

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0218

BARBARA ZUMWALDE,

Case No. _____

Plaintiff/Appellee,

-vs-

On Appeal from the Hamilton
County Court of Appeals,
First Appellate District

MADEIRA AND INDIAN HILL
JOINT FIRE DISTRICT,

Defendant,

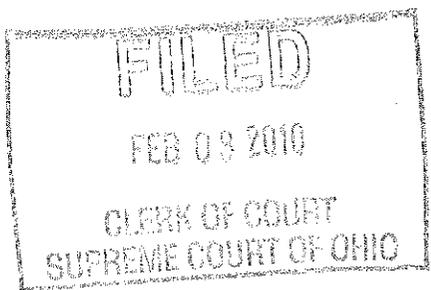
Court of Appeals
Case No. C0900015

and

STEPHEN ASHBROCK,

Defendant/Appellant.

**APPELLANT, STEPHEN ASHBROCK'S
MEMORANDUM IN SUPPORT OF JURISDICTION**



Wilson G. Weisenfelder, Jr. (0030179)
RENDIGS, FRY, KIELY & DENNIS, L.L.P.
One West Fourth Street, Suite 900
Cincinnati, OH 45202
(513) 381-9292
(513) 381-9206 - Facsimile
E-mail: wgw@rendigs.com
Counsel for Appellant, Stephen Ashbrock

Marc D. Mezibov, Esq.
LAW OFFICES OF MARC MEZIBOV
401 East Court Street, Suite 600
Cincinnati, OH 45202
(513) 621-8800
(513) 621-8833 - Fax
Counsel for Appellee

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**EXPLANATION AS TO WHY THIS CASE IS
OF PUBLIC OR GREAT GENERAL INTEREST**

The First District Court of Appeals held R.C. §2744.09(B) operates to deny immunity to a fellow employee of a political subdivision for a claim “arising out of the employment relationship.” This holding directly conflicts with the plain language of the statute and the application of the statutory provision in the Eighth Appellate District in *Campolieti v. Cleveland*, Cuyahoga App. No. 92238, 2009-Ohio-5224 at ¶ 32. The *Campolieti* Court concluded R.C. §2744.09(B) does not apply to a claim against a fellow employee of a political subdivision because the statute is limited only to actions against the “political subdivisions” themselves. *Id.* at ¶ 32. The First District Court of Appeals acknowledges its recent decision is in conflict with other jurisdictions. (See pg. 4 of the Decision filed December 24, 2009). Appellee filed a Motion to Certify the conflict to the Ohio Supreme Court. The Motion was denied on January 12, 2010.

By accepting jurisdiction, this Court will resolve a conflict between the Ohio Appellate Courts regarding interpretation and application of this statute. A resolution is necessary in order for there to be consistent and fair application of the statute to the large number of Ohio governmental employees and the wide variety of potential claims that may be deemed to “arise out of their employment relationship.”

Further by accepting jurisdiction, this Court can reinforce the general proposition there is a strong presumption of immunity for employees of political subdivisions and the exceptions to immunity must be narrowly construed to protect the employees.

Political subdivisions and their employees need clarity as to how this statutory provision will be applied and interpreted consistently throughout the state. Otherwise, political subdivisions and their employees risk different interpretations and exposure to liabilities depending on the particular Appellate District in which the case is pending.

Therefore, given the need for statewide consistency on the construction and application of the statute, as well as reinforcement of the principal there is a strong presumption of immunity for employees of political subdivisions, this Appeal presents an issue of great general and public interest.

STATEMENT OF THE CASE AND FACTS

This case arises out of a retaliation claim brought by Appellee, Barbara Zumwalde, against the Madeira and Indian Hill Joint Fire District and Appellant, Stephen Ashbrock.

In order to qualify for full-time employment with the District, Appellee was required to complete and pass a pre-placement physical examination. The full-time position was available as a result of Appellee's previous suit against the District for discrimination. If she did not pass the physical examination, the District had no obligation to hire her on a full-time basis.

Appellee made several misrepresentations about her current and prior back problems on the pre-placement physical examination forms. Two months after she started the full-time position, she sustained an injury to her low back while engaged in a training exercise.

Appellee saw the District's physician and filed a claim for workers' compensation. Appellant approved Appellee's initial claim for workers' compensation benefits. The District learned of Appellee's misrepresentations about her prior and existing back problems on the pre-placement forms.

The District investigated the matter, charged Appellee with violating two Chapters of the Personnel Guide, and she was suspended without pay for thirty days. The suspension was upheld on appeal but reduced to twenty days.

Appellee claims her suspension was retaliation for her earlier lawsuit against the District and Appellant and also for submitting a Workers' Compensation claim. The District

and Appellant filed Motions for Summary Judgment. Appellant, an employee of the District, argued he was immune from the claims by virtue of the provisions of R.C. §2744.03(A)(6) and there was no evidence of malicious, bad faith, or wanton or reckless conduct.

The Trial Court denied summary judgment to Appellee on his defense of immunity under R.C. §2744.03(A)(6), with little explanation. The First District upheld the denial of immunity, but analyzed the immunity issue, for the first time, under R.C. §2744.09(B).¹ The First District held R.C. §2744.09(B) operates to remove immunity of an employee of a political subdivision from a fellow-employee's claim that arises out of the employment relationship. The Court of Appeals erred in ruling R.C. §2744.09(B) applies to a claim against a fellow employee "arising out of the employment relationship" and thereby operates to remove employee's the shield of immunity. In support of its position on this issue, the Appellant presents the following argument.

¹ Appellee had not challenged Appellant's entitlement to immunity under R.C. §2744.09(B) in the trial court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: R.C. §2744.09(B) applies only to claims by an employee against a “public subdivision” for “claims arising out of the employment relationship”.

The plain language of the statute at issue limits its application only to an employee’s claims against “his political subdivision.” The statute does not include claims against fellow employee’s of the political subdivision.

R.C. §2744.09, provides in pertinent part:

This chapter does not apply to, and shall not be construed to apply to, the following:

(A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;

(B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;

Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Dean v. U.S.*, (2009), 129 S. Ct. 1849, 1853-1854, 173 L.Ed.2d 785, 77 USLW 4357.

Under Subsection (A), the legislature included language to cover claims against “a political subdivision or any of its employees.” This language was intentionally excluded from subsection (B). Under the rules of statutory construction, if the legislature meant to include claims against “political subdivisions” and “any employees of the subdivision,” in subsection (B), it would have included the specific language - as it did in section (A).

The First District's Decision is in conflict with the decision in *Campolieti v. Cleveland*, Cuyahoga App. No. 92238, 2009-Ohio-5224 at ¶ 32. In *Campolieti*, a firefighter filed an action against the city and its fire chief, alleging age discrimination. On appeal, the Eighth District Court of Appeals rejected the plaintiff's argument that R.C. §2744.09 removed the immunity protections from both the city and the fire chief.

This section specifically removes sovereign immunity from "political subdivisions" in actions by its employees involving matters arising out of the employment relationship. While appellant's claim against the city fits neatly into this statutory exception, the claim against Chief Stubbs does not. Appellant argues that Chief Stubbs remains liable on agency principles, but can cite no statutory provision in Ohio's governmental immunity statutes that would grant appellant the ability to maintain suit against Chief Stubbs individually for actions taken within the scope of his employment. *Id.* at ¶ 32.

The First District's interpretation of R.C. §2744.09(B) frustrates the fundamental purpose of the Political Subdivision Tort Liability Act and negates the purpose of R.C. §2744.03(A)(6). R.C. §2744.03(A)(6) operates to remove the employee's immunity for acts committed with "malicious purpose, bad faith, or in a wanton and reckless manner." On the other hand, R.C. §2744.09(B) operates to remove the sovereign-immunity shield from the "political subdivision" in specific types of situations. If R.C. §2744.09(B) is interpreted to apply to claims against fellow employees as well as the political subdivision, it would render R.C. §2744.03(A)(6) irrelevant and obsolete - a result that is clearly not intended by the Ohio Legislature.

Because the First District's interpretation of R.C. § 2744.09(B): (1) exposes political subdivisions and its employees to a multitude of claims that were not intended to exist when the legislature enacted the statute; (2) conflicts with other appellate district's

application of the statute; and (3) conflicts with the plain language of the statute, the Supreme Court must take jurisdiction to resolve these issues and to provide state-wide clarification and consistency necessary for Ohio political subdivisions and their employees.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests that this Court accept jurisdiction in this case so that the important issue presented will be reviewed on the merits.

Respectfully submitted,

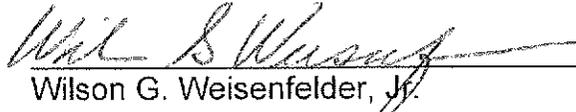


Wilson G. Weisenfelder, Jr. (0030179)
RENDIGS, FRY, KIELY & DENNIS, L.L.P.
One West Fourth Street, Suite 900
Cincinnati, OH 45202
(513) 381-9292
(513) 381-9206 - Facsimile
E-mail: wgw@rendigs.com
Counsel for Appellant, Stephen Ashbrock

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum was served upon the following by first-class U.S. mail, postage prepaid, on this the 2nd day of February, 2010:

Marc D. Mezibov, Esq.
LAW OFFICE OF MARC MEZIBOV
401 East Court Street, Suite 600
Cincinnati, OH 45202



Wilson G. Weisenfelder, Jr.

APPENDIX

Judgment Entry of the Hamilton County Court of Appeals, First App. Dist.
(Dec. 24, 2009) 1

Decision of the Hamilton County Court of Appeals, First App. Dist.
(Dec. 24, 2009) 2

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BARBARA ZUMWALDE,

Plaintiff-Appellee,

vs.

MADEIRA AND INDIAN HILL JOINT
FIRE DISTRICT,

Defendant,

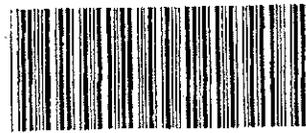
and

STEPHEN ASHBROCK,

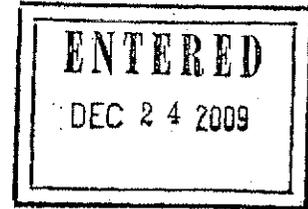
Defendant-Appellant.

APPEAL NO. C-090015
TRIAL NO. A-0611022

JUDGMENT ENTRY.



D86380516



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 24, 2009 per Order of the Court.

By:

A handwritten signature in black ink, appearing to be "Shana O".

Presiding Judge

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

BARBARA ZUMWALDE,

Plaintiff-Appellee,

vs.

MADEIRA AND INDIAN HILL JOINT
FIRE DISTRICT,

Defendant,

and

STEPHEN ASHBROCK,

Defendant-Appellant.

APPEAL NO. C-090015
TRIAL NO. A-0611022

DECISION.

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 24, 2009

*Law Offices of Marc Mezibou, Marc Mezibou, and Susan M. Lawrence, for
Plaintiff-Appellee,*

*Rendigs, Fry, Kiely & Dennis, L.L.P., and Wilson G. Weisenfelder, Jr., for
Defendant-Appellant.*

Please note: This case has been removed from the accelerated calendar.

SUNDERMANN, Judge.

{¶1} Stephen Ashbrock appeals the trial court's denial of his motion for summary judgment. We conclude that Ashbrock was not immune from the claims brought by plaintiff-appellee Barbara Zumwalde, so we affirm the judgment of the trial court.

{¶2} Zumwalde is a firefighter with the Madeira and Indian Hill Joint Fire District ("the JFD"), and Ashbrock is the fire chief of the JFD. In 2006, Zumwalde was suspended for 20 days for allegedly lying on medical questionnaires that she had submitted to the JFD prior to becoming a full-time firefighter. Zumwalde filed a lawsuit against the JFD and Ashbrock in which she asserted that the suspension had been ordered in retaliation for an age- and gender-discrimination lawsuit that she had previously filed against the JFD and Ashbrock, as well as in retaliation for the workers' compensation claim that she had filed for a recent injury.

{¶3} The JFD and Ashbrock filed a motion for summary judgment against Zumwalde, asserting that Ashbrock was immune from the claims, that Zumwalde had failed to establish a prima facie case of retaliation, and that the JFD was immune from Zumwalde's claim for punitive damages. The trial court denied the motion with respect to whether Ashbrock was immune from the claims and whether Zumwalde had established a prima facie case of retaliation. The trial court granted summary judgment to the JFD on the issue of punitive damages. This appeal followed.

{¶4} Ashbrock challenges the trial court's judgment that the existence of immunity could not be decided as a matter of law. A trial court's determination that

a political subdivision or its employee is not entitled to immunity under R.C. Chapter 2744 is a final, appealable order.¹

{¶5} In his sole assignment of error, Ashbrock specifically asserts that the trial court erred when it refused to conclude as a matter of law that he was immune from Zumwalde's claims under R.C. 2744.03(A)(6). We review the trial court's decision not to grant summary judgment de novo.²

{¶6} Under R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability, unless one of three exceptions applies: (1) the employee acted outside the scope of his employment; (2) the employee acted "with malicious purpose, in bad faith, or in a wanton or reckless manner"; or (3) civil liability is expressly imposed by statute. The trial court concluded that there existed a genuine issue of material fact about whether Ashbrock had acted maliciously, in bad faith, or in a wanton or reckless manner.

{¶7} Although the trial court began its analysis with R.C. 2744.03 and its exceptions, we conclude that the analysis should have begun with R.C. 2744.09, which removes certain types of actions from the purview of R.C. Chapter 2744. R.C. 2744.09(B) provides that R.C. Chapter 2744 "does not apply to * * * [c]ivil actions by an employee * * * against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision."

{¶8} To determine whether R.C. 2744.09(B) makes R.C. Chapter 2744 inapplicable to Zumwalde's action, we must first determine whether R.C. 2744.09(B)

¹ See R.C. 2744.02(C); *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, syllabus.

² *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243.

applies to the claims against Ashbrock individually, and then we must decide whether the claims made by Zumwalde “arise[] out of the employment relationship.”

{¶9} Ashbrock argues that R.C. 2744.09(B) removes from the purview of R.C. Chapter 2744 only employee actions against the political subdivision itself. While the JFD may not be entitled to immunity from the action under R.C. 2744.09(B), Ashbrock contends, he was still entitled to immunity under R.C. 2744.03(A). The Eighth Appellate District agrees with Ashbrock’s view. In *Campolieti v. Cleveland*, that court concluded that R.C. 2744.09(B) did not work to remove immunity from a political subdivision’s employee, because the section referred only to actions against the political subdivision.³ On the other hand, the Fourth and Eleventh Appellate Districts have concluded that R.C. 2744.09(B) does exclude from R.C. Chapter 2744 claims against individual employees if the claims arise out of the employment relationship with the political subdivision.⁴ We conclude that this latter view reflects a more logical reading of the statute. A political subdivision’s employee is cloaked with immunity under R.C. 2744.03 by virtue of his employment with the subdivision. To follow the Eight Appellate District’s conclusion would mean that the political subdivision’s immunity could be removed for actions arising out of the employment relationship but that the individual employee’s immunity would remain. We, therefore, conclude that R.C. 2744.09(B) does apply to the claims against Ashbrock that arise from Zumwalde’s employment relationship with the JFD.

{¶10} We next consider whether Zumwalde’s claims arise from the disciplinary action taken against her as an employee of the JFD. In *Engleman v.*

³ 8th Dist. No. 92238, 2009-Ohio-5224.

⁴ See *Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, 833 N.E.2d 300; *Ross v. Trumbull Cty. Child Support Enforcement Agency* (Feb. 9, 2001), 11th Dist. No. 2000-T-0025.

Cincinnati Bd. of Edn., this court considered whether a teacher's claim against a school board for failing to provide adequate protection was excluded from the purview of R.C. Chapter 2744 under R.C. 2744.09(B).⁵ We concluded that R.C. 2744.09(B) did not remove the claim from the purview of R.C. Chapter 2744, because intentional torts occur outside the employment relationship.⁶

{¶11} *Engleman* followed the lead of the Ohio Supreme Court in *Brady v. Safety-Kleen Corp.*, in which the court held that employer intentional torts occur outside the employment relationship.⁷ Because such torts occur outside the employment relationship, the court reasoned, a cause of action by an employee for an employer intentional tort was not preempted by Section 35, Article II of the Ohio Constitution or by R.C. 4123.74 and 4123.741, which govern the workers' compensation system in Ohio.⁸ But the Ohio Supreme Court's pronouncement on intentional torts with respect to the workers' compensation system is inapposite to the determination of whether a claim for retaliation "arises out of the employment relationship between the employee and the political subdivision" for purposes of R.C. 2744.09(B).

{¶12} We find the reasoning of the Eleventh Appellate District persuasive: "In many instances, the *Brady* holding is readily applicable to an immunity case under R.C. 2744.09(B). For example, if a political subdivision employee initiates a lawsuit for battery against his or her employer alleging that a supervisor inappropriately touched him or her, such conduct would clearly be outside of the employment relationship. This is because once the supervisor made the decision to

⁵ (June 22, 2001), 1st Dist. No. C-000597.

⁶ *Id.*

⁷ (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, paragraph one of the syllabus.

⁸ *Id.*

engage in the inappropriate behavior, he was acting independently from the interests of the employer and was no longer acting in the course and scope of his employment. However, we do not believe that the *Brady* holding acts as a per se bar to any intentional tort claim by a political subdivision employee against his or her employer. If the conduct forming the basis of the intentional tort arose out of the employment relationship, the employer does not have the benefit of immunity pursuant to the plain language of R.C. 2744.09(B)."⁹

{¶13} This court even acknowledged in *Engleman* that R.C. 2744.09 removed claims for the intentional torts of invasion of privacy and racial discrimination from the purview of R.C. Chapter 2744.¹⁰ Here, the claims for retaliation that were asserted by Zumwalde clearly arose out of her employment relationship with the JFD. That she alleged an intentional tort did not make R.C. 2744.09(B) inapplicable. We limit the holding of *Engleman* to its specific determination that intentional-tort claims for failure to provide adequate protection do not arise out of the employment relationship for purposes of R.C. 2744.09(B).

{¶14} Our conclusion is in accord with the Ohio Supreme Court's acknowledgement that R.C. 2744.09(B) would apply to an employee's discrimination lawsuit.¹¹ And other appellate districts have similarly concluded that R.C. 2744.09(B) does apply to employer intentional torts that arise from the employment relationship.¹²

⁹ *Fleming v. Ashtabula Area City School Bd. of Edn.*, 11th Dist. No. 2006-A-0030, 2008-Ohio-1892.

¹⁰ *Engleman*, supra.

¹¹ *Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm.*, 74 Ohio St.3d 120, 123, 1995-Ohio-302, 656 N.E.2d 684.

¹² *Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, 833 N.E.2d 300 (retaliation and hostile work environment); *Ross v. Trumbull Cty. Child Support Enforcement Agency* (Feb. 9, 2001), 11th Dist. No. 2000-T-0025 (invasion of privacy).

{¶15} We therefore conclude that R.C. 2744.09(B) applies to Zumwalde's claims. The trial court properly concluded that Ashbrock was not entitled to immunity as a matter of law under R.C. 2744.03. The judgment of the trial court is affirmed.

Judgment affirmed.

HENDON, P.J., and **MALLORY, J.**, concur.

Please Note:

The court has recorded its own entry this date.