

ORIGINAL

IN THE SUPREME COURT OF OHIO

DARRELL SAMPSON,
:
:
Plaintiff-Appellee,
:
:
v.
:
CUYAHOGA METROPOLITAN
HOUSING AUTHORITY, et al.,
:
:
Defendants-Appellants.
:

Case No. **10-1561**

**On Appeal from the
Eighth District Court of Appeals
Cuyahoga County, Ohio**

**Court of Appeals
Case No. 09 093441**

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF AMICUS INTEREST	3
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT	4
<u>Proposition of Law No. 1: R.C. 2744.09(B) does not preclude the application of the statutory defenses that are available to a political subdivision pursuant to R.C. Chapter 2744 when an intentional tort is alleged to be committed against an employee by its employer, the political subdivision, because such an alleged intentional tort does not "arise out of the employment relationship." (<i>Blankenship v. Cincinnati Milacron Chemicals, Inc.</i>, 69 Ohio St.2d 608, 433 N.E.2d 572, construed and applied.)</u>	4
CONCLUSION.....	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Cases

Blankenship v. Cincinnati Milacron Chemicals, Inc., 69 Ohio St.2d 608, 433 N.E.2d 572 4, 5, 6

Brady v. Safety-Kleen Corporation, 61 Ohio St.3d 624, 576 N.E.2d 772 5, 6

Ellithorp v. Barberton City School District Board of Education, 1997 WL 416333 (Ohio App. 9 Dist.) 2, 6

Engleman v. Cincinnati Board of Education, 2001 WL 705575 (Ohio App. 1 Dist.)..... 1, 6, 7

Fabian v. City of Steubenville, 2001 WL 1199061 (Ohio App. 7 Dist.) 2, 6

Sabulsky v. Trumbull County, 2002 WL 31886686 (Ohio App. 11 Dist.)..... 2, 6, 7

Sampson v. Cuyahoga Metropolitan Housing Authority, 2010-Ohio-3415 1, 2, 5, 6, 7

Schmitz v. Xenia Board of Education, 2003 WL 139970 (Ohio App. 2 Dist.) 1, 6

Stanley v. City of Miamisburg, 2000 WL 84645 (Ohio App. 2 Dist.) 2,6

Terry v. Ottawa County Board of Mental Retardation & Developmental Disabilities, 151 Ohio App.3d 234, 783 N.E.2d 959 (Ohio App. 6 Dist.)..... 2, 6

Williams v. McFarland Properties, L.L.C., 177 Ohio App.3d 490, 895 N.E.2d 208 (Ohio App. 12 Dist.) 2, 6, 7

Zieber v. Heffelfinger, 2009 WL 695533 (Ohio App. 5 Dist.)..... 2, 6

Statutes

R.C. 2744.02 1

R.C. 2744.09(B)..... 1, 2, 3, 4, 5, 6, 7

R.C. Chapter 2744..... 1, 3, 4, 5, 6, 7

INTRODUCTION

THIS CASE INVOLVES A MATTER OF PUBLIC AND GREAT GENERAL INTEREST

The Ohio Municipal League (“League”), as amicus curiae on behalf of the Cuyahoga Metropolitan Housing Authority (“CMHA”), urges this Court to accept jurisdiction over this case in order to reverse the decision in *Sampson v. Cuyahoga Metropolitan Housing Authority*, 2010-Ohio-3415. This Court has an opportunity to clarify that Ohio’s statutory political subdivision immunity provisions are applicable in cases where an intentional tort claim is made against a political subdivision that employees the plaintiff.

The Eighth District, in *Sampson*, held that R.C. 2744.09(B), applies to intentional tort claims made by an employee against an employer which precludes the application of the defenses and immunities otherwise provided in Chapter 2744. According to the Eighth District, because of the application of R.C. 2744.09(B), CMHA was not entitled to R.C. Chapter 2744 immunity for an employee’s claims against CMHA for an alleged intentional infliction of emotional distress and abuse of process.

This erroneous interpretation of R.C. 2744.09(B) is in direct conflict with the following decisions from other appellate districts:

First District

Engleman v. Cincinnati Board of Education, 2001 WL 705575 (Ohio App. 1 Dist.), holding that no exception to tort immunity was applicable when the plaintiff, a public employee, raised an intentional tort claim against the public employer. A copy of this decision is attached hereto as Exhibit “A.”

Second District

Schmitz v. Xenia Board of Education, 2003 WL 139970 (Ohio App. 2 Dist.), holding that a cause of action for employer intentional tort does not fall within an exception to governmental

immunity. A copy of this decision is attached hereto as Exhibit "B."

Stanley v. City of Miamisburg, 2000 WL 84645 (Ohio App. 2 Dist.), holding that R.C. 2744.09(B) does not prevent the application of Chapter 2744 immunity to employer intentional tort claims as such claims do not arise out of the employment relationship. A copy of this decision is attached hereto as Exhibit "C."

Fifth District

Zieber v. Heffelfinger, 2009 WL 695533 (Ohio App. 5 Dist.), holding that political subdivisions are immune under R.C. 2744.02 from intentional tort claims and that the exception set forth in R.C. 2744.09(B) is not applicable to an employee's claims of intentional infliction of emotional distress. A copy this decision is attached hereto as Exhibit "D."

Sixth District

Terry v. Ottawa County Board of Mental Retardation & Developmental Disabilities, 151 Ohio App.3d 234, 783 N.E.2d 959 (Ohio App. 6 Dist.), declining to depart from established law and holding that R.C. 2744.09(B) does not except an employer intentional tort from the immunity granted under the Political Subdivision Tort Liability Act.

Seventh District

Fabian v. City of Steubenville, 2001 WL 1199061 (Ohio App. 7 Dist.), holding that R.C. 2744.09(B) does not strip a political subdivision of immunity when a plaintiff asserts claims for intentional torts. A copy of this decision is attached hereto as Exhibit "E."

Ninth District

Ellithorp v. Barberton City School District Board of Education, 1997 WL 416333 (Ohio App. 9 Dist.), holding that R.C. 2744.09(B) includes no specific exceptions for intentional torts and, therefore, R.C. 2744.09(B) is inapplicable to an intentional tort claim asserted by an employee. A copy of this decision is attached hereto as Exhibit "F."

Eleventh District

Sabulsky v. Trumbull County, 2002 WL 31886686 (Ohio App. 11 Dist.), holding that R.C. 2744.09(B) does not apply to intentional torts and, therefore, the political subdivision was granted immunity

as the plaintiff only alleged employer intentional tort. A copy of this decision is attached hereto as Exhibit "G."

Twelfth District

Williams v. McFarland Properties, L.L.C., 177 Ohio App.3d 490, 895 N.E.2d 208 (Ohio App. 12 Dist.), holding that R.C. 2744.09(B) does not apply as plaintiff's complaint, against a political subdivision, alleged solely an employer intentional tort.

It is clear that the Eighth District's decision in *Sampson* conflicts with the decisions of other appellate districts on the same question of law (whether or not the defenses and immunities of the political subdivision tort liability immunity act, provided in R.C. Chapter 2744, apply to a claim by an employee that its political subdivision employer has committed an intentional tort), and the League respectfully requests that this Court exercise jurisdiction over this case.

This case contains a matter of great public and general interest, and is worthy of the time and attention of this Court. The League urges this Court to accept jurisdiction over this case, which is of great general interest.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. The League and its members have an interest in the proper interpretation of R.C. 2744.09(B) and ensuring that intentional tort claims fall within the general rule of political subdivision immunity, as intended by the Ohio General Assembly.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Memorandum in Support of Jurisdiction of CMHA.

ARGUMENT

Proposition of Law No. 1: R.C. 2744.09(B) does not preclude the application of the statutory defenses that are available to a political subdivision pursuant to R.C. Chapter 2744 when an intentional tort is alleged to be committed against an employee by its employer, the political subdivision, because such an alleged tort does not "arise out of the employment relationship." (*Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 572, construed and applied.)

R.C. 2744.09(B)

R.C. 2744.09(B) provides:

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

(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.***

R.C. 2744.09(B), therefore, excludes, from the application of the provisions of R.C. Chapter 2744, civil actions by an employee “relative to any matter that arises out of the employment relationship.” (Emphasis added.) The interpretation of the phrase “arises out of the employment relationship” is the determinative issue in this case.

Intentional Torts do not “Arise Out of the Employment Relationship”

In *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 572, this Court considered the issue of whether an intentional tort can arise out of an employment relationship and, therefore, be barred by workers’ compensation provisions in the Ohio Constitution and the Ohio Revised Code. In reviewing this issue, this Court noted that “neither the relevant constitutional language nor the pertinent statutory language expressly

extend the grant of immunity to actions alleging intentional tortious conduct by employers against their employees.” *Blankenship* at 612. This Court concluded that “[n]o reasonable individual would equate intentional and unintentional conduct in terms of the degree of risk which faces an employee nor would such individual contemplate the risk of an intentional tort as a natural risk of employment.” *Id.* at 613. This Court then held that an intentional tort cannot arise out of the employment relationship and, therefore, an employee is not precluded by the workers’ compensation provisions in the Ohio Constitution and the Ohio Revised Code from enforcing his common law remedies against his employer for an intentional tort.

In response to this Court’s decision in *Blankenship*, the General Assembly enacted legislation including intentional torts within the workers’ compensation system. In *Brady v. Safety-Kleen Corporation*, 61 Ohio St.3d 624, 576 N.E.2d 772, this Court considered the constitutionality of such legislation and concluded that it was unconstitutional as the General Assembly cannot “enact legislation governing intentional torts that occur within the employment relationship, because such intentional tortious conduct will **always** take place outside that relationship.” *Brady* at 634. (Emphasis added.) In its review of the issue, this Court concluded that “[i]njuries resulting from an employer’s intentional torts, even though committed at the workplace, are utterly outside the scope of the purposes intended to be achieved *** by the Act. *Such injuries are totally unrelated to the fact of employment.*” *Id.* (Emphasis in original.)

Appellate courts have applied this Court’s “intentional torts will always take place outside the employment relationship” rationale to claims against political subdivision employers which allege an intentional tort. The appellate courts, with the exception of the recent *Sampson* decision by the Eighth District, have concluded that exception set forth in R.C. 2744.09(B) does not apply to employer intentional torts, and, therefore, political subdivisions are entitled to R.C.

Chapter 2744 immunity. See *Engleman, Schmitz, Stanley, Zieber, Terry, Fabian, Ellithorp, Sabulsky, and Williams*.

In their review of this issue, the appellate courts have noted that R.C. 2744.09 does not exempt intentional torts from the application of the privileges and immunities provided in R.C. Chapter 2744. The appellate courts have also noted that the exception language in R.C. 2744.09(B) is limited to “any matter that arises out of the employment relationship.” Relying on this Court’s decisions in *Blankenship* and *Brady*, the other courts have correctly concluded that intentional conduct is always outside the employment relationship and political subdivisions are entitled to R.C. Chapter 2744 immunity. *Engleman* at *5, *Stanley* at *8, *Zieber* at ¶29, *Terry* at ¶21, *Fabian* at *4, *Ellithorp* at *3, *Sabulsky* at ¶18, and *Williams* at ¶16.

“The rationale underlying this finding is that an employer’s intentional tort against an employee does not arise out of the employment relationship, but occurs outside of the scope of employment.” *Zieber* at ¶29; and *Terry* at 241. An intentional tort, therefore, “by its nature” cannot arise out of the employment relationship. *Fabian* at *3. (Emphasis in original.)

The appellate courts have also declined “to depart from established appellate law and find that R.C. 2744.09(B) does not except an employer intentional tort from immunity granted under the Political Subdivision Tort Liability Act.” *Zieber* at ¶29; and *Terry* at 241. See also *Engleman* at *5, *Sabulsky* at ¶19, and *Williams* at ¶17.

The Eighth District’s departure from established precedents in *Sampson* creates a conflict with the decisions of other appellate court districts and this Court should resolve the conflict by accepting jurisdiction over this case in order to consider the question of whether R.C. 2744.09(B) applies to an employer intentional tort allegedly committed by a political subdivision.

CONCLUSION

This case presents a matter of great public and general interest to all political subdivisions, at all levels of government, throughout Ohio. The exercise of jurisdiction over this case is warranted and respectfully requested.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction of Amicus Curiae the Ohio Municipal League* has been sent via regular U.S. mail, postage pre-paid this 3rd day of Sept., 2010 to:

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