

IN THE SUPREME COURT OF OHIO

SUSAN COATS, Administrator of the Estate of Brandon Ratliff, Deceased, :
: 07-0607
Appellant, :
: On Appeal from the Franklin County
v. : Court of Appeals, 10th Appellate District
: :
CITY OF COLUMBUS, :
: Court of Appeals Case No. 06AP-681
Appellee. :
:

APPELLEE'S, CITY OF COLUMBUS, MEMORANDUM IN RESPONSE TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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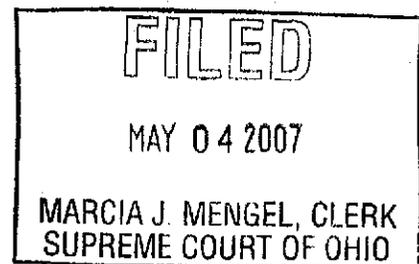


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THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Tenth District Court of Appeals affirmed the decision of the Trial Court, which sustained the dismissal of the case based upon the City's Motion for Summary Judgment. Both Courts held that the City was immune from liability because there are no exceptions under R.C. 2744 for intentional acts, but even if there were, under the facts of this case, the act of Decedent in causing his own death by way of suicide was a separate intervening act for which the City could not be liable.

The unfortunate death of a young man, no matter how tragic, does not create liability when the facts fail to establish fault. The Decedent took his own life in his own apartment with a weapon he had acquired himself. Why one takes his own life is a next-to-impossible question to answer. Here the Decedent left a suicide note, making reference to a failed love affair, but no mention of the City of Columbus.

In its Decision, the Court of Appeals held that Plaintiff had claimed in her Complaint that the Defendant acted recklessly and intentionally and never made a claim that the Defendant acted negligently. The Court then concluded since R.C. 2744.02 speaks in terms of negligent acts, the statute would have no applicability to the matter before the Court. The Court of Appeals also concluded, considering the facts of this case, that suicide was a separate intervening cause in the chain of causation.

The Appellant has attempted to cobble various statutes together in order to avoid the effects of a fairly simple fact pattern that leads to a straight-forward legal conclusion.

First, Appellant argues that there is a constitutional issue because there is a disparity for intentional acts between a private and public employer. There is no constitutional issue in that regard.

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The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, sets forth a three tiered analysis for determining whether a political subdivision is immune from liability. First, R.C. 2744.02(A) sets forth the general rule of immunity, that political subdivisions are not liable in damages for the personal injuries or death of a person.

The Court in *Cater* went on to conclude that the second step in the immunity analysis is to determine whether or not any of the five exceptions enumerated in the statute apply and, if so, then to proceed to the third step to determine if any of the defenses found in R.C. 2744.03 apply. If a defense is applicable, then immunity can be reinstated. The *Cater* Court clearly stated that "R.C. 2744.03(A)(5) is a defense to liability; ... it cannot be used to establish liability." See *Cater*, 83 Ohio St.3d at 32, citing *Hill v. Urbana* (1997), 79 Ohio St.3d 130, 135. See also *Colbert v. City of Cleveland* (2003), 99 Ohio St.3d 215, 2003 Ohio 3319.

Thus, the statute establishes the process through which one must pass in order to determine if immunity exists for a political subdivision. That process does not support Appellant's argument that reading R.C. 2744.02 together with R.C. 2744.03 allows one to conclude that wanton or reckless behavior encompasses negligent behavior. R.C. 2744.03 provides in part that there is governmental immunity "unless the judgment or discretion was exercised with malicious purpose, in bad faith or in a wanton or reckless manner."

The Tenth District Court of Appeals correctly determined that the amended Statute (2744.02), which became effective April 9, 2003, is the applicable statute in this case, rather than an earlier version because it is the date of the injury that is controlling; however, because Plaintiff did not sue for negligence and this statute deals only with

negligence, the Court of Appeals appropriately concluded that the statute was not relevant.

Appellant did not make a claim for negligence, which is why she is now trying to make a convoluted argument that negligence is also included in an intentional or reckless act. In reality, the argument regarding which version of R.C. 2744.02(B)(4) one uses is meaningless because neither version would apply to the facts of the instant case.

This case is not of great general or public interest because the Courts below correctly applied the law to the facts to reach a correct result. Because that result is contrary to Appellant's position, she has attempted to combine various theories together to create a case of liability where none exists.

STATEMENT OF THE CASE AND FACTS

Susan Coats alleged in her Complaint under Count One that the City of Columbus had intentionally inflicted mental distress upon her son, the Decedent. To support this claim, she alleged that the City violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) which is a federal law designed to protect people who are called into military service regarding their civilian employment. Appellant also alleged that the City acted intentionally or recklessly towards the Decedent. Count One is a survivorship action, while Count Two is a wrongful death claim with no additional allegations of wrongdoing directed against the City. Ms Coats abandoned her claim based on USERRA, because federal courts have exclusive jurisdiction for such a claim, and proceeded strictly on allegations that the City had acted intentionally and recklessly.

Ms. Coats claimed that the City of Columbus intentionally and recklessly acted in an extreme, outrageous and degrading manner toward the Decedent, which caused Decedent to take his own life.

Brandon Ratliff, son of Susan Coats, worked at the Columbus Health Department. He applied for and was accepted for another position within the Health Department that paid about \$3,600.00 a year more. Before Mr. Ratliff could proceed with signing all necessary papers with the Civil Service Commission relative to the new position, he was called into military service. While Mr. Ratliff was deployed in Afghanistan, the position for which he applied was filled by another employee with more seniority because that person would otherwise have been laid off. Under the work rules of the City of Columbus, a person who is to be laid off because of a reduction in force is entitled to bump a less senior person from a position.

Thus, when Mr. Ratliff returned from service, the position for which he had applied and been accepted had been filled by a person with more seniority. Mr. Ratliff returned to the position he left when called to active duty and all of this was explained to him.

Several months later, Mr. Ratliff complained for the first time to the management of the Health Department about the fact that he had not received the promised position upon his return from military service. Once Mr. Ratliff made known his displeasure to management, the City promised to conduct an investigation; however, in a little more than three weeks, Mr. Ratliff elected to take his own life with his own weapon in his apartment.

After Ms. Coats abandoned her USERRA claim, she proceeded strictly on a theory that the City had intentionally and recklessly caused Mr. Ratliff to take his own life. When the Trial Court sustained the City's Motion for Summary Judgment, it found that the statute that Ms. Coats attempted to use for liability purposes (R.C. 2744.02) applied only to negligence claims and, further, that the act of Mr. Ratliff was a separate intervening act in the chain of causation under the facts. The Franklin County Court of Appeals affirmed on the same basis.

LAW AND ARGUMENT

Appellant asserts in her First Proposition of Law that "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"; however, no such constitutional challenge was ever raised in the trial court.

Appellant asserted for the first time at the appellate level a challenge to the constitutionality of R.C. 2744.02. No such challenge was asserted or claimed in the trial court; therefore, it is clearly improper for a reviewing court to pass judgment on an issue that was never raised in the trial court. The Complaint and the Memorandum Contra Defendant's Motion for Summary Judgment make no reference to this statute being unconstitutional, and it is only in Appellant's brief, filed in the Tenth District Court, that such a claim was made for the first time. Appellant has waived any challenge to the constitutionality of the statute, but even if she had not, the Ohio Supreme Court has already considered the arguments of Appellant and rejected them.

The Supreme Court of Ohio specifically rejected the argument now made by Appellant in her first proposition of law in *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 1994 Ohio 368 when the Court held in the syllabus:

1. R.C. 2744.02(B)(4) does not violate the guarantees of equal protection of the Ohio or United States Constitutions.
2. R.C. 2744.02(B)(4) does not violate the due process provisions of the Ohio or United States Constitutions.
3. R.C. 2744.02(B)(4) does not violate Section 16, Article I of the Ohio Constitution.

See also *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 1995 Ohio 295.

The arguments contained within Appellant's First Proposition of Law have been considered and rejected by this Court on more than one occasion, even if the issue had been challenged in the Trial Court.

Appellant asserts in her Second Proposition of Law that "R.C. 2744.02(B) provides an exception to immunity for wanton or reckless misconduct, including intentional tort claims"; however, such an interpretation would violate the plain meaning of the statute. R.C. 2744.02 speaks only in terms of negligence, which Appellant admits on page 12 of her Memorandum. In an attempt to avoid the fact that the statute only uses the term negligence and never mentions wanton or reckless behavior, she argues in her brief at page 12 that "wanton or reckless behavior has to be inclusive of negligent behavior." This is an argument without substance. If wanton or reckless behavior included negligent behavior, there would be no difference between them. Negligent acts are separate and distinct from wanton or reckless acts. They are not part and parcel of the same type of conduct. Negligence is an accident that occurs without thought or intent. Wanton or reckless acts that cause injury are more than negligence and require some higher degree of fault on behalf of the wrongdoer. Because

negligence and wanton or reckless are distinct *scienters*, one is not included within the preceding other.

Appellant asserts in her Third Proposition of Law that "the date of the wanton or reckless misconduct, not the date of the jury, controls whether the pre- or post-April 9, 2003, version of R.C. 2744.02(B)(4) applies." Regardless of which version of the statute is used, it has no application to this matter. R.C. 2744.02(B)(4) states in part: "... political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees ..."

The statute speaks only in terms of negligence, but the claim asserted in the Complaint is not one of negligence. The Complaint filed in this matter is based on intentional and/or reckless conduct of the Appellee. (Plaintiff's Complaint, paragraph 20). Nowhere in Plaintiff's Complaint is there any allegation that the Defendant acted negligently, which is why the Tenth District Court of Appeals reasoned that the amended version of R.C. 2744.02(B)(4) would apply "even if negligence had been raised." (Opinion, February 22, 2007, page 7.) The Court of Appeals said earlier in its Opinion "We reiterate that R.C. 2744.02(B) speaks solely in terms of negligence, a claim appellant has not made."

In reaching Appellant's statutory argument, the Court of Appeals held:

... it is clear that Brandon did not suffer any injury until after he returned to work in September 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. *Id.* at p. 7.

The statute that Appellant attempts to use as a basis for liability simply has no relevance to this matter.

Appellant asserts in her Fourth Proposition of Law that "suicide can be foreseen if a tortfeasor acts wantonly or recklessly", but there is no legal basis for such an assertion. Appellant cites to 77 ALR 3d 311 as authority for the concept that one need not establish proximate cause to recover for death by suicide if the tortfeasor committed a willful injury that was a factor in the suicide. The reference to this ALR citation is misleading, because the article published in 1977 is entitled "Liability of One Causing Physical Injuries as a Result of Which Injured Party Attempts or Commits Suicide." The very first two sentences of the annotation state at page 313:

This annotation collects and discusses judicial decisions considering the civil liability of a tortfeasor who has inflicted a physical injury on a plaintiff or on plaintiff's decedent, for the attempted or consummated suicide of the injured party. The fact that the defendant is or may be liable for the antecedent physical injury is presupposed; for instance, a case in which ultimate liability for suicidal actions is defeated by a showing that the defendant is not civilly liable for the personal injuries which are said to have triggered the suicidal behavior is excluded.

Thus, the annotation is not germane to the instant lawsuit, because there is no physical injury to the Plaintiff's Decedent that is the result of either a negligent or intentional act of the Defendant.

The text writer in the ALR citation continued on at pages 314 and 315 and stated:

Civil liability for suicide or attempted suicide following the negligent infliction of physical injuries has typically been decided on proximate cause grounds. Although there is authority to the contrary, it has generally been held that where negligently inflicted personal injuries induce a state of insanity characterized by cognitive unawareness or uncontrollably impulsive behavior as a result of which the tort victim attempts or commits suicide, the tortfeasor may be held liable for the additional injuries sustained by, or for the death of, the tort victim.

The whole article is premised upon the fact the defendant caused physical injuries, either negligently or intentionally, and then at a later date, the injured party

committed or attempted to commit suicide. The ALR citation makes no reference to any case wherein the Decedent committed suicide by his own voluntary self-destructive act and then a plaintiff attempted to hold someone else liable for the Decedent's own actions, with no connection to any act of the defendant.

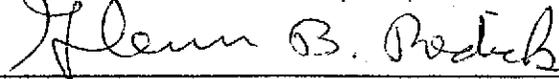
Appellant's Decedent committed suicide and Appellant asserts that is because the Decedent did not receive a job that would have paid him an additional \$3,600.00 a year. No one could foresee that someone would commit suicide because of such an event. One may become upset or even despondent, but it is not foreseeable that an individual would kill himself over an additional \$3,600.00 a year compensation. As the Court of Appeals held, "Brandon's suicide could not have been reasonably foreseen."

CONCLUSION

The loss of life by way of suicide is always tragic and it is tragic in this matter, but tragic events do not establish breach of a legal duty and proximate cause. There is no evidence that the City of Columbus breached any duty to Brandon Ratliff and/or that any act of the City of Columbus was the direct and proximate cause of his suicide. Only Brandon Ratliff knew why he caused his own death.

For all of these reasons, this Court should hold that the appeal does not present any issue of public or great general interest, thereby denying Appellant's request for further review.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellee's, The City Of Columbus, Memorandum In Response To Appellant's Memorandum In Support Of Jurisdiction was sent by First Class U.S. Mail, postage prepaid, to Douglas J. Blue, BLUE, WILSON + BLUE, 471 East Broad Street, Suite 1100, Columbus, OH 43215, the 4th day of May 2007.



Glenn B. Redick

GBR/ka