of others, a knowing violation of that policy is undoubtedly relevant to determining whether a municipal or county employee should retain the cloak of immunity or not. In many other cases, the violation of a policy will not be relevant to determining mental state. For example, if the policy is purely administrative—or, when the policy is aspirational or represents 'best practices' or goals for the organization. In these instances, the violation of these policies does not imply a culpable mental state.

The Appellants and their *amicus* overlook these distinctions. As an initial matter, the Ohio Municipal League erroneously asserts that a court's decision to deny summary judgment based, in part, on the violation of internal policies, somehow decides the case: "The Fifth District's decision, as a practical matter, concludes that Coombs' alleged departmental policy violations ... were made knowing that his conduct would in all probability result in injury .. [and its decision] result[s] in a determination that reckless conduct occurred." Amicus Brief, pp. 6-7. When a court denies summary judgment, however, it is not *determining* the action—it is simply observing that there are facts and inferences which could lease reasonable minds to find for the plaintiff.

That was certainly the case here. The court of appeals was clear that "[t]his case is far from over. Our holding here does not mean appellants recover; it just means they could have an opportunity to present their case to a jury who will decide whether Coombs was reckless. It means there are important issues yet to be decided." *Burlingame,* 2011-Ohio-1325, at ¶ 62. Indeed, the court of appeals spent about a dozen pages of its opinion reviewing the right to trial

by jury and the standards for summary judgment. Neither the Appellants nor their *amicus* mention the right or the standard.

More important, their arguments regarding 'chilling effects' are overbroad and unreasonable. The Appellants and their *amicus* assert that unless this Court carves out a new exception to the rules of evidence and renders internal policies inadmissible to prove mental state, governments across the state will simply lower their standards. Appellants' Brief, pp. 8-10. First, are our law enforcement agencies so fickle and litigation-oriented, and so devoid of civic duty, that they would cynically lower their standards simply to protect themselves (or their insurers) from potential liability? Even if this Court answers that question in the affirmative, are our courts so blunt a tool that judges will not be able to sort out base-line safety policies from aspirational goals? Trial courts are perfectly capable of determining which internal policies represent basic standards for protecting public safety and which are more exacting standards intended to elevate the profession. And if the court needs assistance in this inquiry, other evidence can easily be introduced to explain the nature and purpose of a particular policy on a case-by-case basis. But the Appellants' blanket exclusion is overbroad and unnecessary.

IV. APPELLANTS' SECOND PROPOSITION OF LAW

A violation of a traffic statute is not relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless under R.C. 2744.

Even in the context of immunity law, where courts have been encouraged to interpret Chapter 2744 to protect municipalities, this proposition is a bridge too far. If this Court accepted this new rule and made state law irrelevant to the question of whether a person who broke state law was reckless, it would wildly distort our civil justice system.

In a simple negligence case, "[t]he concept of negligence per se allows the plaintiff to prove the first two prongs of the negligence test, duty and breach of duty, by merely showing

that the defendant committed or omitted a specific act prohibited or required by statute; ***no other facts are relevant***." *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, at ¶ 15 (emphasis added). Thus, to prove that the defendant knew or should have known of a risk to a foreseeable person (the test for breach), his violation of a state law is the ***only*** relevant fact. To prove that the defendant knew or should have known that the risk was substantial and the likelihood of physical harm great (the test for recklessness), his violation of law is, at a minimum, a central and relevant fact. This is especially true where the defendant is a member of the law enforcement community who has greater knowledge of what the traffic safety laws are. This is not to say that violation of a state law would constitute 'recklessness per se,' it would simply mean that such violation may be considered, along with the totality of the circumstances, to aid in determining whether the violator's mental state was reckless, wanton, or willful.

The Appellants would turn this all on its head, conjuring a Looking Glass world in which the laws passed by the General Assembly have no bearing on the torts committed by employees of political subdivisions. Neither the Appellants nor the Municipal League even mention the Rules of Evidence, relevancy and its limits, or from what evidentiary doctrines their wholesale exclusion of state statute derives.

To obfuscate the unwarranted and counter-productive nature of their proposition, the Municipal League tries to muddy the waters with references to R.C. 2744.02(B)(5). Amicus Brief, p. 11. That section sets forth an exception to the general grant of immunity to political subdivisions, rendering them liable "when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code." The League's argument is that the traffic statute at issue here does not impose such liability and therefore its violation is irrelevant "in the

absence of the imposition of civil liability by the statute itself." Amicus Brief, p. 11. The League has failed to understand the nature of the case.

When a government employee is driving a vehicle, the potential exception to immunity is set forth in R.C. 2744.02(B)(1) for the driving of a motor vehicle. In such a case, the plaintiff need not rely on any other exception to immunity, like R.C. 2744.02(B)(5). The question is whether, when determining whether immunity applies under the relevant exception—for the driving of motor vehicles—the driver had the requisite mental state to fall under the exception; which, for fire department personnel is willful, wanton, or reckless. The plaintiffs in these cases do not seek to use the traffic statute to *impose* liability, but rather to *prove* by inference that the conduct of the employee was reckless under the motor vehicle exception.

Devoid of other arguments, or sound reasoning supporting their proposition, the Appellants' blanket evidentiary exclusion should be rejected.

CONCLUSION

The right to a jury trial is circumscribed only in cases where, under Ohio Rule of Civil Procedure 56, the judge finds that no reasonable mind could find for the plaintiff, considering the totality of the circumstances and all relevant evidence in the record. In cases alleging the defendant was an employee of a political subdivision operating a motor vehicle, the plaintiff must present facts from which a reasonable juror could infer that the employee was reckless, willful, or wanton. If the employee violated a statute or an internal safety policy, and did so knowingly, that is evidence relevant to proving his mental state. To deny the plaintiff use of this necessary evidence would upend decades of jurisprudence. The Propositions of the Appellants and their *amicus* should be rejected, and this Court should reinforce its prior precedent by endorsing OAJ's Proposition of Law and affirming the judgment of the court of appeals.

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