

IN THE SUPREME COURT OF OHIO

Susan Coats, Administrator
of the Estate of Lieutenant
Brandon Ratliff, Deceased

Appellant,

v.

City of Columbus

Appellee.

07-0607

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 06AP-681

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT SUSAN COATS,
ADMINISTRATOR OF THE ESTATE OF LIEUTENANT BRANDON RATLIFF,
DECEASED

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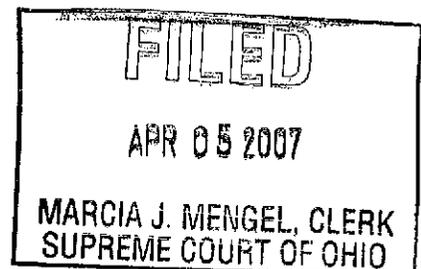


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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION

This honorable Court has repeatedly held that employers are responsible for intentional torts committed against their employees. *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115. This Court has also held that R.C. 2744.02 (A)(1) provides immunity for political subdivisions and, under R.C. 2744.02(B), “[t]here are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress.” *Wilson v. Stark Cty. Dept of Human Serv.* 70 Ohio St.3d 450 (1994). This disparity creates a substantial constitutional question pursuant to Section 16, Article I of the Ohio Constitution granting open access to courts and suits against the state.

The court of appeals also held that R.C. 2744.02(B) “speaks only in terms of negligence,” not intentional torts. Specifically, R.C. 2744.02(B)(4) provides as follows:

Subject to sections 2744.03 and 2744.05 of the Revised Code, 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 of any of its employees in connection with a governmental or proprietary function as follows:

* * *

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

The court of appeals interpretation is inconsistent with the intent 2744.02(B) in light of R.C. §2744.03 (5). The latter provides as follows:

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

If R.C. 2744.02 applies only to negligence claims and not to wanton or reckless claims then R.C. 2744.03 serves no purpose. The intent of R.C. 2744.02(B) and 2744.03(5), when read together, is for wanton or reckless behavior to encompass negligence behavior -- i.e. for an individual to act wanton or reckless, that individual had to also have acted negligently.

The court of appeals also held that even if R.C. 2744.02(B) was “not limited to negligence claims, the General Assembly amended R.C. 2744.02(B)(4) effective April 9, 2003 to make it clear that the exception applies only to cases where injuries resulted from physical defects in the property.” The court concludes that because “Brandon did not suffer any injury until after he returned to work in September of 2003....the amended version of R.C. 2744.02(B)(4) would apply, and since appellant’s claims were not based on injury resulting from a physical defect in appellee’s property, the exception would not apply even if negligence had been raised.” In *Hubbard*, this Court looks to the act, not the injury, as the controlling event of R.C.2744.02(B)(4). To hold otherwise reaches an absurd result that goes against public policy.

Finally, this case is a case of great general or public interest because the court of appeals concludes that, irrespective of how egregious a person’s behavior is, he/she cannot be held liable for suicide. The court held that, even if the appellee acted wantonly or recklessly, it cannot be held liable for suicide “because Brandon’s act could not have been foreseen.” Even though, the court acknowledges that “[i]t is truly tragic that nobody with the City who was aware of the efforts being made on Brandon’s behalf communicated to him that those efforts were being made, an act that may well have prevented the outcome that occurred,” the court puts a blanket non-foreseeability on suicide holding that “[i]t is common knowledge that virtually all human beings experience depression of varying degrees at various times of their lives. Depression is not an unusual emotional condition. Seldom does depression lead to suicide....Brandon’s act could not have been foreseen.”

STATEMENT OF THE CASE AND FACTS

Brandon Ratliff began his employment with the City's Health Department in 1995 during high school. After graduating from Franklin University in 2001, he took a full time position as a Disease Intervention Specialist ("DIS"). His position entailed "helping on a syphilis elimination project where the key focus would be syphilis and HIV education, testing, assuring treatment and partner notification."

In 2002, a new, higher paying position opened in the Health Department's "Van Grant" program. The funding for this program was from the Ohio Department of Public Safety. In the Van Grant program, a Health Education Program Planner ("HEPP") position was available. Brandon applied for the position and was interviewed by Health Department employees Charles Phillips, Mike Smeltzer and Alicia Dickerson. In the interview, Brandon came across as "a very hard worker, someone that was dependable and trustworthy." Mr. Phillips offered Brandon the position. Brandon accepted the position and was set to start work the first Monday of October, 2002. All that was needed was the "civil service walkthrough" and, according to Mr. Phillips, once a candidate was decided on, "that's usually – I mean, it's kind of a done deal at that point." The week before Brandon was to start in his new position, he received orders to report for military duty as part of the Army Reserves. He communicated these orders to Mr. Phillips and indicated that he "wouldn't be able to...start the position on that date that... was already planned." The civil service walkthrough, referred to by Mayor Coleman as a "technicality," was scheduled the day after Brandon left for his military service.

Brandon was deployed to Afghanistan and served as an executive officer in a medical unit. He was promoted from Second Lieutenant to First Lieutenant during duty. Unfortunately, he dealt with horrific injuries resulting from combat but returned safely to Ohio in June, 2003. Under military law, Brandon had 90 days to attempt to reacclimatize himself before returning to work.

He took those 90 days and returned to the Health Department September 2, 2003. Unfortunately, he did not return to the HEPP position that he was offered and he accepted before leaving, but rather returned to being a DIS.

The reason for his not returning to his accepted HEPP position, was that his position was given to another Health Department employee - Linda Norris, a HEPP in Community Relations in the Environmental Health division. Ms. Norris was scheduled to be laid off because of a budget shortfall. Ms. Norris' move to the HEPP position came about when an inquiry was made to Larry Thomas, the Human Resources Director for the Health Department, as to whether, under the AFSCME contract (which controlled Brandon's prior DIS position), the injury prevention program needed to hold Brandon's new position or they could give it to someone else. Mr. Thomas read the contract and determined "he didn't go through the processing....Civil Service is very protective of their process and Brandon didn't complete the process, so [his] interpretation [was that] he is still an employee in the sexual health program as a DIS 1."

To support his interpretation, Mr. Thomas contacted attorney Alan Varhus at the City Attorney's office. Mr. Varhus told Mr. Thomas that Brandon would be "com[ing] back to the Sexual Health [or DIS] position." Soon after that communication, Mike Smeltzer began having conversations with Linda Norris. Ms. Norris, however, had concerns about moving into that position given that "Brandon had actually been hired for that position." She went to Ron Phillips and said "what about Brandon?" Mr. Phillips replied that "technically, Brandon had not signed the papers to take the position." So, in mid-February, 2003, Ms. Norris moved into the HEPP position.

As previously mentioned, Brandon returned from Afghanistan the beginning of June, 2003. The Health Department became aware of his return from his mother, Susan Coats, who worked in the Human Resources Department. Brandon's former supervisors decided to send him a letter

stating “I would like to verify your interest in returning to the sexual health team and that you are aware that you have 90 days to report.” The letter proposed that they meet offsite “for breakfast or coffee in Grandview.” Brandon agreed to meet and he met Merry Krempasky and Joan Finley. They told him that he would be coming back to Sexual Health working under Michelle Headley as a DIS. Brandon did return on September 2, 2003, to the Health Department. When he returned he was doing more of outreach activities, one-on-one interviews, rather than working in a community setting. He had moved into a work area that was shared by six people rather than two. He didn’t have any equipment except for a shared phone. Brandon began to feel “hurt” and he shared his feeling with his co-workers. Brandon went to Alicia Dickerson and told her that “he felt, in his heart, that he was demoted. Because he came back, he felt like the spot where he used to be was gone, and he was sitting in with a bunch of people, and he didn’t have a computer anymore, and his phone wasn’t ready when he got back.”

Having not been approached by anyone in management for six (6) months as to why he did not return to the HEPP position, Brandon eventually went to Thomas Horan, Assistant Commissioner for the Health Department. On February 13, 2004, at 10:30 a.m., Brandon scheduled a meeting with Mr. Horan. Brandon, knowing what his rights were as a veteran, told Mr. Horan that “[he] wanted to have a career at the Health Department, but [he] just [had] some questions and [he had] been talking to some people and they just didn’t think [he had] been treated fairly regarding the position that [he was] supposed to move into prior to being deployed.” He went on to say that he felt the City “w[as] obligated to hold that position for him, he had been promised that position before he left.”

Mr. Horan explained to Brandon that this was the first time “[he] understood the level of detail specifically from him.” Before this point, Mr. Horan “knew something was going on right before [Brandon] was deployed, but [he] really [couldn’t] speak to it.” Now, this “was really the

first time [Mr. Horan] understood he applied for it, was offered the job, and subsequently did not complete the paperwork.”

In response, Mr. Horan told Brandon two things: (1) He was leaving on vacation that day and this was going to take some time in that he needed to do some “checking” and “talk to some people; and (2) that Brandon “[had] rights as a veteran” and “whatever you do, make sure you protect your rights as a veteran.” Mr. Horan concluded the meeting by saying “if there is an issue or concern, we will work through this” and that he “needed a couple weeks.” That same day, after the meeting, Mr. Horan called Larry Thomas into his office and explained that he had met with Brandon and he “really need[ed] to understand this because [Brandon] is claiming that he actually was promised this position and we did not follow through.” He further told Mr. Thomas that “this is very serious, clearly a very serious situation and not one that we want to take lightly.” Mr. Horan instructed Mr. Thomas “to research this next week while I am gone and when I get back, I want to talk to you about it and see what the next step is we have to take.”

Mr. Horan returned a week later and, after a few days, asked Mr. Thomas “where we were.” Mr. Thomas said that “he had not had a lot of time to spend on the research....[a]nd he was looking for some file, that he was unable to find where they were, didn’t know where Brandon’s files were and/or some of the information in Brandon’s file.” Mr. Horan told Mr. Thomas “we have got to work on this....I promised Brandon that I would get back to him. We cannot fool around with this here. You’ve got to get the file and information together.”

In the meantime, Mr. Horan called the City Attorney’s office and spoke again to Alan Varhus. He laid out the situation for Mr. Varhus in order to “get guidance.” Mr. Horan further explained to Mr. Varhus that he “suspect[ed] this could be a big concern if we have done something we shouldn’t have done.” Mr. Horan then again instructed Mr. Thomas to pull the

information because “[he had] to meet with Brandon.” The next week Mr. Horan again followed up with Mr. Thomas and, by that point, Mr. Thomas finally had the “paperwork.”

Mr. Horan and Mr. Thomas reviewed the paperwork and, three weeks after their initial meeting, Mr. Horan met again with Brandon on March 5, 2004. Mr. Horan explained to Brandon that he had spoke to the City Attorney’s office and Larry Thomas and “based on everything I had seen or was made aware of, that we believed that we did what we were required to do appropriately on bringing him back to work.” Brandon responded by saying “I really do not believe that I have been treated fairly in this circumstance and there are other people who believe this.” Mr. Horan pushed Brandon for what he meant by “other people.” Brandon told him that he had been talking to the Department of Labor. On March 8, 2004, Brandon emailed Mr. Horan and explained he wasn’t going to be representing himself anymore and he would have someone contact him.”

On March 11, 2004, the Columbus Dispatch contacted the Health Department inquiring about Brandon’s situation. On March 15, 2005, the Dispatch ran a front page article entitled “Reservist loses his promotion.” In the article, Brandon is quoted as saying “I didn’t think that I’d have to fight over there and come back and fight these guys.” The article goes on to say that “U.S. Labor Department officials last week said they think Ratliff lost his promotion unfairly.”¹ Brandon was further quoted as saying “[i]t’s hard enough to readjust without this.”

The article was seen by Health Department officials including Dr. Teresa Long and Thomas Horan. It was also read by Mayor Michael Coleman. Upon reading the article, Mayor Coleman instructed his Chief of Staff, Michael Schwarzwald, to contact Dr. Long. This call came in the same day that the article ran. Mayor Coleman instructed Mr. Schwarzwald to tell Dr. Long that he would like to see “her do what she could to get this guy his job that apparently he

¹ Plaintiff is offering this not to prove the truth of the matter but to show Brandon’s state of mind.

was promised and didn't get." Dr. Long replied to Mr. Schwarzwaldler "[w]e did have some conversations about the job with him. I'm investigating now to find out more about it." Mr. Schwarzwaldler then told her "[w]ell, whatever the situation may be, the Mayor would like to see him get his promotion." Dr. Long then said "[w]ell, the unfortunate thing is that job doesn't exist. We have had to abolish that job, so, in fact, it would be very difficult to give him that job since it doesn't exist." Mr. Schwarzwaldler then said "[w]hat about a comparable job?" She said that "[w]ell, I will certainly look into that." Mr. Schwarzwaldler relayed this information to the Mayor the same day and he had Mr. Schwarzwaldler call her back and tell her "well, at least tell her that he should get the money that he would have gotten if there was a raise involved," which both Mr. Schwarzwaldler and the Mayor "thought there was." The Mayor was very clear to Mr. Schwarzwaldler in telling him what to say to Dr. Long - "Tell her to make sure that he gets the money associated with that." Mr. Schwarzwaldler called Dr. Long again and told her what the Mayor wanted done. Dr. Long responded by saying "Fine. Yeah, okay. I'll see what we can do about that." She went on to say "[w]e may have to do some shuffling around to find that money, but I understand what I'm being asked to do."

Dr. Long then began "trying again to understand it, both a chronology of what had happened with respect to the HEPP position, but more so trying to and had actually been looking at different kinds of positions depending on people's skill sets we can either place them or, at least, try and place them and qualify them for the civil service process and different positions." According to Dr. Long and Thomas Horan, they also approached Larry Thomas in Human Resources to see what it would cost to adjust Brandon's salary to commensurate with the HEPP position.

None of these efforts, however, were communicated to Brandon in the three (3) days that followed the Dispatch article. Dr. Long, despite asking Brandon's co-workers "how is [Brandon]

doing” and “[i]s he hanging in there,” never communicated, or instructed her staff to communicate, the Mayor’s directives and her efforts to Brandon.

Thomas Horan, after meeting with Brandon twice, realizing the issue was very “serious”, explaining to Brandon that he had “rights as a veteran,” and telling him “to do what he needed to do,” did not communicate the efforts being made to rectify the situation.

Larry Thomas, after being approached three, if not four times, about Brandon’s situation, never communicated the efforts to resolve this situation to Brandon.

During this time period, Brandon was suffering emotional injury – not only evidenced in the discussions with his co-workers and his supervisor, Thomas Horan, but as evidenced in the Employee Assistance Program’s (EAP) records. The EAP’s office is on the first floor, room 117, of the Health Department. On March 16, 2004, Brandon walked into the EAP offices. He asked to see someone and Clem Hodges, a counselor with the program, was available. Mr. Hodges took Brandon into his office, shut the door, and, according to the chart, had a one-on-one discussion with him for forty (40) minutes. Under the “presenting problem: (as reported by the client)” section of the chart, Mr. Hodges has checked four (4) categories: (1) mental/emotional; (2) stress; (3) physical problems; and (4) job related. He further describes Brandon’s “assessed problem(s)” as “(1) stress, (2) resentments, (3) expectations, (4) hurt.” Mr. Hodges writes under the “notes” section of the chart that Brandon “shares thoughts and feelings and concerns re: on the job stress as result of his job position being taken from him while he was on active duty with the army reserve. Clt. feels betrayed and abused. Clt. claims as a result of what has happened he has developed severe stress [increase] B.P. inability to sleep and headaches. We discussed options and strategies.” Brandon was scheduled for a follow-up appointment on March 19, 2004.

On March 18, 2004, after three days of hearing nothing, Brandon wrote “I do know that what I thought was going to happen (for) the next 20 years of my life has changed...that my career

at the health department is over and also that I have to rely on their references to get employment at another agency/organization.” A few hours later, he writes, “I will no longer be an employee there within the hour....Please just go own (sic) with your life...” Shortly thereafter, he shot himself.

The trial court granted appellees motion for summary judgment. Appellant appealed to the Franklin County Court of Appeals which affirmed the trial court’s decision holding that “political subdivisions are immune from intentional tort claims” and “Brandon’s suicide was an intervening cause for which appellee cannot be held responsible.”

The court of appeals erred in not recognizing that R.C. 2744.02(B) violates Section 16, Article I of the Ohio Constitution which grants open access to courts and suits against the state. The appellate court also erred in holding that R.C. 2744.02(B) only speaks to negligence claims. The court additionally erred in concluding it is the date of injury, not the date of the act, that determines which version of R.C. 2744.02(B)(4) controls -- the pre- or post-April 9, 2003 version. Finally, the court of appeals erred in holding that irrespective of the egregiousness of a party’s actions, suicide is an intervening cause that breaks the chain of causation.

In support of her position, the appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Interpreting R.C. 2744.02(B) to grant immunity to political subdivisions for intentional torts committed against its employees violates Section 16, Article I of the Ohio Constitution.

This Court has held that the protective barrier established for employers’ negligence under Ohio Constitution Article II, Section 35 and R.C. 4123.74 does not apply to employers’ intentional torts. *Blakenship v. Cincinnati Milacron Chemicals, Inc.* (1982), Ohio St.2d 608; *Van Fossen v.*

Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100; and *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115. In this case, the court of appeals reiterated what this Court has held in regards to intentional torts and political subdivisions – “Ohio courts have traditionally and consistently held that since R.C. 2744.02 includes no provisions excepting intentional torts from the general rule of immunity, political subdivisions are immune from intentional tort claims.” (citing *Featherstone v. City of Columbus*, Franklin Ap. No. 06-89, 2006-Ohio-3150, in turn, citing *Wilson v. Stark Cty. Dept of Hum. Sers.* (1994), 70 Ohio St.3d 450, 1994-Ohio-394, 639 N.E.2d 105; *Hubbard v. Canton City Sch. Bd. Of Edn.* (2002), 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543). In *Wilson*, Chief Justice Moyer wrote that “[t]he parties have not placed in issue the constitutionality of the provisions of R.C. Chapter 2744 involved in this case.” *Wilson, supra*, at 451. In the case *sub-judice*, appellant is placing the constitutionality of R.C.2744.02 in issue.²

Section 16, Article I, of the Ohio Constitution, provides a person with open access to courts, a remedy for an injury done to his/her person, and the right to suits against the state:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

To read R.C. 2744.02 as containing “no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress” in the employer-employee context, in light of *Fyffe*, violates this constitutional provision as it relates to public employees’ rights and, as such, should be declared unconstitutional.

Proposition of Law No. II: R.C. 2744.02(B) provides an exception to political subdivision immunity for wanton or reckless misconduct including intentional tort claims.

² The court of appeals did not address appellant’s constitutional argument in its decision.

The court of appeals held that “[w]e reiterate that R.C. 2744.02(B) speaks solely in terms of negligence, a claim appellant has not made.” Appellee’s actions in this case rose to a level that exceeded negligence, that being wanton or reckless misconduct. Black’s Law Dictionary, Fifth Edition, defines “negligence” as “[t]he omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.” It is accurate that R.C. 2744.02(B) only uses the word “negligence” but wanton or reckless behavior has to be inclusive of negligent behavior. To look at it another way, why would the legislature strip away political subdivisions immunity for “negligence of their employees and that occurs within or on the grounds of...office buildings” but not for wanton or reckless acts of their employees? The answer is they would not and this intent is expressed in R.C. 2744.03 which gives back immunity resulting from “the exercise of judgment or discretion in determining...how to use...personnel” but takes it away again if the “judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.” To interpret wanton or reckless behavior as not inclusive of “negligent” behavior, would be to cause 2744.03 to be meaningless because one has to go through 2744.02(B) to get to 2744.03.

In the event a statute is ambiguous, R.C. 1.49 suggests that a court look to “the object sought to be obtained” and “the consequences of a particular construction.” The “object” of 2744.02 is to strip away immunity. The “object” of 2744.03 is to give it back unless there is wanton or reckless behavior. Again, the “consequence” of not interpreting the negligence language in 2744.02(B) as including wanton or reckless behavior would be to make 2744.03 meaningless. The legislature’s intent to make 2744.03 meaningful is seen in its other language in 2744.02. R.C. 2744.02(B)(1) provides that a political subdivision is liable for injury “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) and (b) however takes that liability away unless the actions of “a member of a municipal corporation police department or....fire department...did not constitute willful or wanton misconduct.” So, how could a driver of an emergency vehicle be acting wantonly or willfully unless they were at first or, at the very least, acting “negligently”?

Proposition of Law No. III: The date of the wanton or reckless misconduct, not the date of the injury, controls whether the pre- or post-April 9, 2003 version of R.C. 2744.02(B)(4) applies.

The court of appeals held that even if R.C. 2744.02(B) was “not limited to negligence claims, the General Assembly amended R.C. 2744.02(B)(4) effective April 9, 2003 to make it clear that the exception applies only to cases where injuries resulted from physical defects in the property.” The court concludes that because “Brandon did not suffer any injury until after he returned to work in September of 2003....the amended version of R.C. 2744.02(B)(4) would apply, and since appellant’s claims were not based on injury resulting from a physical defect in appellee’s property, the exception would not apply even if negligence had been raised.”

This Court only need to refer to its opinion in *Hubbard v. Canton City School Bd. of Edn.* (2002), 97 Ohio St.3d 451, to conclude that the date of the act itself, not the date of the injury, controls which version of R.C. 2744.02(B)(4) applies. In *Hubbard*, Chief Justice Moyer held “[s]ince the injuries claimed by plaintiffs were caused by negligence occurring on the grounds of a building used in connection with a government function, R.C.2744.02(B)(4) applies and the board is not immune from liability. *Id.* at 455. The focus of this Court is on the act, not the injury. To hold otherwise would reach an absurd result. For example, take a fact pattern where a teacher sexually assaults a child on April 8, 2003, on school premises, and the Board was negligent in

supervising or hiring the teacher directly causing the sexual assault. The child appears to be fine but emotional injuries surface a week later requiring intensive, long term counseling and therapy. It would be inappropriate and against public policy for a court to hold that the Board was not responsible for this injury because the injury did not occur until after the amendment to R.C. 2744.02(B)(4).

Proposition of Law No. IV: Suicide can be foreseen if a tortfeasor acts wantonly or recklessly.

The court of appeals decided that even if appellee did not have immunity and there was a question of fact as to whether appellee acted wantonly or willfully, there still could not be liability because “Brandon’s suicide was an intervening cause for which appellee cannot be held responsible.” This Court has not examined suicide in the context of wanton and reckless behavior. According to the American Law Reports, in dealing with wanton and reckless behavior, “the Restatement of Torts [1st] discards the proximate causation concept of superceding causes in favor of a cause-in-fact test. This transposition has the effect, on the issue of civil liability for suicide, of obviating the need for the court’s queries into the sanity of the tort victim and into the reasonable foreseeability of his suicidal acts. The question becomes, simply, whether the willful tortfeasor’s injury was a substantial factor in bringing about the tort victim’s suicide or suicide attempt.” 77 ALR3d311 2[a].

In Brandon’s case, Phillip Resnick, M.D., has reviewed numerous emails and depositions. Dr. Resnick is a psychiatrist with over thirty-five (35) years of experience. He is a Professor of Psychiatry as well as the Director of the Division of Forensic Psychiatry at Case Western Reserve University. Dr. Resnick is of the opinion that “[b]ased upon the materials that I have reviewed and my training, education, and experience, it is my opinion, with reasonable medical certainty, that the Columbus Health Department’s refusal to grant Lt. Ratliff the promotion he was

scheduled to receive prior to his military deployment in Afghanistan directly and proximately caused emotional distress and his suicide on March 18, 2004.” As such, reasonable minds could differ as to whether the City’s actions directly and proximately caused Brandon to take his own life on March 18, 2004.

The court of appeals’ holding seems to discard its previous thought process on civil liability for suicide. In *Fischer, Admx. V. Morales*, 30 Ohio App.3d 110 (1987), the Tenth District dealt with an allegation of negligence resulting in suicide. The complaint read “the acts of Defendant as set forth hereinabove constitute negligence which was the direct and proximate cause of decedent’s death.” The court held “[t]here was no allegation that appellee furnished a firearm or negligently made it accessible to Howard knowing her to be suicidal.” The court concluded “[t]aking all reasonable inferences that can be made from the allegations of the complaint, appellant has failed to state a cause of action for which relief could be granted.” The court did hold, however, “[n]evertheless, a defendant will not be relieved of liability by an intervening force which could have been foreseen or by one which was a normal incident of the risk involved” (*citing* Annotation, Civil Liability for Death by Suicide (1950), 11 A.L.R.2d 751, 757; Annotation, Liability of One Causing Physical Injuries as a result which Injured Party Attempts or Commits Suicide (1977), 77 A.L.R.3d 311, 315).

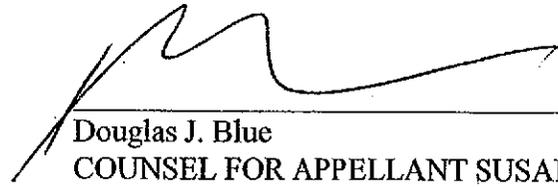
Appellant is asking this Court examine this issue for the first time and hold that suicide be looked at as a cause-in-fact or substantial factor test with regard to wanton or reckless behavior.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

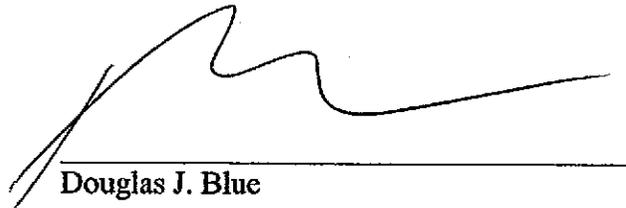
Douglas J. Blue, Counsel of Record



Douglas J. Blue
COUNSEL FOR APPELLANT SUSAN
COATS, ADMINISTRATOR OF THE
ESTATE OF LIEUTENANT BRANDON
RATLIFF, DECEASED

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, Glenn Redick, 90 West Broad Street, Columbus, OH 43215 on April 5th, 2007.



Douglas J. Blue

COUNSEL FOR APPELLANT
SUSAN COATS, ADMINISTRATOR OF THE
ESTATE OF LIEUTENANT BRANDON
RATLIFF, DECEASED

APPENDIX

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Susan Coats, Administrator of the Estate of Lt. Brandon Ratliff,	:	
	:	
Plaintiff-Appellant,	:	
v.	:	No. 06AP-681
	:	(C.P.C. No. 04CV-9210)
City of Columbus,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

O P I N I O N

Rendered on February 22, 2007

Blue, Wilson and Blue, and Douglas J. Blue, for appellant.

Richard C. Pfeiffer, Jr., City Attorney, and Glenn Redick, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, P.J.

{¶1} Appellant, Susan Coats, Administrator of the Estate of Lieutenant Brandon Ratliff, deceased ("appellant"), filed this appeal seeking reversal of a decision by the Franklin County Court of Common Pleas granting summary judgment in favor of appellee, City of Columbus ("appellee" or "the City"). For the reasons that follow, we affirm the trial court's decision.

{¶2} Brandon Ratliff ("Brandon") was employed by the Columbus Health Department starting in 1995, as a seasonal employee while still in high school. In 2001,

Brandon started working full-time for the Health Department as a Disease Intervention Specialist. At some point, Brandon approached Debbie Coleman, his manager at the Health Department, and told her he was experiencing financial problems and needed a job that would pay him more money. The two discussed a Health Education Program Planner position that would be available as part of a grant program that was funded for the period from October 1, 2002 through September 30, 2003. Brandon applied for and was ultimately offered the position. Appropriate personnel action forms were completed, and the only action remaining to be taken was what was known as the "civil service walkthrough," which entailed having Brandon sign some forms and have his picture taken.

{¶3} The week before Brandon was to start in his new position, he received orders to report for military duty as part of the Army Reserves. Brandon was deployed to Afghanistan, where he served in a medical unit until he returned to Columbus in June of 2003. Brandon returned to work at the Health Department in September of 2003.

{¶4} While Brandon was deployed in Afghanistan, Larry Thomas, Human Resources Director for the Health Department, determined that since Brandon had not completed the process of taking his new position, there was no requirement that the position be held for him pending his return from military service. Instead, the position was given to Linda Norris, a Health Education Program Planner in a different program, who was about to be laid off from her position due to budget constraints. Ms. Norris questioned her placement in that position because she was aware the position had been offered to Brandon before he left for military service, but was told that Brandon had not signed the papers necessary to actually take the position.

{¶5} Thus, upon his return from military service, Brandon returned not to the position he had been about to start, but to his old job as a Disease Intervention Specialist. Brandon was working in a work area in which he had no computer and no other work equipment other than a shared telephone, which had not been the case before he was deployed to Afghanistan. Brandon expressed to some of his co-workers that he felt hurt by this situation, and like he had been demoted for some reason.

{¶6} In February of 2004, Brandon went to meet with Thomas Horan, Assistant Commissioner of the Health Department, to express his feelings about the way he had been treated upon his return from Afghanistan. Mr. Horan told Brandon he would look into the situation to see if there was anything that could be done, and that this process would take a couple of weeks. Mr. Horan then directed Larry Thomas to investigate what had happened and to see if anything needed to be done. Mr. Horan also consulted with Alan Varhus of the City Attorney's office regarding the issue.

{¶7} On March 5, 2004, Mr. Horan met with Brandon again. Mr. Horan explained that based on the review that had been conducted, he believed the City had taken all legal steps it was required to take when Brandon returned to work. Mr. Horan offered to hold further discussions regarding the issue, but Brandon ultimately informed him that someone representing him would contact the City for any further discussions.

{¶8} On March 15, 2004, the Columbus Dispatch published an article detailing Brandon's story. The story was seen by a number of City officials, including Mr. Horan, Dr. Teresa Long of the Health Department, and Mayor Michael Coleman. Mayor Coleman's Chief of Staff, Michael Schwarzwald, contacted Dr. Long and expressed Mayor Coleman's wishes that Brandon receive the promotion he had been promised or a

comparable job or, in the lack of an available comparable job, that Brandon at least be given the additional salary he would have received with the promotion. Dr. Long then began to take steps to follow the Mayor's wishes.

{¶9} Unfortunately, the efforts undertaken by City officials on Brandon's behalf were not communicated to him. On March 16, 2004, Brandon visited the office of Health Department's Employee Assistance Program for counseling, where he expressed the mental and emotional problems he was experiencing as a result of the situation. On March 18, 2004, Brandon shot and killed himself.

{¶10} Appellant, Brandon's mother and the administrator of his estate, filed this action alleging two causes of action: one a survivorship action seeking recovery for intentional infliction of emotional distress, and the other a wrongful death claim. The trial court ultimately granted summary judgment to appellee, and appellant filed this appeal alleging the following as the sole assignment of error:

THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFF/APPELLEE (sic) IN GRANTING DEFENDANT/APPELLEE'S BECAUSE (sic) REASONABLE MINDS COULD DIFFER AS TO WHETHER DEFENDANT/APPELLEE ACTED WANTONLY OR RECKLESSLY DIRECTLY AND PROXIMATELY CAUSING INJURY AND DEATH TO LIETENANT (sic) BRANDON RATLIFF.

{¶11} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 654 N.E.2d 1327. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion, and that conclusion is

adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the nonmoving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Rels. Bd.* (1997), 78 Ohio St.3d 181, 183, 677 N.E.2d 343.

{¶12} The trial court concluded that appellee was entitled to judgment as a matter of law by application of the immunity granted to political subdivisions by R.C. Chapter 2744. In reviewing a claim of political subdivision immunity, R.C. Chapter 2744 sets forth a three-tiered analysis. *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 697 N.E.2d 610. First, R.C. 2744.02(A)(1) sets forth the general rule that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Next, it is necessary to determine whether any of the exceptions to this general rule listed in R.C. 2744.02(B)(1) through (5) are applicable. Finally, if it is determined that one of the exceptions might apply, the political subdivision may assert one of the affirmative defenses set forth in R.C. 2744.03(A). See *Colbert v. Cleveland* (2003), 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781.

{¶13} In this case, there is no question that appellee is a political subdivision entitled to the general rule of immunity. Therefore, the issue is whether any of the exceptions to immunity set forth in R.C. 2744.02(B)(1) through (5) would apply to appellant's claims. Initially, we note that at the trial court, there was some argument about whether appellee violated a statutory duty under the Uniformed Service Employment and Reemployment Rights Act ("USERRA"). The trial court concluded that

jurisdiction to hear USERRA claims is vested solely in the Federal courts, and the statute could therefore not be used as the basis for appellant's claims. In her appellate brief, appellant specifically stated that she is not claiming any violation of USERRA, the collective bargaining agreement covering City Health Department employees, or the City's Management Compensation Plan. Thus, it is not necessary for us to consider that portion of the trial court's decision.

{¶14} Appellant's survivorship and wrongful death claims allege the intentional infliction of emotional distress. Ohio courts have traditionally and consistently held that since R.C. 2744.02 includes no provisions excepting intentional torts from the general rule of immunity, political subdivisions are immune from intentional tort claims. *Featherstone v. City of Columbus*, Franklin App. No. 06-89, 2006-Ohio-3150, citing *Wilson v. Stark Cty. Dept. of Hum. Sers.* (1994), 70 Ohio St.3d 450, 1994-Ohio-394, 639 N.E.2d 105; *Hubbard v. Canton City Sch. Bd. Of Edn.* (2002), 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543.

{¶15} Appellant argues that the cases applying political subdivision immunity to intentional tort claims are distinguishable because those cases involved claims that were outside the employer-employee context. R.C. 2744.09 does establish an exception to immunity for claims by an employee of a political subdivision arising out of the employee relationship between the employee and the political subdivision. However, Ohio courts have generally held that intentional tort claims, by definition, cannot arise out the employee relationship because such intentional acts necessarily occur outside the scope of the employee relationship. See *Brady v. Safety Kleen Corp.* (1991), 61 Ohio St.3d

624, 576 N.E.2d 722; *Ellithorp v. Barberton City Sch. Dist. Bd. of Edn.* (Jul. 9, 1997), Summit App. No. 18029.

{¶16} Appellant argues that the exception to political subdivision immunity set forth in R.C. 2744.02(B)(4) should apply here. Prior to April 9, 2003, that section specified that political subdivisions could be liable for negligence occurring on grounds or buildings used in conjunction with a governmental function. In *Hubbard*, supra, the Ohio Supreme Court held that this language was not limited to injuries suffered as a result of physical defects within the property. *Hubbard*, at syllabus.

{¶17} We reiterate that R.C. 2744.02(B) speaks solely in terms of negligence, a claim appellant has not made. Even if the exception were not limited to negligence claims, the General Assembly amended R.C. 2744.02(B)(4) effective April 9, 2003 to make it clear that the exception applies only to cases where the injuries resulted from physical defects in the property. Appellant argues that in this case, Brandon's injuries resulted from a course of conduct that began when he left for military service in October of 2002, and that the prior version of R.C. 2744.02(B)(4) and, by extension, the Ohio Supreme Court's decision in *Hubbard*, applies. However, it is clear that Brandon did not suffer any injury until after he returned to work in September of 2003. Therefore, the amended version of R.C. 2744.02(B)(4) would apply, and since appellant's claims were not based on injury resulting from a physical defect in appellee's property, the exception would not apply even if negligence had been raised.

{¶18} Appellant also argues that appellee's immunity should be stripped away because appellant acted in a wanton or reckless manner in its dealings with Brandon.

Appellant argues that R.C. 2744.03(A)(5) would apply in this situation. R.C. 2744.03(A)(5) provides that:

The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶19} As we noted in *Hiles v. Franklin Cty. Bd. of Commrs.*, Franklin App. No. 05AP-253, 2006-Ohio-16, R.C. 2744.03 does not create a basis for liability, but rather provides immunities and defenses to liability. *Hiles*, at ¶35. Under the framework set forth in *Cater*, supra, it is only necessary to consider whether one of the R.C. 2744.03 defenses applies if it is first determined that one of the exceptions to immunity in R.C. 2744.02(B)(1) through (5) applies, a hurdle appellant has not overcome in this case. Further, even if one of the exceptions to immunity did apply, the question of whether appellee acted in a reckless or wanton manner is only relevant to defeat a claim by the political subdivision that its action involved "the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources" as provided in R.C. 2744.03(A)(5). The City has not asserted that as a defense.

{¶20} Even if appellee did not have the benefit of the immunity provided to political subdivisions, appellee correctly argues that it would still be entitled to summary judgment, because Brandon's suicide was an intervening cause for which appellee cannot be held responsible. It is well-settled that "[t]he general rule is that suicide

constitutes an intervening force which breaks the line of causation stemming from the wrongful act, and, therefore, the wrongful act does not render the defendant civilly liable." *Fischer v. Morales* (1987), 38 Ohio App.3d 110, 112, 526 N.E.2d 1098. An exception to this general rule exists where the intervening cause could have been reasonably foreseen or was a normal incident of the risk involved. *Id.* at 112.

{¶21} In this case, Brandon's suicide could not have been reasonably foreseen, nor was it a normal incident of the risk involved. As we stated in *Fischer*, "It is common knowledge that virtually all human beings experience depression of varying degrees at various times of their lives. Depression is not an unusual emotional condition. Seldom does depression lead to suicide." *Id.* It is truly tragic that nobody with the City who was aware of the efforts being made on Brandon's behalf communicated to him that those efforts were being made, an act that may well have prevented the outcome that occurred. However, that failure cannot result in the imposition of legal liability against the City, because Brandon's act could not have been foreseen.

{¶22} Consequently, we overrule appellant's assignment of error, and affirm the decision of the trial court.

Judgment affirmed.

BROWN and WHITESIDE, JJ., concur.

WHITESIDE, J., retired of the Tenth Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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Plaintiff-Appellant,

v.

City of Columbus,

Defendant-Appellee.

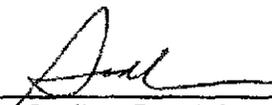
No. 06AP-681
(C.P.C. No. 04CV-9210)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on February 22, 2007, appellant's single assignment of error is overruled, and it is the order and judgment of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs to be assessed to appellant.

SADLER, P.J. , BROWN & WHITESIDE, JJ.



Lisa L. Sadler, Presiding Judge

WHITESIDE, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.