

Stephen L. Byron #0055657 (*Counsel of Record*)
Rebecca K. Schaltenbrand #0064817
Schottenstein Zox & Dunn Co. LPA
4230 State Route 306, Suite 240
Willoughby, Ohio 44094
Telephone: (440) 951-2303
Facsimile: (216) 621-5341
sbyron@szd.com

John Gotherman #0000504
Ohio Municipal League
175 S. Third Street #510
Columbus, Ohio 43215
Telephone: (614) 221-4349
Facsimile: (614) 221-4390
jgotherman@columbus.rr.com

Stephen J. Smith #0001344
Schottenstein Zox & Dunn Co. LPA
250 West Street
Columbus, Ohio 43215
Telephone: (614) 462-2800
Facsimile: (614) 462-5135
ssmith@szd.com

Counsel for Amicus Curie The Ohio Municipal League

APPELLEE'S MEMORANDUM OF OBJECTION TO
RECONSIDERATION OF APPELLANTS' ISSUE II

On December 15, 2010, the Court accepted jurisdiction over proposition of law I of Appellants' Memorandum in Support of Jurisdiction and denied jurisdiction over proposition of law II. Appellants now ask the Court to reconsider its denial of jurisdiction over the second proposition of law.

The standard this Court has set for itself in accepting a motion for reconsideration is derived from Supreme Court Rule of Practice XI(2). The Rule provides in part that "[a] motion for reconsideration shall not constitute a reargument of the case..." S.Ct. Prac. R. XI(2)(B). Therefore, a rehash of matters already decided by the Court is not authorized by the Rule. *State ex rel. Shemo v. City of Mayfield Heights*, 96 Ohio St.3d 379, 2002-Ohio-4905, at ¶9. Where a motion raises no germane arguments of fact or law that were not considered by the Court in the disposition of appellant's appeal, the motion should be overruled. See *City of Rocky River v. State Employment Relations Board* (May 10, 1989), 43 Ohio St.3d 1, at paragraph two of the syllabus.

In their Motion, the individual Appellants make the amazing argument that because the Court has accepted the appeal of CMHA on Proposition of Law No. I, it must necessarily accept their Proposition of Law (No. II) because both arise out of the same set of circumstances. In other words, apparently whenever this Court agrees to hear a proposition of law in a case it must necessarily hear all other propositions if they arise out of the same facts, even when, as here, the issues concern the application of different statutes to different parties.

In making their argument, the individual Appellants (or is it CMHA) present snippets (from Appellee's deposition taken in November 2008). These snippets were not provided to the Court by Appellants in their brief in support of jurisdiction, or referred to below. The snippets

are mixed together with a quoted phrase from the *Wherefore Clause* of the Complaint and a deposition quote in bold labeled "A". Ignoring all facts contained in the 73-page deposition of Mr. Sampson and the 717-pages contained in the depositions of George Phillips, Anthony Jackson Ronald Morenz and another CMHA employee, "Appellants" now argue that these out of context snippets demonstrate that "Sampson does not differentiate" between CMHA and the three individuals" and presumably (if true) this would mean that the Court should not do so

It is correct as Appellants state, that a political subdivision (as any entity) can act only through its employees. It is also an accurate statement of the law that public employees who act in a manner which does not give them the benefit of immunity are liable on their own for their acts. When evidence is presented sufficient to create a genuine issue whether an employee of a political subdivision acted with malicious purpose or in bad faith, or in a wanton or reckless manner, a question is presented that precludes summary judgment on the basis of immunity, as the lower court and the appellate court found.

R.C. 2744.02(A) provides a presumption of immunity for individual employees of political subdivisions, but R.C. 2744.03(A)(6)(b) by its terms abrogates that immunity when "... the employee's acts or omissions were malicious, in bad faith, or in a wanton or reckless manner." (emphasis added). The question whether R.C. 2744.03(A)(6)(b) applies in any particular case to any particular public employee 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.)

(8th District Opinion at ¶ 45.)

It has long been the law that summary judgment on the issue of R.C. 2744.03(A)(6)(b) immunity is inappropriate where, as here, issues of fact material to the character of the individual defendants' actions exist. *Garrison v. Bobbitt*, 134 Ohio St.3d 373 (2nd Dist. 1999) This was the finding below. See also, *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356 (1994).

CONCLUSION

Appellants have not presented new facts or germane legal arguments which morph the factual questions underlying the individual Appellants' claims of immunity into questions of "public or great general interest as distinguished from questions of interest primarily to the parties". *Williamson v. Rubich*, 171 Ohio St.3d 253, 254 (1960).

WHEREFORE, Appellant respectfully asks the Court to deny Appellants' Motion for Reconsideration.

Respectfully submitted,


NANCY C. SCHUSTER #0020690
2913 Clinton Avenue
Cleveland, Ohio 44113
(216) 348-1100 (Telephone)
(216) 348-0013 (Facsimile)
ss@apk.net (e-mail)
by Consent

Counsel of Record for Appellee

CERTIFICATE OF SERVICE

I certify that a copy of this Appellee's Memorandum of Objection to Reconsideration of Appellants' Issue II was sent by ordinary U.S. Mail to the following, on January 6, 2011:

Aretta K. Bernard
Karen D. Adinolfi
Stephen K. Funk
Roetzel & Andress, L.P.A.
222 South Main Street
Akron, Ohio 44308

Counsel for Defendants-Appellants

Stephen L. Byron
Rebecca K. Schaltenbrand
Schottenstein Zox & Dunn Co. LPA
4230 State Route 306, Suite 240
Willoughby, Ohio 44094

*Counsel for Amicus Curie
The Ohio Municipal League*

John Gotherman
Ohio Municipal League
175 S. Third Street #510
Columbus, Ohio 43215

*Counsel for Amicus Curie
The Ohio Municipal League*

Stephen J. Smith
Schottenstein Zox & Dunn Co. LPA
250 West Street
Columbus, Ohio 43215

*Counsel for Amicus Curie
The Ohio Municipal League*


NANCY C. SCHUSTER #0020690

Counsel of Record for Appellee