

ORIGINAL

IN THE SUPREME COURT OF OHIO

DARRELL SAMPSON,

Plaintiff-Appellee,

v.

**CUYAHOGA METROPOLITAN
HOUSING AUTHORITY, ANTHONY
JACKSON, GEORGE PHILLIPS, AND
RONALD MORENZ**

Defendants-Appellants.

CASE NO. _____

10-1561

On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate
District, Case No. 09-093441

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS CUYAHOGA METROPOLITAN HOUSING AUTHORITY,
ANTHONY JACKSON, GEORGE PHILLIPS AND RONALD MORENZ**

Nancy C. Schuster, Esq.
SCHUSTER & SIMMONS
2913 Clinton Avenue
Cleveland, Ohio 44113
Telephone: (216) 348-1100
Facsimile: (216) 348-0013
ss@apk.net

*Attorneys for Plaintiff-Appellee
Darrell Sampson*

Aretta K. Bernard (039116)
Stephen W. Funk (0058506)
**Counsel of Record*
Karen D. Adinolfi (0073693)
ROETZEL & ANDRESS, LPA
222 South Main Street
Akron, OH 44308
Telephone: (330) 376-2700
Facsimile: (330).376.4577
abernard@ralaw.com; sfunk@ralaw.com
kadinolfi@ralaw.com

*Attorneys for Defendants-Appellants
Cuyahoga Metropolitan Housing Authority,
Anthony Jackson, George Phillips and
Ronald Morenz*

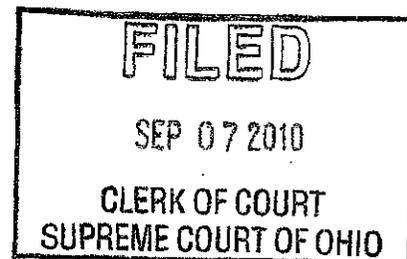
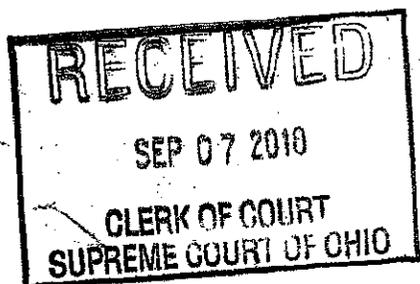


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
EXPLANATION OF WHY THIS CASE PRESENTS ISSUES OF PUBLIC AND GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS	5
A. CMHA’S Investigation and Arrest of 13 Employees	5
B. Sampson’s Complaint against CMHA and Its Employees.....	6
ARGUMENT	8
I. PROPOSITION OF LAW NO. I:	
R.C. 2744.09 Does Not Create An Exception To Political Subdivision Immunity For Intentional Tort Claims Alleged By A Public Employee	8
II. PROPOSITION OF LAW NO. II:	
Evidence Of Alleged Errors In The Investigation and Arrest Of An Employee Is Not Sufficient To Establish Wanton Or Reckless Conduct Under R.C. 2744.03(A)(6) Unless The Plaintiff Can Establish That The Defendant Acted With A Perverse Disregard Of A Known Risk And the Accompanying Knowledge That The Alleged Conduct Will In All Probability Result In Injury	11
CONCLUSION.....	15
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Abdalla v. Olexia</i> (Oct. 6, 1999), 7 th Dist. No. 97-JE-43, 1999 WL 803592	2, 10
<i>Boyd v. Village of Lexington</i> , 5 th Dist. No. 01-CA-64, 2002-Ohio-1285, 2002 WL 416016	4, 13
<i>Brady v. Safety-Kleen Corp.</i> (1991), 61 Ohio St.3d 624, 576 N.E.2d 722	2
<i>Carney v. Cleveland Hts.-University Hts. School Dist.</i> (2001), 143 Ohio App. 415.....	10
<i>Chase v. Brooklyn City School Dist.</i> (2001), 141 Ohio App.3d 9, 749 N.E.2d 798	7
<i>Coats v. City of Columbus</i> (Feb. 22, 2007), 10 th Dist. App. No. 06AP-681, 2007-Ohio-761, 2007 WL 549462.....	2, 9, 10
<i>Ellithorp v. Barberton City Sch. Dist.</i> (July 9, 1997), 9 th Dist. No. 18029, 1997 WL 416333	2, 9
<i>Engelman v. Cincinnati Bd. of Edn.</i> (June 22, 2001), 1st Dist. No. C-000597, 2001 WL 705575	2, 9
<i>Gessner v. City of Union</i> (2004), 159 Ohio App.3d 43, 2004-Ohio-5770, 823 N.E.2d 1	10
<i>Hale v. Village of Madison</i> (N.D. Ohio May 23, 2006), No. 1:04-CV-1646, 2006 WL 4590879	10
<i>Kohler v. City of Wapakoneta</i> (N.D. Ohio 2005), 371 F. Supp.2d 692	11
<i>McFadden v. Cleveland State Univ.</i> , 120 Ohio St.3d, 2008-Ohio-4914, 896 N.E.2d 672	7
<i>Miller v. Central Ohio Crime Stoppers, Inc.</i> (Mar. 20, 2008), 10 th Dist. 07AP-669, 2008-Ohio-669, 2008 WL 747723.....	4, 13
<i>Moore v. Lorain Metropolitan Housing Authority</i> , 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606.....	8
<i>Nielsen-Mayer v. CMHA</i> (Sept. 2, 1999), 8 th Dist. No. 75969, 1999 WL 685635	7
<i>O'Toole v. Denihan</i> , 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505	3, 4, 11, 12
<i>Sabulsky v. Trumbull Cty.</i> (Dec. 27, 2002), 11 th Dist. No. 2001-T-0084, 2002-Ohio-7275, 2002 WL 31886686.....	2

<i>Sampson v. Cuyahoga Metropolitan Housing Authority</i> , Journal Entry & Opinion En Banc No. 93441 (July 22, 2010).....	1, <i>passim</i>
<i>Schmitz v. Xenia Bd. Of Edn.</i> (Jan. 17, 2003), 2d Dist. No. 2002-CA-69, 2003-Ohio-213, 2003 WL 139970.....	2
<i>Stanley v. City of Miamisburg</i> (Jan. 28, 2000), 2d Dist. No. 17912, 2000 WL 84645	2, 10
<i>Terry v. Ottawa County Board of Mental Retardation & Developmental Disabilities</i> , 151 Ohio App.3d 234, 2002-Ohio-7299, 783 N.E.2d 959	2
<i>Ventura v. City of Independence</i> (May 7, 1998), 8 th Dist. No. 72526, 1998 WL 230429	7
<i>Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm'n</i> (1995), 74 Ohio St.3d 120	10
<i>Williams v. McFarland Properties, LLC</i> , 177 Ohio App.3d 490, 2008-Ohio-3594, 895 N.E.2d 208.....	2
<i>Wilson v. Stark Cty. Dept. of Human Serv.</i> , 70 Ohio St.3d 450, 1994-Ohio-394, 639 N.E.2d 105.....	1, 9
<i>Zieber v. Heffelfinger</i> (Mar. 17, 2009), Fifth Dist. No. 08CA0042, 2009-Ohio-1227, 2009 WL 695533	1, 2, 9, 10

Statutes

R.C. 2744.02	1, 7, 8,
R.C. 2744.03	3, <i>passim</i>
R.C. 2744.09	1, <i>passim</i>

**EXPLANATION OF WHY THIS CASE PRESENTS
ISSUES OF PUBLIC AND GREAT GENERAL INTEREST**

This case presents two important legal issues of public and great general interest concerning the scope of political subdivision liability under R.C. Chapter 2744.

1. The first legal issue is whether, and to what extent, a political subdivision is entitled to immunity from common law intentional tort claims alleged by a public employee under R.C. 2744.09(B). This Court has long held that political subdivisions are entitled to immunity from intentional tort claims under R.C. Chapter 2744.02. *See Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450, 452, 1994-Ohio-394, 639 N.E.2d 105. In an *en banc* opinion decided on July 22, 2010, however, the Eighth District Court of Appeals has held that R.C. 2744.09(B) creates an exception to this bright line rule for intentional tort claims alleged by a public employee if it arises out of his or her employment relationship with the political subdivision. *See Sampson v. Cuyahoga Metropolitan Housing Authority*, Journal Entry and Opinion En Banc No. 93441 (July 22, 2010) ("En Banc Opinion") (copy attached in Appendix). In so doing, the Eighth District has wrongfully and significantly expanded the scope of political subdivision liability for intentional tort claims in a manner that will undermine the bright-line rule that has long protected political subdivisions in the State of Ohio.

Timely and proper resolution of this legal issue is a matter of public and great general interest, not only because the *en banc* opinion is immediately binding upon all political subdivisions within the Eighth District, but because it creates an inter-district conflict that should be promptly and conclusively resolved by this Court. Here, although this Court has not directly addressed this legal issue, the vast majority of the appellate courts "have determined that an employer intentional tort is not excepted under R.C. 2744.09(B) from the statutory grant of immunity to political subdivisions." *Zieber v. Heffelfinger* (Mar. 17, 2009), Fifth Dist. No.

08CA0042, 2009-Ohio-1227, 2009 WL 695533, at ¶ 29 (citing cases); *see also Williams v. McFarland Properties, LLC*, 177 Ohio App.3d 490, 2008-Ohio-3594, 895 N.E.2d 208, at ¶ 19; *Coats v. City of Columbus* (Feb. 22, 2007), 10th Dist. App. No. 06AP-681, 2007-Ohio-761, 2007 WL 549462, at ¶ 14-15; *Terry v. Ottawa County Board of Mental Retardation & Developmental Disabilities*, 151 Ohio App.3d 234, 2002-Ohio-7299, 783 N.E.2d 959, at ¶ 21; *Schmitz v. Xenia Bd. Of Edn.* (Jan. 17, 2003), 2d Dist. No. 2002-CA-69, 2003-Ohio-213, 2003 WL 139970, at ¶ 15-21; *Sabulsky v. Trumbull Cty.* (Dec. 27, 2002), 11th Dist. No. 2001-T-0084, 2002-Ohio-7275, 2002 WL 31886686, at ¶ 17-21; *Engelman v. Cincinnati Bd. of Edn.* (June 22, 2001), 1st Dist. No. C-000597, 2001 WL 705575, at *4-5; *Stanley v. City of Miamisburg* (Jan. 28, 2000), 2d Dist. No. 17912, 2000 WL 84645, at *7-8; *Abdalla v. Olexia* (Oct. 6, 1999), 7th Dist. No. 97-JE-43, 1999 WL 803592, at *11; *Ellithorp v. Barberton City Sch. Dist.* (July 9, 1997), 9th Dist. No. 18029, 1997 WL 416333, at *2-3.

The rationale underlying this bright-line rule is based upon the reasoning of this Court in *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, which held that an employer's intentional tort against an employee, by definition, does not arise out of the employment relationship, but will always occur outside the scope of employment even if it occurs at the workplace. As this Court explained in *Brady*, "[w]hen an employer intentionally harms his employee, that act effects a complete breach of the employment relationship, and for purposes of the legal remedy for such injury, the two parties are not employer and employee, but intentional tortfeasor and victim." *Id.* at 634. Thus, even if the employee's alleged intentional tort claim occurred at the workplace and related to the plaintiff's employment, the intentional tort does not, by definition, arise "out of the employment relationship, but occurs outside the scope of employment" as a matter of law. *Zieber*, 2009-Ohio-1227, 2009 WL 695533, at ¶ 29.

The Eighth District's *en banc* opinion, therefore, conflicts with the above-referenced precedent and wrongfully undermines and confuses the bright-line rule that has long protected political subdivisions from intentional tort claims. If this inter-district conflict is not promptly and conclusively resolved by this Court, more and more political subdivisions will be sued for meritless intentional tort claims, resulting in costly and time-consuming litigation and more potentially conflicting rulings by the lower courts with respect to the meaning and scope of this employment-related "exception." As insurance is not generally available for intentional torts, the purposes of the statutory immunity protections (*i.e.*, protecting the public fisc) will be significantly compromised. It is critical, therefore, for this Court to accept jurisdiction in order to resolve the inter-district conflict and to restore the bright-line rule that makes clear that political subdivisions are immune from intentional tort claims as a matter of law.¹

2. The second issue presented by this appeal relates to the scope of the limited immunity exception for "wanton and reckless" conduct under R.C. 2744.03(A)(6)(b). This legal issue is also a matter of public and great general interest because it will directly impact how and when employees of political subdivisions can be held personally liable for alleged claims. Indeed, in recognition of the personal liability at stake for governmental employees who are named as defendants in litigation, this Court has emphasized that "[t]he standard for showing recklessness is high" and that it "necessarily requires something more than mere negligence." See *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, at ¶ 74-75. Thus, this Court has held that summary judgment should be granted where a plaintiff fails to present sufficient evidence to demonstrate that the defendant acted with "a perverse disregard of

¹ Given the inter-district conflict, Appellants also filed a Motion to Certify a Conflict under App. R. 25. This motion was denied by the court of appeals on September 1, 2010.

a known risk” and with the accompanying knowledge that their conduct “will in all probability result in injury.” *Id.*, 2008-Ohio-2574, at ¶ 73-75, 92.

Here, in its *en banc* opinion, the Eighth District affirmed the denial of statutory immunity to the executive director, the police chief, and a police lieutenant of the Cuyahoga Metropolitan Housing Authority (“CMHA”) who were involved in the investigation and arrest of 13 CMHA employees for criminal charges arising from the alleged misuse of gas credit cards. In its opinion, however, the Eighth District did not apply the proper legal standard, but relied upon evidence relating to alleged errors in the CMHA investigation and in the method of arresting the CMHA employees as evidence of wanton and reckless conduct by the individual defendants. (See *En Banc* Opinion, pg. 16-17). Even when construed in the light most favorable to the plaintiff, this evidence of alleged errors in the investigation and arrest of Sampson, at most, amounts to mere negligence that is not legally sufficient to satisfy the high legal standard that has been established by this Court. In denying statutory immunity to the individual defendants, therefore, the Eighth District’s *en banc* opinion establishes a new binding precedent that significantly undermines the applicable legal standard and creates yet another inter-district conflict relating to whether evidence of alleged errors in a public agency’s investigation is sufficient to establish wanton or reckless conduct under R.C. 2744.03(A)(6)(b). See, e.g., *Miller v. Central Ohio Crime Stoppers, Inc.* (Mar. 20, 2008), 10th Dist. 07AP-669, 2008-Ohio-669, 2008 WL 747723, at *6-7 (errors in an investigation and arrest of a criminal suspect were not sufficient to establish wanton or reckless conduct unless there is “a failure to exercise any care whatsoever”); *Boyd v. Village of Lexington*, 5th Dist. No. 01-CA-64, 2002-Ohio-1285, 2002 WL 416016, at *6 (errors in investigation and arrest were not sufficient to establish wanton or reckless conduct because “[m]ere negligence is not sufficient to remove the cloak of immunity”).

For these reasons, therefore, the Court should accept jurisdiction over this important appeal. The Eighth District's *en banc* opinion establishes a new, binding precedent that conflicts with the decisions of other appellate districts and significantly undermines the legal standards that have long protected political subdivisions and their employees. R.C. 2744.09(B) was not intended to create an exception for intentional tort claims that, by definition, are committed outside the scope of employment. Moreover, the Court should re-affirm that the high legal standard for reckless and wanton conduct under R.C. 2744.03(A)(6)(b) cannot be satisfied unless there is direct and specific evidence to demonstrate a defendant acted with a perverse disregard of a known risk and the accompanying knowledge that the conduct will in all probability result in injury. Both legal issues are matters of public and great general interest because they significantly affect the scope of the statutory immunity that has been granted to all political subdivisions and their employees. Accordingly, the Court should accept jurisdiction in order to resolve the above-referenced inter-district conflicts and conclusively determine the proper legal standards that should govern the adjudication of statutory immunity defenses under Ohio law.

STATEMENT OF THE CASE AND FACTS

A. CMHA's Investigation and Arrest of 13 Employees.

This case arises from the criminal investigation and arrest of 13 employees of the Cuyahoga Metropolitan Housing Authority ("CMHA") for the criminal charges of theft in office and misuse of credit cards in July/August of 2004. The criminal investigation was conducted by Lt. Ronald Morenz of the CMHA police department based upon an anonymous tip on the CMHA TIPS telephone hotline. After reviewing the credit card and employee time records, Lt. Morenz then consulted with the Cuyahoga County Prosecutor's office, which approved the arrest of 13 CMHA employees for the improper use of credit cards and theft in office.

In handling the arrest of the 13 employees, CMHA followed the same procedure that had been used by the Chicago housing authority in performing a similar mass arrest of employees. CMHA has approximately 1,000 employees, over 60 buildings, 14,000 households, and serves 53,000 people. Rather than arrange for police officers to travel throughout the county to arrest the 13 employees at their private homes, CMHA decided that the employees should be arrested in connection with a meeting of approximately 200 employees that was scheduled to take place at a CMHA warehouse in Cleveland, Ohio. It is undisputed that each of the 13 arrestees were called during the meeting to come to a separate area in the back of a CMHA warehouse behind a wall/partition (out of view of the participants in the meeting) where they were photographed and booked. They were then led through a back door and placed into waiting police vehicles. The media was not invited into the warehouse, but some media found their way to a parking lot outside of the warehouse and allegedly photographed some of the employees.

After the arrests were completed, CMHA issued a press release and held a press conference at CMHA headquarters. This action was taken to inform the public and the media about why the arrests were made. The press release did not mention any employee by name, and there is no evidence that Sampson's name was ever mentioned at the press conference or in any newspaper articles produced by Sampson in discovery.

B. Sampson's Complaint against CMHA And Its Employees.

Plaintiff Darrell Sampson was one of the 13 employees who was arrested for theft in office and misuse of credit cards by CMHA. After Sampson was arrested, it is undisputed that the Cuyahoga County Prosecutor elected to present his case to a Cuyahoga County grand jury, which found that there was probable cause to indict Sampson for the felony of theft in office and the misuse of credit cards. On the day before Plaintiff's criminal trial, however, the Prosecutor's

office learned that the credit card company refused to send a representative to testify about the gas card records (and the County Prosecutor had not issued a subpoena). Thus, the County Prosecutor was forced to dismiss the charges. Thereafter, Sampson filed a grievance against CMHA, which resulted in an arbitrator's decision that granted reinstatement with back pay. Sampson then resumed his employment at CMHA in March 2006.

After the arbitration was concluded, Sampson filed a civil action against CMHA, its Executive Director, George Phillips, its Police Chief, Anthony Jackson, and Lt. Ronald Morenz, for the common law tort claims of intentional and negligent infliction of emotional distress, abuse of process, and negligent misidentification. After discovery, CMHA, Phillips, Jackson, and Morenz filed motions for summary judgment, arguing that they were entitled to immunity under R.C. 2744.02 and 2744.03, respectively. In response, Sampson argued that CMHA was not entitled to immunity under R.C. 2744.09(B), which creates an exception for "[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." *Id.* Upon review, a three-judge panel agreed, but its opinion conflicted with other Eighth District cases, which held that R.C. 2744.09(B) did not apply to intentional tort claims. *See Chase v. Brooklyn City School Dist.* (2001), 141 Ohio App.3d 9, 749 N.E.2d 798; *Nielsen-Mayer v. CMHA* (Sept. 2, 1999), 8th Dist. No. 75969, 1999 WL 685635, at *1; *Ventura v. City of Independence* (May 7, 1998), 8th Dist. No. 72526, 1998 WL 230429, at *7-8. Accordingly, upon motion, the Eighth District agreed to hold an *en banc* conference in order to resolve this intra-district conflict pursuant to 8th Dist. Loc. App. R. 26 and in accordance with this Court's decision in *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d, 2008-Ohio-4914, 896 N.E.2d 672. (*See En Banc Opinion*, pg. 1).

On July 22, 2010, the Eighth District issued judgment and *en banc* opinion that concluded that CMHA was not immune from plaintiff's intentional tort claims because they allegedly arose out of the employment relationship under R.C. 2744.09(B). (See En Banc Opinion, pp. 13-14). In so doing, the judges of the Eighth District were split. Five judges joined in the majority opinion, with one judge concurring only in the result. Five judges dissented, in part. Three judges joined in a separate dissenting opinion of Kenneth A. Rocco, which argued that the majority's opinion conflicted with at least 10 other cases from other Ohio appellate courts that all held that "R.C. 2744.09(B) is inapplicable to actions that allege intentional tort by political subdivision employees against their employer." (See Judge Kenneth A. Rocco's Opinion, pp. 21-22). Moreover, two other judges dissented because they argued that the "majority's overbroad holding" improperly "seeks to overturn well reasoned precedent involving classic employer intentional tort cases." (See Judge Colleen Conway Cooney's Opinion, pg. 23).

ARGUMENT

I. Proposition of Law No. I: R.C. 2744.09 Does Not Create An Exception To Political Subdivision Immunity For Intentional Tort Claims Alleged By A Public Employee.

It is well-established that a metropolitan housing authority, such as CMHA, is a "political subdivision" that performs governmental functions. *Moore v. Lorain Metropolitan Housing Authority*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, at ¶ 19. Under R.C. 2744.02(A), "a political subdivision is not 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 an employee of the political subdivision in connection with a governmental or proprietary function." While R.C. 2744.02(B) sets forth five exceptions to this general rule, none of the statutory exceptions apply to intentional torts. Accordingly, this Court has held that "there are no exceptions to immunity for the intentional torts of fraud and intentional infliction of

emotional distress.” See *Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450, 452, 1994-Ohio-394, 639 N.E.2d 105, 107.

Notwithstanding this Supreme Court precedent, the Eighth District’s *en banc* opinion now has created an inter-district conflict relating to whether R.C. 2744.09(B) creates an exception for intentional tort claims alleged by a public employee against a political subdivision employer. As previously discussed, the vast majority of appellate courts “have determined that an employer intentional tort is not excepted under R.C. 2744.09(B) from the statutory grant of immunity to political subdivisions.” *Zieber v. Heffelfinger* (Mar. 17, 2009), Fifth Dist. No. 08CA0042, 2009-Ohio-1227, 2009 WL 695533, at ¶ 29 (citing cases). A list of the relevant cases from the 1st, 2nd, 5th, 6th, 7th, 9th, 10th, 11th and 12th appellate districts is set forth on pages 2-3 of this jurisdictional memorandum and will not be repeated herein. As previously explained, the vast majority of the appellate courts have refused to recognize any exceptions for employer intentional tort claims because it has long been established that intentional torts, by definition, occur outside the scope of employment, even if they are committed in the workplace. As this Court has explained, “[w]hen an employer intentionally harms his employee, that act effects a complete breach of the employment relationship, and for purposes of the legal remedy for such injury, the two parties are not employer and employee, but intentional tortfeasor and victim.” *Brady*, 61 Ohio St.3d at 634. Thus, even if the employee’s alleged claims occurred at the workplace and are related to employment by a political subdivision, most of the appellate courts have agreed that “intentional torts, by definition, cannot arise out of the employee relationship because such intentional acts necessarily occur outside the scope of the employee relationship” as a matter of law. *Coats*, 2007-Ohio-761, 2007 WL 549462, at ¶ 15; see also *Zieber*, 2009 WL 695533, at ¶ 29; *Engelman*, 2001 WL 705575, at *4-5; *Ellithorp*, 1997 WL 416333, at *2-3.

This proposition of law is not limited to workplaces injuries that are subject to the workers' compensation system, but applies equally to other common law intentional torts, such as fraud, intentional infliction of emotional distress, conspiracy, and abuse of process. In *Zieber*, for example, a public employee alleged claims against Richland County for intentional infliction of emotional distress and civil conspiracy based upon certain employment-related actions that were taken by a supervisor at the workplace during working hours. *Id.*, 2009-Ohio-1227, 2009 WL 695533, at ¶ 2-9. "While Appellant's injuries arguably occurred within the scope of her employment," the Fifth District nevertheless held that R.C. 2744.09 was not applicable to the employee's intentional tort claims. *Id.* at ¶ 29. Rather, upon review of the case law, the Fifth District "agreed with the majority of other appellate courts" that "an employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside the scope of employment" as a matter of law.² *Id.*; see also *Coats, supra*, 2007-Ohio-761, 2007 WL 549462, at ¶ 14-15 (holding that R.C. 2744.09 does not establish an exception for intentional infliction of emotional distress claim); *Stanley, supra*, 2000 WL 84645, *1, 7-8 (R.C. 2744.09(B) does not create an exception for defamation, intentional and negligent infliction of emotional distress claims); *Abdalla, supra*, 1999 WL 803592, at *1, 11 (R.C. 2744.09(B) does not create an exception for intentional tort claims that included claims for intentional and negligent infliction of emotional distress); *Hale v. Village of Madison* (N.D. Ohio May 23, 2006), No. 1:04-CV-1646, 2006 WL 4590879, at *17-18 (R.C. 2744.09(B) does not create an exception for

² We note that the courts have applied R.C. 2744.09(B) to employment discrimination, harassment, and retaliation claims alleged by public employees against their political subdivision employers. See, e.g., *Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm'n* (1995), 74 Ohio St.3d 120, 123; *Gessner v. City of Union* (2004), 159 Ohio App.3d 43, 2004-Ohio-5770, 823 N.E.2d 1, at ¶ 47; *Carney v. Cleveland Hts.-University Hts. School Dist.* (2001), 143 Ohio App. 415, 424. This case law is inapplicable to this case, however, because employment discrimination claims generally are not classified as "employer intentional torts." *Gessner*, 2004-Ohio-5770, at ¶ 47; *Carney*, 143 Ohio App.3d at 424.

intentional infliction of emotional distress claim); *Kohler v. City of Wapakoneta* (N.D. Ohio 2005), 371 F. Supp.2d 692, 699-702 (R.C. 2744.09(B) does not create an exception for intentional infliction of emotional distress and invasion of privacy claims).

The Eighth District's opinion, therefore, conflicts directly with this case law. Although the court of appeals has suggested that its decision is limited to the specific facts of this case, the simple fact remains the *en banc* opinion has established a new proposition of law that will permit public employees to bring intentional tort claims against their political subdivision employers under R.C. 2744.09(B). In so doing, the court of appeals has undermined the legal rationale for why employer intentional tort claims do not arise out of the employment relationship and opens the door to new wave of litigation (and potentially new conflicting judicial rulings) on the meaning and scope of this new employment-related exception. Accordingly, in order to resolve the inter-district conflict and to restore the bright-line rule that has long protected political subdivisions from intentional tort claims, the Court should accept jurisdiction over this appeal.

II. Proposition of Law No. II: Evidence Of Alleged Errors In The Investigation And Arrest Of An Employee Is Not Sufficient To Establish Wanton Or Reckless Conduct Under R.C. 2744.03(A)(6) Unless The Plaintiff Can Establish That The Defendant Acted With A Perverse Disregard Of A Known Risk And The Accompanying Knowledge That The Alleged Conduct Will In All Probability Result In Injury.

The second issue presented by the Eighth District's *en banc* opinion relates to the scope of the statutory immunity granted to CMHA employees. In general, employees of political subdivisions enjoy a presumption of immunity. In order to overcome the legal presumption of immunity, therefore, Sampson must have presented evidence that each defendant acted with "malicious purpose, in bad faith or in a wanton or reckless" manner under R.C. 2744.03(A)(6)(b). As this Court has held, this legal standard is "high" and "necessarily requires something more than mere negligence." *O'Toole*, 118 Ohio St.3d 374, 2008-Ohio-2874, at ¶ 74

Thus, in order to satisfy this legal standard, Sampson was required to present evidence that each defendant acted with a “perverse disregard of a known risk” and with the “accompanying knowledge that ‘his conduct in all probability result in injury.’” *Id.* at ¶ 74-75, 92.

“Although the determination of recklessness is typically within the province of the jury,” this Court has held summary judgment should be granted if the plaintiff fails to present sufficient evidence to “demonstrate a disposition to perversity.” *Id.* at ¶ 75. In *O’Toole*, for example, this Court reversed an Eighth District decision that also found that the issue of recklessness should be resolved by the jury because this Court determined that the plaintiff had not presented sufficient evidence to satisfy the applicable legal standard. In *O’Toole*, the court of appeals’ decision was based upon evidence of alleged errors in a public agency’s child abuse investigation, which included violations of the investigation standards that were set forth in the Ohio Administrative Code and the agency’s own policies. Upon review, however, this Court held that such violations did “not rise to the level of reckless conduct unless a claimant can establish a perverse disregard of the risk.” *Id.*, 2008-Ohio-2574, at ¶ 92. “Without evidence of an accompanying knowledge that the violations ‘will in all probability result in injury,’” the Court held that the case should not be submitted to a jury because defendants were entitled to immunity as a matter of law. *Id.*

Here, the Eighth District’s *en banc* opinion completely ignored and significantly undermined this high legal standard by holding, with only limited discussion, that the issue of whether the defendants engaged in wanton and reckless conduct should be decided by a jury. In so doing, the Eighth District cited and relied upon only two pieces of evidence that, by definition, amounts to mere negligence that falls far short of the legal standard that has been established by this Court. First, the Eighth District’s opinion cited evidence of alleged errors in the CMHA investigation, stating that Lt. Morenz engaged in a “relatively short investigation”

and citing “a report detailing problems with the investigation” that was drafted in January 2005. (See En Banc Opinion, pg. 16). This evidence, however, amounts to nothing more than mere negligence in the conduct of the CMHA investigation, which clearly does not satisfy the legal standard and conflicts with the holdings of other appellate courts. See, e.g., *Miller v. Central Ohio Crime Stoppers, Inc.* (Mar. 20, 2008), 10th Dist. 07AP-669, 2008-Ohio-669, 2008 WL 747723 (alleged errors in investigation not sufficient to satisfy recklessness standard); *Boyd v. Village of Lexington*, 5th Dist. No. 01-CA-64, 2002-Ohio-1285, 2002 WL 416016 (alleged errors in investigation and arrest not sufficient to satisfy recklessness standard).

Second, the Eighth District’s *en banc* opinion found evidence of reckless or wanton conduct based upon the fact that Phillips, Jackson, and Morenz allegedly “orchestrated a plan” to arrest the 13 employees “in front of approximately 200 fellow co-workers.” (See En Banc Opinion, pg. 16). This evidence also does not rise to the level of recklessness under the applicable legal standard. Even if, as the court of appeals found, Defendants were motivated by the goal of using “the arrested employees as an example for all CMHA employees that they will be arrested if they steal from CMHA,” this alleged motive is not unlawful and does not violate any known standard of care. The decision to effectuate the arrests at the workplace is inherently a discretionary matter that falls within the range of permissible governmental conduct that should be entitled to immunity under R.C. Chapter 2744. While the Eighth District, with the benefit of 20/20 hindsight, apparently believes that CMHA should have used a different procedure for arresting the employees, any alleged error in how the arrests were conducted amounts to nothing more than mere negligence that does not establish that defendants acted with “perverse disregard of a known risk” under the applicable legal standard.

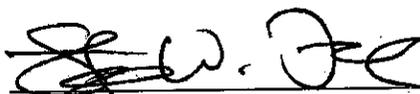
In this regard, there is absolutely no evidence in the record to establish that Phillips, Jackson, or Morenz were consciously aware of any alleged "errors" in their investigation or arrest procedures at the time of the arrests in August 2004. Morenz has testified that he consulted with the county prosecutor before arresting any of the employees, and there is nothing in the record to demonstrate that CMHA did not have probable cause for the arrests, which was later confirmed by the indictment that was issued by the grand jury. Moreover, there is no evidence in the record to show that Phillips, Jackson or Morenz had any reason to know that it was somehow "improper" or "erroneous" to arrest the 13 employees at the workplace. There is no evidence in fact that CMHA's arrest procedures violated any regulation, policy, or other standard of care, let alone to establish that defendants acted with any knowledge that the arrest procedures were somehow "improper," and that they nevertheless proceeded ahead with a "perverse disregard of a known risk." Rather, it is clear that the Eighth District is improperly using the benefit of 20/20 hindsight (and the fact that "charges were ultimately dismissed") to second-guess CMHA's arrest procedures after the fact. (See En Banc Opinion, pp. 16-17).

This is not the legal standard that should govern the adjudication of statutory immunity claims and, unless reversed by this Court, will remain a binding precedent that will directly undermine and erode the high legal standards for recklessness that have been established by this Court. As this Court held in *O'Toole*, judges "must apply the law without consideration of emotional ramifications and without the benefit of 20-20 hindsight." *Id.* at ¶ 76. Accordingly, in order to clarify, enforce, and re-affirm the applicable legal standard and to resolve the inter-district conflicts created by the Eighth District's opinion, the Court should accept jurisdiction and conclude that evidence of alleged errors in the investigation and arrest of public employees is not sufficient to deny immunity to governmental officials under R.C. 2744.03(A)(6)(b).

CONCLUSION

For these reasons, therefore, the Court should accept jurisdiction over this important appeal. The Eighth District's *en banc* opinion establishes a new, binding precedent that conflicts with the decisions of other appellate districts and significantly undermines the legal standards that have long protected political subdivisions and their employees. Accordingly, the Court should accept jurisdiction over this appeal in order to resolve the above-referenced inter-district conflicts and conclusively determine the legal standards that should govern the adjudication of statutory immunity defenses under R.C. 2744.09(B) and R.C. 2744.03(A)(6)(b).

Respectfully submitted,



Aretta K. Bernard (039116)

Stephen W. Funk (0058506)

Karen D. Adinolfi (0073693)

ROETZEL & ANDRESS, LPA

222 South Main Street

Akron, OH 44308

Telephone: (330) 376-2700

Facsimile: (330) 376-4577

abernard@ralaw.com; sfunk@ralaw.com

kadinolfi@ralaw.com

*Attorneys for Appellants CMHA, Anthony Jackson
George Phillips and Ronald Morenz*

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2010, a true and correct copy of the foregoing *Memorandum in Support of Jurisdiction* was served via regular U.S. mail upon the following counsel of record:

Nancy C. Schuster, Esq.
Schuster & Simmons
2913 Clinton Avenue
Cleveland, OH 44113

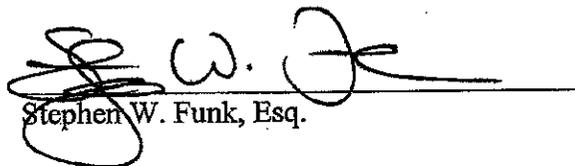
Attorney for Plaintiff-Appellee

Stephen L. Byron, Esq.
Rebecca K. Schaltenbrand, Esq.
Schottenstein Zox & Dunn Co.
4230 State Route 306, Suite 240
Willoughby, OH 44084

Stephen J. Smith, Esq.
Schottenstein Zox & Dunn Co.
250 West Street
Columbus, OH 43215

John Gotherman, Esq.
Ohio Municipal League
175 S. Third Street, #510
Columbus, OH 43215-7100

*Counsel for Amicus Curiae
The Ohio Municipal League*


Stephen W. Funk, Esq.

Request Publication

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
EN BANC
No. 93441

DARRELL SAMPSON

PLAINTIFF-APPELLEE

vs.

**CUYAHOGA METROPOLITAN
HOUSING AUTHORITY, ET AL.**

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-600324

BEFORE: En Banc Court

RELEASED: July 22, 2010

JOURNALIZED: JUL 23 2010

RECEIVED JUL 23 2010

ATTORNEYS FOR APPELLANTS

Joseph W. Boatwright, IV
Lewis W. Adkins, Jr.
Gina A. Kuhlman
Roetzel & Andress, LPA
1375 East Ninth Street
One Cleveland Center - 9th Floor
Cleveland, Ohio 44114

Karen D. Adinolfi
Aretta K. Bernard
Roetzel & Andress, LPA
222 South Main Street
Akron, Ohio 44308

ATTORNEY FOR APPELLEE

Nancy C. Schuster
Schuster & Simmons Co., LPA
2913 Clinton Avenue
Cleveland, Ohio 44113-2940

FILED AND JOURNALIZED
PER A.P.M.R. 22(C)

JUL 22 2010

THOMAS B. FURBER
CLERK OF THE COURT OF APPEALS
DEP.

MARY EILEEN KILBANE, J.:

Pursuant to Loc.App.R. 26 and in accordance with *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, this court held an en banc conference to address an alleged conflict between *Sampson v. CMHA*, 8th Dist. No. 93441, 2010-Ohio-1214, and several other cases from this appellate district.

Appellee, Darrell Sampson ("Sampson"), brought suit against Cuyahoga Metropolitan Housing Authority ("CMHA") and three of its employees, George Phillips ("Phillips"), Anthony Jackson ("Jackson"), and Ronald Morenz ("Morenz") (collectively "appellants"), alleging that appellants negligently accused him of theft and arrested him. Appellants filed a motion for summary judgment with the trial court alleging they were immune from suit. The trial court denied the motion and appellants filed the instant appeal.

Facts

Sampson was raised in a CMHA housing development. In 1988, at age 22, CMHA hired him as a groundskeeper. In 2000, Sampson was promoted to the position of Serviceman V Plumber. CMHA plumbers work in the Property Maintenance Department, reporting for work each day at the plumbers' shop, which is located at 4315 Quincy Avenue, Cleveland, Ohio. At the plumbers'

shop, they punch in for work, pick up their tools, and receive their work assignments for the day.

The plumbers service the CMHA properties in Cleveland as well as the surrounding suburbs, and CMHA provides the plumbers with numerous vehicles to drive to these locations. Gasoline credit cards were assigned to CMHA vehicles so that employees could purchase gasoline for the vehicles using their individual employee PIN numbers provided by CMHA.

On July 20, 2004, CMHA received an anonymous tip on the CMHA "tips hotline," accusing plumber Alvin Roan ("Roan") of using a CMHA gasoline credit card to purchase gasoline for his personal vehicle. Lieutenant Ronald Morenz ("Lieutenant Morenz") worked at the CMHA Police Detective Bureau and was assigned to investigate the allegations against Roan under the supervision of CMHA Police Chief Anthony Jackson ("Chief Jackson"), who worked under the direction of CMHA Executive Director George Phillips ("Director Phillips").

Lieutenant Morenz investigated Roan and the other plumbers for approximately four weeks. On August 27, 2004, Director Phillips, along with Chief Jackson, called a special meeting of CMHA employees. Director Phillips, Chief Jackson, and Lieutenant Morenz, all orchestrated a plan to arrest numerous plumbers, as well as painters (the subjects of a separate investigation), at the employee meeting. When Director Phillips had worked at the Chicago

Housing Authority, he had witnessed a very similar mass arrest, where numerous Chicago Housing Authority employees were arrested by police at a warehouse. (Deposition of Phillips at 75.) Director Phillips determined that arresting the employees in front of 200 of their fellow coworkers would save them the embarrassment of being arrested at home in front of their children. (Deposition of Phillips at 104.) Director Phillips and Chief Jackson issued a press release detailing the agenda for a press conference to be held on August 31, 2004, at 10:30 a.m., immediately following the employee meeting regarding employee theft and arrests.

On August 30, 2004, the plumbers were told not to follow their daily routine of reporting to the plumbers' shop on Quincy Avenue the following morning, but rather to report for work directly to the CMHA warehouse located at 4700 Lakeside Avenue, Cleveland, Ohio for an employee meeting.

On August 31, 2004, approximately 200 CMHA employees gathered at the CMHA warehouse. Sergeant Ray Morgan ("Sergeant Morgan") of the CMHA Community Policing Unit announced the names of 13 CMHA employees, including Sampson. Sergeant Morgan then announced that the 13 individuals (six plumbers and seven painters) were under arrest for theft. The men were handcuffed and searched in front of their fellow CMHA employees. The arrested employees were then taken behind a partition where they were photographed and

then led outside into waiting patrol cars. Television news cameras were present outside and photographed the arrested employees, video of which later aired on local news broadcasts depicting the identity of those arrested. Appellants maintain that they did not contact the media prior to the arrests.

Arrested employees spent the night in jail before being released the following day without charges. All arrested employees were placed on administrative leave from their positions with CMHA.

On October 7, 2004, Sampson and several other plumbers were indicted on theft, misuse of credit cards, and theft in office. The State contended that Sampson had misused the gasoline credit cards provided for the CMHA vehicles. On February 2, 2005, nearly five months after his arrest at the employee meeting, the State dismissed the charges.

On November 22, 2005, an arbitration hearing was held to determine whether Sampson should be reinstated to his position with CMHA. Ultimately, the arbitrator concluded that CMHA had failed to present any evidence of gasoline theft and ordered that Sampson be reinstated. The arbitrator stated in pertinent part:

"There were other failures in Lt. Morenz's investigation. Lt. Morenz testified that he did not check to see if each vehicle in the Property Maintenance Department had its own gas card until September 2004. At no time did he talk to Grievant or any of his co-workers. * * * In the face of the evidence, the arbitrator finds that the preponderance of the evidence shows

no theft of gasoline at all, much less any evidence that the grievant was guilty of such theft.”

In March 2006, Sampson returned to work for CMHA. According to Sampson, the position he returned to involved different duties than his position prior to the arrest. Further, Sampson claims that he was no longer permitted to retrieve his own equipment or drive CMHA vehicles. Sampson was subsequently diagnosed with posttraumatic stress disorder.

Procedural Background

On August 31, 2006, Sampson filed suit against appellants, alleging intentional infliction of emotional distress, negligent infliction of emotional distress, and abuse of process. Sampson later amended his complaint to include negligent misidentification.

On November 3, 2006, appellants filed a motion for judgment on the pleadings with respect to the negligent infliction of emotional distress. On November 17, 2006, after receiving one extension of time, Sampson filed his brief in opposition. On December 5, 2006, appellants filed their reply brief. On October 2, 2007, the trial court granted the motion, dismissing the negligent infliction of emotional distress claim but leaving all other claims pending.

On December 12, 2008, appellants filed a motion for summary judgment, alleging sovereign immunity on all remaining claims. On January 9, 2009,

Sampson filed his brief in opposition. On January 13, 2009, appellants filed their reply brief.

On June 4, 2009, the trial court denied the motion for summary judgment, finding that a genuine issue of material fact still existed as to whether appellants' conduct was wanton or reckless.

Appellants filed the instant appeal pursuant to R.C. 2744.02, which allows political subdivisions and employees of political subdivisions to immediately appeal an order that denies immunity, asserting two assignments of error.

ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT ERRED AS A MATTER OF LAW, IN THE PREJUDICE OF THE CUYAHOGA METROPOLITAN HOUSING AUTHORITY IN NOT DISMISSING ALL CLAIMS AGAINST IT ON SUMMARY JUDGMENT BECAUSE POLITICAL SUBDIVISIONS ARE ABSOLUTELY IMMUNE FROM INTENTIONAL TORT CLAIMS PURSUANT TO OHIO REVISED CODE 2744 AND NO EXCEPTION TO IMMUNITY APPLIES TO PLAINTIFF'S NEGLIGENT MISIDENTIFICATION CLAIM."

CMHA argues that it is immune from suit pursuant to R.C. 2744.02.

Sampson argues that pursuant to R.C. 2744.09, CMHA is barred from raising immunity in this case.

Summary Judgment Standard

In Ohio, appellate review of summary judgment is *de novo*. *Comer v. Risko* 106 Ohio St.3d 185, 186, 2005-Ohio-4559, 833 N.E.2d 712. "Accordingly, we afford

no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate." *Mobsey v. Sanders*, 8th Dist. No. 92605, 2009-Ohio-6459, at ¶11, citing *Hollins v. Schaffer*, 182 Ohio App.3d 282, 286, 2009-Ohio-2136, 912 N.E.2d 637.

The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 1998-Ohio-389, 696 N.E.2d 201, as follows: "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." See, also, *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

Analysis

Political subdivisions are immune from suit, with the exception of limited situations provided for by statute. *Campolieti v. Cleveland*, 8th Dist. No. 92238, 2009-Ohio-5224, 921 N.E.2d 286, at ¶32, citing *Hodge v. Cleveland* (Oct. 22, 1998), 8th Dist. No. 72283. Whether a political subdivision is immune from liability is a question of law that should be resolved by the trial court, preferably on a motion for summary judgment. *Sabulsky v. Trumbull Cty.*, Trumbull App. No. 2001-T-

0084, 2002-Ohio-7275, at ¶7, citing *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 595 N.E.2d 862.

In the motion for summary judgment, CMHA argued that it was entitled to immunity from suit pursuant to R.C. 2744.02, which states:

“[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.”

In response, Sampson maintains that R.C. 2744.02 is inapplicable pursuant to an express exception outlined in R.C. 2744.09(B), which states that Ohio Revised Code Chapter 2744 shall 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.” (Emphasis added.)

CMHA argues that none of Sampson’s causes of action stemmed from his employment, particularly his claim for intentional infliction of emotional distress. However, after a review of the facts and pertinent law, we find that all of Sampson’s claims, including his claim for intentional infliction of emotional distress, clearly arose out of his employment relationship, thus barring CMHA from asserting immunity pursuant to R.C. 2744.09(B).

CMHA argues that *Fuller v. CMHA*, 8th Dist. No. 92270, 2009-Ohio-4716, and *Inghram v. City of Sheffield Lake* (Mar. 7, 1996), 8th Dist. No. 69302, both support its position. However, both cases are clearly distinguishable.

Fuller was a CMHA employee who was arrested after entering a vacant CMHA property while he was off duty. Fuller filed suit against CMHA for negligent hiring, retention, and intentional infliction of emotional distress. *Fuller* is clearly not relevant to our discussion in the instant case because Fuller was off duty at the time of his arrest; whereas here, an employee meeting was specifically scheduled for the sole purpose of arresting Sampson and several other coworkers, in front of several hundred employees, with the specific purpose of setting an example. Sampson's arrest was clearly within the purview of his employment, while Fuller's was not. Further, *Fuller* does not even address R.C. 2744.09, which is specifically at issue in this case.

Similarly, *Inghram* is also factually distinguishable. While Inghram was working in North Royalton, he locked himself out of his vehicle. He contacted the North Royalton Police Department for assistance. When the officers arrived, they mistakenly arrested Inghram believing a warrant was issued out of Sheffield Lake for his arrest. Later, it was discovered that the arrest warrant was for another individual of the same name. Inghram sued both North Royalton and Sheffield Lake for libel, slander, malicious prosecution, false arrest, abuse of process, and

negligence. *Inghram* is clearly not relevant to our discussion here because, even though *Inghram* was arrested while he was working, his claims were not against his employer. *Inghram* never addressed R.C. 2744.09, which is our focus in the instant case.

The first case in which this court specifically addressed whether intentional torts can arise out of an employment relationship pursuant to R.C. 2744.09(B) was *Ventura v. Independence* (May 7, 1998), 8th Dist. No. 72526. *Ventura* was employed by the city of Independence as a maintenance worker and had several medical conditions that restricted his ability to perform certain tasks at work.

Ventura sued the city alleging that the city failed to accommodate his medical conditions and was assigned tasks that exacerbated his conditions. *Ventura* alleged that this conduct by the city constituted an intentional tort. Although the *Ventura* court ultimately concluded that the intentional tort claims did not arise out of the employment relationship, it did not conduct a full analysis of R.C. 2744.09(B) and concluded that R.C. 2744.09(B) did not apply to the specific facts of the case.

Several subsequent cases from this court relied on *Ventura* to bar employees from recovering against political subdivisions for intentional torts. However, such reasoning was misplaced in light of the language used in *Ventura*, which limited

its holding to the facts of that case. In *Nielsen-Mayer v. CMHA* (Sept. 2, 1999), 8th Dist. No. 75969, this court stated:

“This appellate court has recently determined that intentional torts do not arise out of the employment relationship and that the sovereign immunity codified in R.C. 2744, et seq., applies to immunize the political subdivision from such intentional tort claims.”

In support of this broad proposition of law, *Nielsen-Mayer* cited to *Ventura*. However, *Ventura* articulated a narrow holding that the plaintiff could not recover for his intentional torts in that case because R.C. 2744.09(B) did not apply to those specific facts. *Ventura* did not create a broad proposition of law as stated in *Nielsen-Mayer*. Similarly, in *Chase v. Brooklyn City School Dist.* (Jan. 16, 2001), 8th Dist. No. 77263, this court relied on an overly broad interpretation of *Ventura* and concluded that intentional torts could not arise out of the employment relationship pursuant to R.C. 2744.09(B).

In our more recently decided case, *Young v. Genie Industries*, 8th Dist. No. 89665, 2008-Ohio-929, this court reiterated that R.C. 2744.09(B) did not allow an employee to recover for an intentional tort against a political subdivision. Specifically, *Young* relied on *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, which held that intentional torts do not arise out of the employment relationship, and that such conduct takes place outside of the employment relationship. We find this court’s reliance on *Brady* in this context

to be misplaced. *Brady* was a workers' compensation case and never dealt with sovereign immunity or R.C. 2744.09(B).

In *Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450, 1994-Ohio-394, 639 N.E.2d 105, the Ohio Supreme Court recognized that political subdivisions are afforded broad immunity pursuant to Chapter 2744. However, *Wilson* never addressed the specific exceptions to immunity outlined in R.C. 2744.09, and we are unaware of any Ohio Supreme Court decision that has concluded that intentional torts cannot arise out of the employment relationship with respect to R.C. 2744.09(B).

Therefore, we conclude that our reasoning in *Ventura* was limited to the specific facts of the case, and that *Nielsen-Mayer* and *Chase* were erroneously decided because they applied a fact specific holding to create a broad proposition of law, prohibiting recovery under R.C. 2744.09(B) for intentional torts under any circumstance. Further, we conclude that the reasoning in *Brady*, which held that intentional torts do not arise out of the employment relationship, is inapplicable because *Brady* dealt solely with workers' compensation law. Consequently, the reasoning in *Young* was misplaced because it relied exclusively on *Brady*, which is inapplicable.

As we have determined that intentional torts can arise out of the employment relationship with respect to R.C. 2744.09(B), we must now look to the

totality of the circumstances and determine if Sampson's claims actually did arise out of the employment relationship. *Ruckman v. Cubby Drilling Inc.*, 81 Ohio St.3d 117, 1998-Ohio-455, 689 N.E.2d 917, citing *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277, 551 N.E.2d 1271. In order for a claim to arise out of one's employment, there must be a causal relationship between the employment and the claim. *Keith v. Chrysler, L.L.C.*, 6th Dist. No. L-09-1126, 2009-Ohio-6974, at ¶16, citing *Aiken v. Indus. Comm.* (1944), 143 Ohio St. 113, 117, 53 N.E.2d 1018. A direct causal connection is not required, an indirect causal relationship is sufficient. *Keith* at ¶17, citing *Merz v. Indus. Comm. of Ohio* (1938), 134 Ohio St. 36, 15 N.E.2d 632.

The facts of this case clearly indicate that Sampson's claims stem from his employment with CMHA. Sampson, along with approximately 200 other coworkers were specifically told to report to the Lakeside Avenue warehouse for their work assignment. The meeting occurred during the workday, and the arrested employees were handcuffed and searched in front of their fellow employees. The facts indicate that CMHA intended this meeting to serve as an example to other employees, demonstrating that if caught stealing you too will be placed on display and arrested, searched, handcuffed, and taken away in a patrol car before hundreds of your fellow coworkers. Director Phillips acknowledged that this served as an example to other CMHA employees, and Sampson maintains

that while the employees were being arrested, Director Phillips announced to the remainder of the employees that this should serve as an example to them. (Deposition of Phillips at 105; deposition of Sampson at 17.) Sampson's claims clearly arose out of his employment when he was arrested during the workday in front of all of his fellow coworkers, rather than being arrested at home.

Further, the investigation into the alleged gasoline theft by the plumbers was considerably shorter than other investigations into employee theft. Director Phillips stated that the investigation into theft by CMHA painters, who were arrested on the same day as Sampson and the other plumbers, lasted approximately nine months, as opposed to the mere several weeks of investigation conducted regarding the alleged plumber theft. (Deposition of Phillips at 109.)

Consequently, we find that R.C. 2744.09(B) bars CMHA from raising immunity pursuant to Chapter 2744. Therefore, summary judgment was properly denied with respect to all claims asserted against CMHA.

This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

"THE TRIAL COURT ERRED, AS A MATTER OF LAW, TO THE PREJUDICE OF ANTHONY JACKSON, GEORGE PHILLIPS, AND RONALD MORENZ IN NOT DISMISSING ALL CLAIMS AGAINST THEM ON SUMMARY JUDGMENT PURSUANT TO OHIO REVISED CODE CHAPTER 2744 BECAUSE THERE IS NO EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT TO EXCEPT THE INDIVIDUAL DEFENDANTS FROM IMMUNITY FOR INTENTIONAL

**TORTS AND INDIVIDUAL DEFENDANTS ARE IMMUNE
FROM NEGLIGENCE CLAIMS AS A MATTER OF LAW.”**

Director Phillips, Chief Jackson, and Lieutenant Morenz argue that they are entitled to immunity against all of Sampson's claims. After a review of the record and applicable case law, we disagree.

Sampson does not allege that R.C. 2744.09(B) applies to bar the defendants from attempting to raise immunity. By its express language, R.C. 2744.09(B), as discussed in the first assignment of error, only applies to political subdivisions, and not their employees. As all three individual appellants have asserted immunity pursuant to Chapter 2744, we must conduct a two-tiered immunity analysis to determine if summary judgment was appropriately denied. *State ex rel. Conroy v. Williams*, 7th Dist. No. 08 MA 60, 2009-Ohio-6040, at ¶17, citing *Knox v. Hetrick*, 8th Dist. No. 91102, 2009-Ohio-1359, ¶15.

First, it is presumed that employees of a political subdivision are immune from suit. There is no dispute that Director Phillips, Chief Jackson, and Lieutenant Morenz are all employed by CMHA, and that CMHA is a political subdivision. *Fuller* at ¶9, citing *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606.

Secondly, we must analyze whether any of the exceptions outlined in R.C. 2744.03(A)(6) apply to bar immunity. *State ex rel. Conroy* at ¶20, citing *Knox*.

Sampson specifically argues that R.C. 2744.03(A)(6)(b) applies, which states in pertinent part, "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

Sampson presented evidence that the relatively short investigation consisted merely of looking at employee time cards and interviewing one car dealership regarding gas tank capacity. (Deposition of Morenz at 75-80.) Director Phillips, Chief Jackson, and Lieutenant Morenz orchestrated the plan to arrest 13 employees at the warehouse in front of approximately 200 fellow coworkers. They claim this was to protect the arrested employees from being arrested in front of their children. However, comments made in the subsequent press release indicate that the real motivation for arresting the employees at the warehouse was to use the arrested employees as an example for all CMHA employees that they will be arrested if they steal from CMHA. Chief Jackson helped draft the press release. (Deposition of Phillips at 75.)

In January 2005, Lieutenant Morenz drafted a report detailing problems with the investigation, such as not all CMHA vehicles contained gas cards, employees shared their individual PIN numbers, and not all employees that needed to use the gas cards were issued PIN numbers. In March 2005, Lieutenant Morenz even noted that Sampson's explanation that he shared his PIN number

was plausible. (Deposition of Morenz at 145, 217-220.) Charges were ultimately dismissed against all of the plumbers.

Factual determinations as to whether conduct has risen to the level of wanton or reckless is normally reserved for trial. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, 639 N.E.2d 31, citing *Matkovich v. Penn Cent. Transp. Co.* (1982), 69 Ohio St.2d 210, 431 N.E.2d 652. Therefore, we find that Sampson has presented evidence that creates a genuine issue of material fact as to whether the conduct of Director Phillips, Chief Jackson, and Lieutenant Morenz was wanton or reckless pursuant to R.C. 2744.03.

Consequently, summary judgment was appropriately denied with respect to the claims against the individual employees. This assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, A.J.,
PATRICIA A. BLACKMON, J.,
LARRY A. JONES, J., and
JAMES J. SWEENEY, J., CONCUR;

MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY;

KENNETH A. ROCCO, J., CONCURS IN PART; DISSENTS IN PART (SEE SEPARATE OPINION);

FRANK D. CELEBREZZE, JR., J., CONCURS WITH SEPARATE OPINION OF JUDGE KENNETH A. ROCCO;

ANN DYKE, J., CONCURS WITH SEPARATE OPINION OF JUDGE KENNETH A. ROCCO;

COLLEEN CONWAY COONEY, J., CONCURS IN PART DISSENTS IN PART (SEE SEPARATE OPINION); CONCURS WITH SEPARATE OPINION OF JUDGE KENNETH A. ROCCO AS TO THE FIRST ASSIGNMENT OF ERROR;

MELODY J. STEWART, J., CONCURS WITH SEPARATE OPINION OF JUDGE COLLEEN CONWAY COONEY;

CHRISTINE T. McMONAGLE, J., RECUSED.

KENNETH A. ROCCO, J., CONCURRING IN PART, DISSENTING IN PART:

As the writer of *Ventura v. Independence* (May 7, 1998), Cuyahoga App. No. 72526, I find myself constrained respectfully to dissent from the majority opinion's analysis and decision with respect to the first assignment of error.

Contrary to the majority opinion's characterization, *Ventura* did not indicate "its holding was limited to the facts of that case." The *Ventura* decision stated,

"As he did in the trial court, appellant argues his claims for intentional tort and intentional infliction of emotional distress arise out of his employment relationship with the city; thus, he contends immunity does not apply. However, the court in *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), Summit App. No. 18029, unreported, recently stated as follows:

"Because Section 2744.02(B) includes no specific exceptions for intentional torts, courts have consistently held that political subdivisions are immune from intentional tort claims. See, e.g., *Wilson [v. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450 at 452-453, 639 N.E.2d 105] (claims for fraud and intentional infliction of emotional distress); *Farra v. Dayton* (1989), 62 Ohio App.3d 487, 576 N.E.2d 807 (claim for intentional interference with business interests); *Monesky v. Wadsworth* (Apr. 3, 1996), 1996 Ohio App. LEXIS 1402,

Medina App. No. 2478-M, unreported (claims for trespass and demolition of a building). ***

"Ms. Ellithorp also argued in the trial court, and has argued on appeal, that Section 2744.09(B) of the Ohio Revised Code provides an exception to sovereign immunity applicable to this case. That Section provides that Chapter 2744 immunity does not apply to civil actions brought by an employee against a political subdivision "relative to any matter that arises out of the employment relationship between the employee and the political subdivision [.]” The school board has asserted, and this Court agrees, that Section 2744.09(B) is inapplicable to the facts of this case. *An employer’s intentional tort against an employee does not arise out of the employment relationship, but occurs outside of the scope of employment. Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, paragraph one of the syllabus. (Emphasis added.) See, also, *Nungester v. Cincinnati* (1995), 100 Ohio App.3d 561 at 567, 654 N.E.2d 423; *Brannon v. Troutman*, supra; *Marsh v. Oney* (Mar. 1, 1993), Butler App. No. CA92-09-165, unreported.’

"This court finds such reasoning persuasive. To paraphrase *Wilson*, to allow such claims as appellant’s would frustrate the purpose of both Chapter 2744 and laws providing for collective bargaining and workers’ compensation;

consequently, R.C. 2744.09(B) does not create an exception to immunity for the political subdivision on the facts of this case." (Emphasis added.)

I note further that the proposition of law *Ventura* set forth has been followed, not just, as acknowledged by the majority opinion, in *Nielsen-Mayer v. Cuyahoga Metro. Hous. Auth.* (Sept. 2, 1999), Cuyahoga App. No. 75969, and *Chase v. Brooklyn City School Dist.* (2001), 141 Ohio App.3d 9, 749 N.E.2d 798, but in no less than ten additional subsequent cases, many from other Ohio appellate districts. *Lyren v. Wellington* (Sept. 1, 1999), Lorain App. No. 98CA007114 (electrical lineman electrocuted by village power lines); *Abdalla v. Olexia* (Oct. 6, 1999), Jefferson App. No. 97-JE-43 (sheriff acquitted of federal charges denied costs of legal representation by county); *Engleman v. Cincinnati Bd. of Edn.* (June 22, 2001), Hamilton App. No. C-000597 (teacher injured by student with known violent tendencies); *Coolidge v. Riegle*, Hancock App. No. 5-02-59, 2004-Ohio-347, appeal not allowed, 102 Ohio St.3d 1531, 2004-Ohio-3580, 811 N.E.2d 1150; *Fabian v. Steubenville* (Sept. 28, 2001), Jefferson App. No. 00 JE 33 (wastewater treatment worker injured by chlorine gas); *Terry v. Ottawa Cty. Bd. of Mental Retardation and Dev. Disabilities*, 151 Ohio App.3d 234, 2002-Ohio-7299, 783 N.E.2d 959 (workers injured by toxic substances); *Fleming v. Ashtabula Area City School Bd. of Edn.*, Ashtabula App. No. 2006-A-0030, 2008-Ohio-347 (racial-minority teacher's contract not renewed);

Zieber v. Heffelfinger, Richland App. No. 08CA0042, 2009-Ohio-1227 (county treasurer's clerk assaulted at work by county auditor's clerk); and, more recently, *Jopek v. Cleveland*, Cuyahoga App. No. 93793, 2010-Ohio-2356 (police officer accused of using unjustified force) and *Grassia v. Cleveland*, Cuyahoga App. No. 93647, 2010-Ohio-2483 (city worker contracted Legionnaire's disease).

The majority opinion thus overlooks the fact that *Ventura* has been cited numerous times, by this court as well as by other appellate districts, as authority for the position that R.C. 2744.09(B) is inapplicable to actions that allege intentional tort by political subdivision employees against their employer. Moreover, it is not the only case that so holds. See, e.g., *Schmitz v. Xenia Bd. of Edn.*, Greene App. No. 2002-CA-69, 2003-Ohio-213; *Sabulsky v. Trumbull Cty.*, Trumbull App. No. 2001-T-0084, 2002-Ohio-7275, appeal not allowed, 98 Ohio St.3d 1567, 2003-Ohio-2242, 787 N.E.2d 1231.

Clearly, the greater weight of authority does not support the majority opinion's disposition of the first assignment of error in this case. It is significant to me that, as demonstrated by *Coolidge* and *Sabulsky*, the Ohio Supreme Court has had the opportunity, but has declined, to overrule appellate decisions that hold that, in the context of employer intentional tort claims, R.C. 2744.09(B) does not abrogate sovereign immunity. See, e.g., *Chase v. Brooklyn City School Dist.* (2001), 91 Ohio St.3d 1529, 747 N.E.2d 253.

Therefore, I dissent from that portion of the opinion. I agree, however, with the majority opinion's disposition of the second assignment of error.

Appellees may still pursue their claims against the individual appellants. Moreover, as pointed out in the majority opinion, and as contemplated by *Ellithorpe* in its citation to *Wilson*, appellees utilized remedies available to them under the collective bargaining agreement with the CMHA prior to filing this action. Thus, the appellees are not left without recourse in righting the perceived wrongs done to them.

COLLEEN CONWAY COONEY, J., CONCURRING IN PART, DISSENTING IN PART:

I concur in the judgment to affirm the trial court, but I respectfully dissent from the majority's overbroad holding that seeks to overturn well reasoned precedent involving classic employer intentional tort cases.

Sampson's claims do not involve a classic employer intentional tort. Rather, he claimed that defendants acted maliciously, in bad faith, and in a wanton and reckless manner. His claims clearly arose out of his employment relationship — he was given a gasoline credit card to put gas in his employer's vehicles. He pursued arbitration through his collective bargaining agreement and was reinstated to his position — further evidence that his claims arose out of his

employment relationship. Therefore, CMHA is barred from asserting immunity under R.C. 2744.09(B).

However, the majority goes well beyond the facts presented to overrule our prior decisions that actually involved employer intentional torts.¹ Therefore, I concur in the judgment to affirm but I dissent from that portion of the majority opinion overruling our well reasoned precedent.

The reason Sampson alleged that defendants acted maliciously, in bad faith, and in a wanton and reckless manner was to strip them of their immunity pursuant to R.C. 2744.09(B)(6). The trial court correctly found issues of fact existed on this issue and denied summary judgment. But the fact that no deliberate or intentional act was alleged by Sampson brings his claim outside the parameters of an employer intentional tort.

As the Ohio Supreme Court recently noted: *Fyffe's* common-law test for employer intentional torts applied until the General Assembly enacted H.B. 498, effective April 7, 2005, R.C. 2745.01. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶33. "Paragraph two of the syllabus [in *Fyffe v. Jeno's Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108,] states:

¹It is significant that in one of our recent decisions, the Ohio Supreme Court had the opportunity to review our decision applying sovereign immunity in the context of employer intentional tort and declined jurisdiction. *Magda v. Greater Cleveland Regional Transit Auth.*, Cuyahoga App. No. 92570, 2009-Ohio-6219, appeal not allowed, 124 Ohio St.3d 1510, 2010-Ohio-799.

"To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk — something short of substantial certainty — is not intent. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph six of the syllabus, modified as set forth above and explained.)" *Kaminski* at ¶32.

Sampson's allegations do not rise to the level of an employer intentional tort and therefore, the majority goes far beyond the issue presented to overrule this court's precedent that involved claims specifically described as employer intentional tort. On this basis, I agree with Judge Rocco's separate opinion.

I find the following reasoning of the Fourth District Court of Appeals particularly instructive on this very subject. The court in *Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, 833 N.E.2d 300, ¶16-20, stated in pertinent part:

"We acknowledge that Ohio courts consistently have held that under the provisions of R.C. Chapter 2744, political subdivisions retain their cloak of immunity from lawsuits for intentional-tort claims. See *Wilson v. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450 at 452, 639 N.E.2d 105, where in a suit by a private citizen the court stated that R.C. 2744.02(B) contains no exceptions to immunity for torts of fraud and intentional infliction of emotional distress. We also acknowledge that in the workers' compensation context, the Supreme Court of Ohio has held that an employer's intentional tort against an employee occurs outside the scope of the employment relationship. *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, paragraph one of the syllabus.

Consequently, Ohio appellate courts have held that R.C. 2744.09 has no application to employer-intentional-tort claims. See *Thayer v. W. Carrollton Bd. of Edn.*, Montgomery App. No. 20063, 2004-Ohio-3921; *Terry v. Ottawa Co. Bd. of Mental Retardation & Developmental Disabilities* (2002), 151 Ohio App.3d 234, 783 N.E.2d 959; and *Chase v. Brooklyn City School Dist.* (2001), 141 Ohio App.3d 9, 749 N.E.2d 798, and the cases they cite.

"But in *Gessner v. Union*, 159 Ohio App.3d 43, 2004-Ohio-5770, 823 N.E.2d 1, the Second District held that age-discrimination and wrongful-discharge claims arose out of the employment relationship, despite the defendant's claim that age discrimination is an intentional tort. In reaching its decision, the court noted that '[t]he case law on this issue is sparse, but that is not surprising in view of such an obvious point.' *Id.* at ¶31. *Gessner* further observed that no other Ohio cases precluded applying R.C. 2744.09(B) when civil rights violations occur in the employment context. 'In fact, suit appears to be routinely permitted against political subdivisions in such situations.' *Id.* at ¶47.

"Like our colleagues in *Gessner*, we are not persuaded that the legislature intended to engraft the Supreme Court's interpretation of the workers' compensation scheme onto its general statutory provisions for political-subdivision immunity. Because employer intentional torts are not a natural risk of employment, the Supreme Court concluded that they occur outside of the employment relationship in the workers' compensation context. See *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St.2d 608, 613, 433 N.E.2d 572.
* * *

"We continue to believe claims that are causally connected to an individual's employment fit into the category of actions that are 'relative to any matter that arises out of the employment relationship.' * * * More recently, the Supreme Court of Ohio went so far as to summarily state that immunity is not available to a political subdivision in an employee's claim for unlawful discrimination. The court cited R.C. 2744.09(B) and (C). *Whitehall ex rel. Wolfe v. Ohio Civ. Rights Comm.* (1995), 74 Ohio St.3d 120, 123, 656 N.E.2d 684. And while *Wilson v. Stark Cty. Dept. of Human Services*, *supra*, does indeed indicate that R.C. 2744.02(B) has no exceptions to immunity for fraud and intentional infliction of emotional distress, that case involved a suit by a citizen who was not a public employee. Thus, R.C. 2744.09(B) was not applicable.

"Because they are causally connected to Nagel's employment with the appellants, the retaliation and hostile-work-environment claims arise out of the

employment relationship and in this case are based upon what Nagel asserts are violations of his civil rights. Therefore, his claims fall within the purview of R.C. 2744.09, which means that the statutory grant of immunity found in R.C. Chapter 2744 does not apply. Thus, we conclude that the trial court correctly decided that appellants are not entitled to summary judgment on these claims."

Likewise, because Sampson's claims are causally connected to his employment and do not involve the workers' compensation context, the trial court correctly decided that appellants are not entitled to immunity on these claims.