

2013 WL 4029081

CHECK OHIO SUPREME COURT RULES FOR  
REPORTING OF OPINIONS AND WEIGHT OF LEGAL  
AUTHORITY.

Court of Appeals of Ohio,  
Fifth District, Stark County.

Grace BURLINGAME, Plaintiff-Appellant

v.

ESTATE OF Dale BURLINGAME,

et al, Defendants-Appellants

and

James R. Coombs, II, et al, Defendants-Appellees.

Nos. 2010-CA-00124, 2010-CA-  
00130. | Decided Aug. 5, 2013.

Civil appeal on remand from the Ohio Supreme Court, Stark  
County Court of Common Pleas, Case No. 2009CV00689.

**Attorneys and Law Firms**

Elizabeth A. Burick, Canton, OH, for Plaintiff-Appellant,  
James **Burlingame**, Administrator of Estate of Grace  
**Burlingame**, Deceased.

Thomas Lombardi, Canton, OH, for Appellant Eva Finley,  
Administrator.

Kristen Bates Aylward, Kevin L'Hommedieu, Canton, OH,  
for Defendant-Appellee Canton City Fire Department,  
Canton City Hall and James R. Coombs.

Orville L. Reed, III, Buckingham, Doolittle & Burroughs,  
LLP, Akron, OH, for Appellant Eva Finley, Administrator.

**Opinion**

GWIN, P.J.

\*1 ¶ 1 Upon remand from the Supreme Court of Ohio,  
this Court is asked to consider whether this Court's ruling  
in *Burlingame v. Estate of Burlingame*, 5th Dist. No. 2010-  
CA-00124, 2011-Ohio-1325, [*"Burlingame I"*] should be  
modified in light of the Supreme Court's decision in *Anderson*  
*v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983  
N.E.2d 266.

¶ 2 We have permitted the parties to brief the issue as  
framed by the Ohio Supreme Court.

***Facts and Procedural History***

¶ 3 Plaintiff-appellant Joseph **Burlingame**, as the  
representative of the Estate of Grace **Burlingame**, deceased,  
and defendant-appellant, Eva Finley, as the representative  
of the Estate of Dale **Burlingame**, deceased, appeal a  
summary judgment of the Court of Common Pleas of Stark  
County, Ohio, which found defendants-appellees the City of  
Canton and its employee James R. Coombs II are entitled to  
immunity from liability arising out of an accident between the  
decedent's vehicle and a Canton City fire truck.

***Assignment of Error***

¶ 4 Appellant assigns a single error to the trial court:

¶ 5 "I. THE TRIAL COURT ERRED WHEN  
IT GRANTED DEFENDANTS/APPELLEES' MOTION  
FOR SUMMARY JUDGMENT AS REASONABLE  
MINDS COULD CONCLUDE THAT DEFENDANTS/  
APPELLEES OPERATED THE VEHICLE IN A  
WANTON, WILLFUL AND/OR RECKLESS MANNER."

**I.**

¶ 6 In *Burlingame I*, we found that a firefighter's alleged  
violations of traffic statutes and departmental policies were  
factors a jury could consider to determine whether the  
officer's conduct was reckless for purposes of overcoming  
statutory immunity, and that genuine issues of material fact as  
to whether firefighter acted wantonly or recklessly precluded  
summary judgment for defendants, based on immunity from  
suit.

¶ 7 The Ohio Supreme Court clarified the definitions of  
these terms in *Anderson*, holding that "[w]illful, wanton,  
and reckless describe different degrees of care and are not  
interchangeable." *Anderson*, paragraph one of the syllabus.  
The Court further held,

Willful misconduct implies an intentional deviation from a  
clear duty or from a definite rule of conduct, a deliberate  
purpose not to discharge some duty necessary to safety,

or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. (*Tighe v. Diamond*, 149 Ohio St. 520, 80 N.E.2d 122 (1948), approved and followed.)

Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. (*Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977), approved and followed.)

Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. (2 Restatement of the Law 2d, Torts, Section 500 (1965), adopted.)

\*2 *Anderson* at paragraphs two, three and four of the syllabus.

{¶ 8} Additionally, the Court reiterated that 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. *Id.* at paragraph five of the syllabus. Nevertheless, “without evidence of an accompanying knowledge that the violations will ‘in all

probability result in injury, evidence that policies have been violated demonstrates negligence at best.” (Citations omitted). *Anderson*, at ¶ 38.

{¶ 9} We find the trial court erred in granting summary judgment. The trial court must apply the definitions of willful, wanton, and reckless conduct as now defined by the Ohio Supreme Court in *Anderson*. Additionally, the trial court erred in the case at bar in finding violations of internal departmental policies are not relevant to a finding of malice, bad faith or wanton or reckless manner. 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*, paragraph five of the syllabus.

{¶ 10} For the foregoing reasons the judgment of the Court of Common Pleas, Stark County, Ohio is reversed, and the cause is remanded for further proceedings in accordance with the law and consistent with this opinion.

GWIN, P.J., HOFFMAN, J., and WISE, J., concur.

#### Parallel Citations

2013 -Ohio- 3447

IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO

NANCY S. REINHOLD  
CLERK OF COURTS  
STARK COUNTY, OHIO  
2014 FEB -7 PM 2:25

GRACE BURLINGAME

Case No. 2009 CV 00689

Plaintiff

JUDGE LEE SINCLAIR (Ret.)

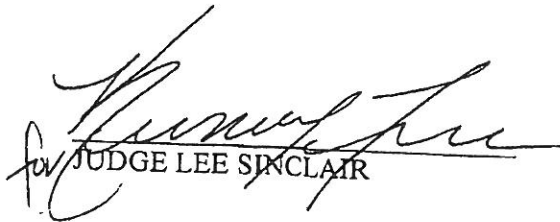
ESTATE OF DALE BURLINGAME, et al.,

JUDGMENT ENTRY

Defendants

This matter comes before the Court on a further Motion for Summary Judgment. The Fifth District Court of Appeals has twice ruled that factual issues exist and that summary judgment is not proper. This Court is bound by the explicit and express language of the higher court rulings. It is abundantly clear that the Fifth District has determined that this case is one where issues remain for the finder of fact and that summary judgment does not apply as a matter of law. The Motion for Summary Judgment is therefore denied. This order shall also apply to the new cause of action for wrongful death. Defendants shall be given leave to file a further motion should discovery indicate that the death was not proximately related to the collision. All parties shall prepare forthwith for trial. Exceptions to all parties. This order shall be considered a final appealable order if permitted by law.

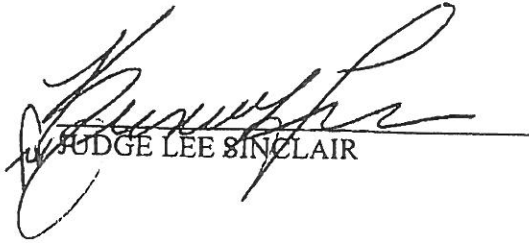
IT IS SO ORDERED.

  
JUDGE LEE SINCLAIR

ENTERED BY: G

**NOTICE TO THE CLERK -- FINAL APPEALABLE ORDER**

The Clerk of Courts shall serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Said notice shall be sent within three days of entering the judgment upon the journal. The Clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket.

  
JUDGE LEE SINCLAIR