

ORIGINAL

No. 10-1561

IN THE SUPREME COURT OF OHIO

DARRELL SAMPSON

*Appellee,*

v.

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

*Appellants.*

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

Court of Appeals  
Case No. 09-093441

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MEMORANDUM IN RESPONSE OF APPELLEE DARRELL SAMPSON

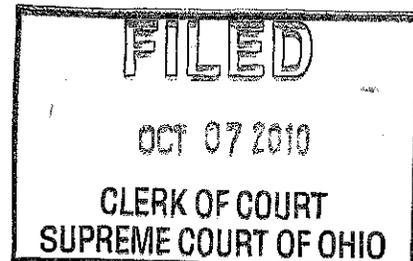
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THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

The Eighth District's *en banc* opinion in this case, affirming denial by a panel of the Court of sovereign immunity for Appellants Cuyahoga Metropolitan Housing Authority ("CMHA") and certain CMHA employees does not expand public employer liability as claimed by Appellants and does not present a question of public or great general interest. Sampson is a narrowly defined case in line with other cases that have applied R.C. 2744.09(B) to permit public employees to sue their political subdivision employers, as intended by the General Assembly. Appellants work to confuse the legal landscape by mixing the particular circumstances of this civil claim with decisions involving intentional workplace injuries compensable via the workers' compensation scheme, which have been held to be outside of the employment relationship.

Appellants try to extrapolate a narrow decision on claims of abuse of process, intentional infliction of emotional distress and negligent misidentification into a broad statement on political subdivision immunity. The Eighth District did not "undermine the bright line rule" of sovereign immunity stated in 2744.02 as CMHA proposes. It simply applied the plain meaning of R.C. 2744.09 (B) to 2744.02(A) and using basic principles of statutory construction, held, as have other Ohio courts, that public employees may sue their public employer for wrongs which arise out of the employment relationship. That this particular case is one which the totality of the circumstances led the Eighth District to find that the claims "stem from Sampson's employment with CMHA" (8<sup>th</sup> District Opinion at ¶ 35) does not mean that a question of public or great general interest is presented.

Appellants actually ask this Court to rewrite the statutory and case law defining the workers' compensation scheme to include intentional torts by employers not now included. The language of R.C. 2744.09(B) is clear, and barring unconstitutionality, authority to change it

remains with the General Assembly who is the “ultimate arbiter of public policy”. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 472 (2007) .

In their second proposition of law, Individual Appellants use this forum to reargue the facts of the underlying case. Both the trial and the appellate court, using the appropriate two-tiered analysis set out in R.C. 2744.02 and R.C. 2744.03 found sufficient evidence presented to create a genuine issue of material fact as to whether the conduct of the individual employees can be found to be with malicious purpose, in bad faith, or wanton or reckless, barring immunity pursuant to R.C. 2744.03(A)(6)(b). *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356 (1994). This question is entirely fact specific and primarily interests the individual plaintiffs and defendants, rather than presenting a legal question of public or great interest. See *Williamson v. Rubich*, 171 Ohio St. 253, 254 (1960) (“*the sole issue for determination at the hearing upon [a motion for jurisdiction] is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties*”). (emphasis in original.)

#### STATEMENT OF THE CASE

On August 31, 2006, Appellee Darrell Sampson filed a civil action against Appellants CMHA, CMHA Lt. Ronald Morenz, CMHA Police Chief Anthony Jackson and CMHA Executive Director George Phillips for abuse of process, intentional infliction of emotional distress, and negligent infliction of emotional distress and amended the complaint on October 16, 2006 to include a claim for negligent misidentification. CMHA moved to dismiss on immunity grounds and on October 2, 2007 the trial court denied the motion but dismissed the negligent infliction claim on other grounds.

Following discovery, all Defendants moved for summary judgment claiming immunity under R.C. 2744.02(C). Mr. Sampson argued that R.C. 2744.09(B) applies to preclude statutory immunity for CMHA and that R.C. 2744.03(A)(6)(b) applies to bar immunity for the individual defendants. The trial court agreed, denying summary judgment on June 3, 2009.

Defendants appealed to the Eighth Appellate District. A three-member panel affirmed on March 25, 2010 and Appellants moved the court to certify a conflict, to conduct a hearing *en banc*, and for reconsideration. The Eighth District convened *en banc* pursuant to Loc.App.R. 26 and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54 (2008). On July 22, 2010, the *en banc* court affirmed the panel's decision. The same day, the court denied Appellants' Motions to Certify a Conflict and for Reconsideration. On September 1, 2010, Appellants second Motion to Certify a Conflict filed on August 2, 2010 was denied. Appellants timely filed notice of appeal and Memorandum in Support of Jurisdiction on September 7, 2010. This response follows.

#### STATEMENT OF FACTS

On August 31, 2004, at 8:15 a.m., Darrell Sampson was called to the podium at the CMHA warehouse to be arrested and handcuffed in front of 200 fellow employees.

Mr. Sampson grew up in CMHA housing and in 1988, at age 22, he went to work as a Groundskeeper for CMHA. He was promoted to Serviceman IV in 1989 and to Serviceman V Plumber in 2000. He was the volunteer coach for his sons' basketball teams. He had never been arrested or charged with any offense and he was the elected Assistant Chief Steward of Local 47, SEIU, which represented the maintenance employees. He was to be named Chief Steward on September 1, 2004.

Each weekday morning at 8:00 a.m. the plumbers, Mr. Sampson among them, reported for work at the plumbers' shop on Quincy Avenue, where they punched in, picked up tools, and

received their work orders. Plumbers were required to travel to CMHA properties throughout Cuyahoga County using special equipment and a variety of vehicle types. The fuel for all CMHA vehicles was purchased using "gas cards" that required personal identification numbers ("PINS"). The cards were issued by Wright Express, an independent payment processing company, and CMHA issued the PINS. Although there was supposed to be a gas card in each vehicle, some vehicles had no cards. Plumbers faced with a missing card were instructed to use a card from a different vehicle. Although each plumber was supposed to have his own PIN, some had none assigned. Plumbers who lacked a PIN were instructed to use a co-worker's.

In September 2003, an internal audit of excessive painter overtime revealed that private homes were being painted on CMHA time. The ensuing investigation by CMHA Internal Security with help from the CMHA Detective Bureau and HUD, included logged surveillance of suspected employees, documented review of time cards and personnel files, investigation activity logs and photographs of the suspect work. Depicted in photographs, two employees cooperated, implicating others, resulting in additional surveillance, videos and additional recorded statements. The investigation, called "Operation Overworked," lasted over ten months ending in August 2004. Seven painters including the initial targets were arrested on August 31, 2004.

On July 20, 2004, ten months after the painter investigation began, an anonymous tip on the CMHA TIPS hotline accused plumber Alvin Roan of using his CMHA gas card to fuel his personal vehicle. At the direction of Appellant Director Phillips, the investigation (assigned to Appellant Lt. Morenz) targeted all of the plumbers. Lt. Morenz' investigation consisted entirely of a review of Wright Express gas card transactions and plumber time cards for the period of January 1, 2004 through July 2004, an unrecorded interview with an unidentified Chevrolet dealership service employee regarding fuel tank capacity, and an unrecorded interview of a

CMHA assistant chief of building maintenance as to what cars the plumbers drove. There were no other interviews, no surveillance, no documented activities, no photographs, no video, and no notes or statements of interviews or summaries.

This "investigation" took less than four weeks, ending days before the mass arrest on August 31, 2004. Lt. Morenz mistakenly reported that all plumbers had their own PINs and that each vehicle had its own gas card. Although he learned that this was not true as early as August 2004, he did not change his report until January 2005.

Sometime prior to August 31, 2004, Director Phillips and Chief Jackson met "a few times" regarding the evidence collected. During the last week of August, they decided that in order to make a point for CMHA's residents and to construct a lesson for the employees, they would call a special meeting of all 200 maintenance employees at the CMHA on Lakeside Avenue and arrest the plumbers and painters at the meeting.

Instead of the normal routine checking in at the plumbing shop, the plumbers were directed to go to the warehouse. When Mr. Sampson at about 8:15 a.m., he thought he might be getting an award. Mr. Phillips was speaking as he entered. After a pause, Sgt. Morgan began to call employees including Mr. Sampson to the front of the room. When 13 names (7 painters and 6 plumbers) had been called, Morgan announced to the room that these men were under arrest for theft. The room went silent. One by one, each of the 13 was handcuffed and searched. As they were led away, Director Phillips announced this is what happens to you when you try to steal from CMHA. Handcuffed, the arrestees were marched past a partial wall (still viewable by the crowd) to be photographed and booked and then led outside past waiting television cameras into squad cars. A press release announced:

The arrest of 13 employees on suspicion of bribery, theft in office, forgery, tampering with government records, complicity and misuse of agency equipment.

The arrests, which were the result of a nine-month long investigation known as 'Operation Overworked' were made during a staff meeting with maintenance workers at CMHA's Maintenance Facility, 4700 Lakeside Avenue.

In fact, the nickname "Operation Overworked" referred only to the separate eleven-month investigation of the CMHA painters, not the four-week "investigation" of the plumbers. The employee plumbers (as well as the painters) were jailed overnight only to be released without charge the next day. Ultimately the cases against the plumbers were each dismissed with prejudice by the State.

Mr. Sampson was terminated by CMHA on October 14, 2004. Upon an arbitrator's finding that "the preponderance of the evidence shows no theft of gasoline at all, much less any evidence that the grievant was guilty of such a theft", Mr. Sampson was ordered reinstated in March 2006. But the job he returned to was not the job he left. He was given lesser tasks, was not permitted to travel between locations, and was not permitted to get his own tools and equipment. He became physically ill, resulting in treatment for post-traumatic stress disorder.

#### ARGUMENT

**Appellants' 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.**

**Appellee's Response: There Is No Language In R.C. 2744.09 Excepting Intentional Torts From The Application Of Chapter 2744. Intentional Torts Can Arise Out Of The Employment Relationship In The Context Of R.C. 2744.09.**

- A. Appellee's reliance on the *Blankenship-Brady* line of cases to argue that Mr. Sampson's civil action does not arise out of the employer/employee relationship distorts the intention of those decisions and is misplaced, based on the context of R.C. 2744.09 and the facts of this case.

Over the last three decades, this court has developed the law of "workplace intentional torts" in the employment relationship, attempting to determine its correct position within the workers' compensation scheme. This court has most recently traced this judicial and legislative

lineage in *Kaminski v. Metal & Wire Prod.*, 125 Ohio St.3d 250, 253-262 (2010). Starting with *Blankenship v. Cincinnati Milacron Chem.*, 69 Ohio St.2d 608, in 1982, this Court established an exception for intended injury to workers' compensation as the employee's exclusive remedy for workplace personal injury, holding that an intentional tort was not an injury arising out of the employment relationship within the meaning of Ohio's worker's compensation statute (R.C. 4123.74). *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90 (1984), *Van Fossen v. Babcock & Wilcox*, 36 Ohio St.3d 100 (1988) and *Fyffe v. Jenos*, 59 Ohio St.3d 115 (1991), as well various iterations of workers' compensation legislation further defined and modified "intentional torts" were subject to suit outside of the worker's compensation scheme. In *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624 (1991), this Court repeated that "[A] cause of action brought by an employee alleging intentional tort by the employer in the workplace is not preempted by [the workers' compensation scheme]. While such a cause of action contemplates redress of tortious conduct that occurs during the course of employment, an intentional tort alleged *in this context* necessarily occurs outside the employment relationship." *Brady*, 61 Ohio St.3d at 635 (emphasis added). In its opinion in *Sampson*, the Eighth District stated the proper context of *Brady*, noting that reliance on *Brady's* holding in the context of political subdivision immunity is misplaced because "*Brady* was a workers' compensation case and never dealt with sovereign immunity or R.C. 2744.09(B)."

B. Analysis of Appellants' claim of immunity in this case requires the application of basic principles of statutory construction leading to the conclusion that with the exception of cases covered by Chapter 4123, R.C. 2744.09(B) generally applies without regard to whether a tort by a public employee is alleged to be intentional or not.

The Eighth District's interpretation of R.C. 2744.09(B) is a classic example of interpreting and applying a statute as the legislature wrote and intended it. When the meaning of a statute is unambiguous and definite, a court is required to apply the statute as it is written.

*Portage County Bd. of Comm'ers v. City of Akron*, 109 Ohio St.3d 106, 116, (2006) (citing *State ex rel. Savarese v. Buckeye Loc. Sch. Dist. Bd. of Educ.*, 74 Ohio St.3d 543 (1996)). The principles of statutory construction are used to discern the actual meaning of a statute in order to give effect to the intent of the legislature, and a court must “read words and phrases in context according to the rules of grammar and common usage” *State ex rel. Knowlton v. Noble County Bd. of Educ.*, \_\_ Ohio St.3d \_\_ (Ohio, Sept. 22, 2010) (citing *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355 (2004) and *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559)); R.C. 1.42. The Court is not free to ignore or add words. *Portage County Bd. of Comm'rs*, 109 Ohio St.3d at 116 (citing *State ex rel. Burrows v. Indus. Comm.* 78 Ohio St.3d 543, 545 (1997)).

R.C. 2744.09(B) provides that “[t]his 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). In this case, the Eighth District found that when the conduct upon which the employee has filed a civil action arises out of the employment relationship, the employer is not immune. Appellate courts in addition to the Eighth District have applied principles of statutory construction to R.C. 2744.09(B) to the same effect. The Tenth District has held that when reading the language of R.C. 2744.09, the “meaning is apparent.” *Marcum v. Rice*, 1999 WL 513813 at \*6 (10<sup>th</sup> Dist. July 20, 1999). Marcum claimed defamation, conspiracy and other torts. Noting that its reading comported with the plain meaning of the statute, a primary goal of statutory construction, the Court held that in combination with R.C. 2744.09(C), “R.C. 2744.09(B) makes R.C. Chapter 2744 inapplicable to all other civil actions brought by

employees of political subdivisions . . . against their political subdivisions which arise out of the employment relationship.” *Id.*

In a gender discrimination case involving a clerk’s civil action against her city council employer, the Eleventh District affirmed summary judgment on the merits, but denied the city council immunity because “this is precisely the situation in which the Ohio Legislature intended that sovereign immunity be inapplicable.” *Poppy v. Willoughby Hills City Council*, 2005-Ohio-2071 (11<sup>th</sup> Dist. 2005). In *Patrolman X v. City of Toledo*, 132 Ohio App.3d 374, 396-97 (6<sup>th</sup> Dist. 1999). affirming summary judgment on the merits, the Sixth District noted that under the language of R.C. 2744.09(B), the city was not immune from liability for a common law privacy tort because the claim arose from the plaintiff’s employment relationship with the city.

C. At least six appellate courts have effectively delineated between “workplace intentional torts” in the worker’s compensation context and intentional torts that “arise out of the employment relationship” in the context of R.C. 2744.09(B).

In order to create a conflict where there is none, Appellants have cited to the following cases as conflicting with the Eighth District’s decision in Sampson: *Ellithorp v. Barbarton City School Dist. Bd. of Ed.*, 1997 WL 416333 (9th Dist. 1997) (Teacher Ellithorp was injured when a classroom window dislodged from its frame and struck her on the head.); *Engleman v. Cincinnati Bd. of Educ.*, 2001 WL 705575 (1st Dist. 2001) (Ms. Engleman was a special education teacher who was physically injured by a student.); *Fabian v. City of Steubenville*, 2001-Ohio-3522 (7<sup>th</sup> Dist. 2001) (Fabian, an operator at the wastewater treatment plant, sustained physical injuries from a leaking chlorine tank); *Sabulsky v. Trumbull County*, 2002-Ohio-7275 (11th Dist. 2002) (Sabulsky, a corrections officer, was injured during an altercation with inmates.); *Schmitz v. Xenia Bd. of Ed.*, 2003 WL 139970 (2nd Dist. 2003) (Mrs. Schmitz, a school custodian’s wife, sued to recover for her husband’s death who fell while trying to change a light bulb in a parking

lot.); *Stanley v. City of Miamisburg*, 2000 WL 84645 (2nd Dist. 2000) (Stanley, a former police officer, alleged various intentional tort claims including retaliation, assault and battery, defamation and “intentional tort”. Immunity was upheld on the “Intentional Tort”. The other claims were dealt with on other grounds.); *Terry v. Ottawa County Bd. of Mental Retardation & Developmental Disabilities*, 151 Ohio App.3d 234 (6th Dist. 2002) (Terry alleged personal injury caused by an unhealthy workplace.); *Williams v. McFarland Properties, et al.*, 177 Ohio App.3d 490 (12th Dist. 2008) (Williams, a city lineman, was burned when he attempted to repair a downed electrical transformer.); *Zieber v. Heffelfinger*, 1994-Ohio-394 (5th Dist. 2009) (Ms. Zieber was injured when a co-worker pushed her.); *Abdalla v. Olexia*, 1999 WL 803592 (7<sup>th</sup> Dist. 1999) (Sheriff’s civil action against county employees who denied reimbursement to him for legal fees incurred defending federal extortion and obstruction of justice charges.); *Coats v. Columbus*, 2007-Ohio-761 (10<sup>th</sup> Dist. 2007) (Employee’s estate sued for intentional infliction of emotional distress following his suicide.)

In its opinion in *Sampson*, the Eighth District simply recognized that an employer’s conduct can create an intentional tort that is within the employment context by way of R.C. 2744.09, excepting the claim from R.C. 2744 statutory immunity. (*en banc* Decision at ¶ 35). A finding that intentional torts *can* arise from within the employment relationship with respect to R.C. 2744.09(B) is not tantamount to a finding that intentional torts by employers against their employees must per se fall within the employment relationship. As the Eighth District correctly held, having 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.” (Opinion at p. 13.) The court found that the particular facts of *Sampson* involved torts whether intentional or

negligent, which arose “out of the employment relationship between the employee and the political subdivision” as described by R.C. 2744.09(B), thereby removing the matter from Chapter 2744 and the immunity afforded therein.

Despite Appellants portrayal of the Eighth District’s decision as “new” (page 11), the application of R.C. 2744.09(B) to employee claims involving intentional torts is neither new nor difficult. The 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Districts have all applied R.C. 2744.09(B) to intentional torts by political subdivisions. See, e.g., *Davis v. City of Cleveland*, 2004-Ohio-6621 at ¶ 34 (8th Dist. 2004) (affirming summary judgment based on the merits, but holding that Chapter 2744 immunity was not applicable since plaintiff’s “claims for defamation and invasion of privacy are civil actions that arise out of [the plaintiff’s] employment with the city.”); *Nagel v. Horner*, 162 Ohio App.3d 221, 222 (4<sup>th</sup> Dist. 2005) (Affirming denial of immunity in a civil suit by a former police officer for *inter alia* retaliation and hostile work environment, “regardless of whether they can be classified as intentional torts, retaliation and hostile work environment claims are causally connected to the employment relationship and thus arise out of it.”); *Patrolman “X” v. City of Toledo*, 132 Ohio App.3d 374 (6<sup>th</sup> Dist. 1999) (city was not entitled to immunity in a police officer’s invasion of privacy claim because the claims arose from his employment with the city.); *Marcum v. Rice*, 1999 WL 513813 (10<sup>th</sup> Dist. 1999) (Affirming denial of immunity in employee’s defamation action resulting from a mayoral investigation). See also *Poppy v. Willoughby Hills City Council*, 2005-Ohio-2071 at ¶ 29 (11<sup>th</sup> Dist. 2005), *supra*; *Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm’n*, 74 Ohio St.3d 120, 123 (1995) (this Court denied immunity in a race and sex discrimination case, citing R.C. 2744.09(B) and (C)).

In a retired police officer’s age-discrimination case against the city, the Second District held that “[d]ischarge is clearly a matter that stems from an employment relationship.

Consequently, because R.C. 2744.09 allows suit against political subdivisions for matters arising out of an employment relationship, actions for wrongful would be permitted. The case law on this issue is sparse, but that is not surprising in view of such an obvious point.” *Gessner v. City of Union*, 159 Ohio App.3d 43, 50 (2d Dist. 2004). The Second District recently declined to reconsider *Gessner*, in *Ogilbee v. Bd. of Educ. Of Dayton Pub. Sch.*, 2010-Ohio-1913 at ¶ 16-19 (2<sup>nd</sup> Dist. Apr. 30, 2010).

*Stanley v. Miamisburg*, *supra*, relied on by Appellants to demonstrate a “conflict” among the districts, actually shows that courts can deftly address the difference between physical intentional torts compensable via the worker’s compensation system and others..

In *Fleming v. Ashtabula Area City Sch. Bd. of Educ.*, a former substitute teacher filed a civil action against the school board for defamation and intentional infliction of emotional distress. The trial court denied summary judgment, holding that “[i]f 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).” *Fleming v. Ashtabula Area City Sch. Bd. of Educ.*, 2008-Ohio-1892 at ¶ 41 (11<sup>th</sup> Dist. Apr. 18, 2008). The school board appealed to this Court, asserting as a matter of public or great general interest that intentional torts do not arise out of the employment relationship for purpose of R.C. 2744.09(B). This Court denied cert at 119 Ohio St.3d 1473 (Ohio Oct 01, 2008), reconsideration denied by 120 Ohio St.3d 1423 (Ohio Dec 03, 2008).

**Appellants’ 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.**

**Appellee's Response: When Evidence Is Presented Sufficient To Create A Genuine Issue Whether An Employee Of A Political Subdivision Acted With Malicious Purpose, In Bad Faith, Or In A Wanton Or Reckless Manner, A Question Is Presented That Precludes Summary Judgment On The Basis Of Immunity.**

There is a presumption of immunity for individual employees of political subdivisions, but this presumption is not absolute. R.C. §2744.03(A)(6)(b) by its terms abrogates R.C. 2744.02(A) immunity when an “employee’s actions or omissions are manifestly outside the scope of employment or the employee’s acts or omissions were malicious, in bad faith, or in a wanton or reckless manner.” (emphasis added). The individual Appellants want to claim, of course, that they were merely negligent. But the question whether R.C. 2744.03(A)(6)(b) applies is fact specific and as the Eighth District found, the facts in this case speak for themselves:

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.)

On June 4, 2008, this Court decided *Rankin v. Cuyahoga County Dept. of Children and Family Services*, 118 Ohio St.3d 392, 398 (2008) and *O’Toole v. Denihan*, 118 Ohio St.3d 374, 387 (2008). Appellants cite to *O’Toole* but not to *Rankin*, in which this Court held that summary judgment on the issue of 2744.03(A)(6)(b) immunity was inappropriate where issues of material fact remained. See also, *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356 (1994), *O’Toole v. Denihan*, 118 Ohio St.3d at 387 (2008).

For the purposes of R.C. 2744.03(A)(6)(b), the conduct of political employees must be “malicious, in bad faith, or in a wanton or reckless manner.”

The cases cited to by Appellants all concern investigations conducted by public employees that were, at most arguably negligent, but not reckless, wanton or in bad faith. In each, summary judgment was granted based on the facts of the cases: In *O'Toole v. Denihan*, Plaintiff brought a wrongful death action against the county and individual employees alleging that deficiencies in a child abuse investigation led to the child's death. The trial court granted summary judgment to the defendants and the Eighth District reversed. This Court reversed, finding that employee's failure to complete certain paperwork did not rise to the level of reckless in light of other factors. *O'Toole*, 118 Ohio St. at 387. In *Miller v. Central Ohio Crime Stoppers Inc.*, 2008-Ohio-669 (10<sup>th</sup> Dist. 2008), Plaintiff's name and photograph were included in a list of "Most Wanted" published in the Columbus Dispatch although a warrant issued against plaintiff for bribery and intimidation of a victim was no longer valid. A retraction was issued the following week. Plaintiff sued Crime Stoppers, the newspaper, the city, and the police detective who provided the list. The trial court dismissed the claim against the newspaper and granted summary judgment to the other defendants based on Chapter 2744 immunity and the Tenth District affirmed, noting evidence that the detective checked the validity of the warrant and if not, the conclusion could only be simple negligence. In *Boyd v. Lexington*, 2002-Ohio-1285 (5<sup>th</sup> Dist. 2002), a police officer was called to a disturbance involving Boyd at a pizza store. Boyd refused to leave the store upon the officer's request, stating that he was an owner. After another request and another refusal, the officer arrested Boyd who filed federal civil rights claims and state tort claims based on wrongful arrest and false imprisonment. The Fifth District affirmed summary judgment for the officer based on the facts of the case finding the arrest was either supported by probable cause, or at most, the officer's conduct could be considered negligent.

To the contrary, Mr. Sampson presented evidence that Appellants conducted a rushed, incomplete and admittedly flawed investigation, followed by an unnecessary arrest orchestrated for maximum effect as a lesson for employees, intentionally misrepresented to the public as being part of a separate, more thorough investigation. In this case, the actions of Defendants are not isolated and independent of each other. "Each of the numerous actions and inactions over the relevant period of time, standing alone, may not rise to the level of such malice, bad faith or wanton reckless conduct. However, when considered in concert and context, as they must be, they cumulatively create a genuinely disputed question of material fact...[making] summary judgment inappropriate." *Riggs*, 2008-Ohio-4697 at ¶ 90. Because Mr. Sampson presented evidence of actions and inactions by the individual defendants which, taken "in concert and context", raise genuine issues of fact, the Eighth District correctly affirmed the trial court's denial of immunity.

CONCLUSION. No question of public and great general interest is presented in this case. Ohio courts, including the Eighth Appellate District have been able to apply the clear mandate of R.C. 2744.09(B) to distinguish employment-related suits involving intentional torts from suits involving intentional injuries compensable under the worker's compensation system. As to the individual defendants, evidence was presented to establish genuine issues of material fact as to whether their conduct was malicious, in bad faith or in a reckless manner under R.C. 2744.03(A)(6), to make summary judgment inappropriate. This question is one of the weight of the evidence, important to the parties but not to the public.

Respectfully submitted,

  
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Certificate of Service

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