

**IN THE SUPREME COURT OF OHIO**

Jeffrey Buck

Appellee,

v.

Village of Reminderville, *et al.*

Appellants.

Case No.

**11-0258**

On Appeal from the Summit  
County Court of Appeals, Ninth  
Appellate District

Court of Appeals  
Case No. 25272

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**APPELLANT VILLAGE OF REMINDERVILLE'S  
MEMORANDUM IN SUPPORT OF JURISDICTION**

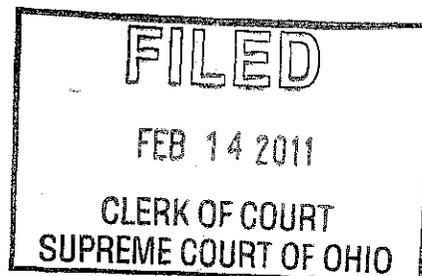
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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

This Court has already determined that the Proposition of Law presented is one of public and great general interest. Indeed, this Court recently accepted for review the same proposition of law in Sampson v. Cuyahoga Metro. Housing Auth., Ohio Supreme Court Case No. 2010-1561, which has entered the merit briefing stage.

The case *sub judice* presents an identical legal issue. To ensure that the law is applied in a fair, consistent, and just manner, the Court should accept this discretionary appeal.

**STATEMENT OF THE CASE AND THE FACTS**

Buck is a full-time employee of the Village of Reminderville, a governmental entity, serving in the capacity of Police Chief. Complaint ¶¶2-3. Varga, a Sergeant in the Village's Police Department, is a full-time employee who is supervised by Buck. *Id.* at ¶4.

Buck alleges that on or about November 15, 2009, Varga sent Village Council a letter that contained numerous false and defamatory accusations. *Id.* at ¶5. Complaint ¶6 purports to summarize the allegations contained in the November 15, 2009 letter. Since those allegations are not germane to this disposition of this Appeal, they will not be repeated herein.

On November 20, 2009, Plaintiff-Appellant Buck (hereafter "Buck") filed his Complaint against Defendant-Appellee Village of Reminderville (hereafter "the Village") and co-Defendant Michael Varga (a Village of Reminderville employee who was on a medical leave of absence at the time of the alleged acts of defamation). In presenting his

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 1

### 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.**

- A. As the Ohio Supreme Court recognized in *Wilson vs. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450, political subdivisions have immunity from suits asserting intentional tort claims against their employees.

The general rule is that the immunity conferred by Chapter 2744 “applies to shield the exercise of governmental or proprietary functions unless the injured party is entitled to rely on one of the exceptions specifically recognized by statute.” *Nungester v. Cincinnati* (1<sup>st</sup> Dist. 1995), 100 Ohio App.3d 561, 565. “R.C. 2744.02(B) provides five exceptions to the immunity created in R.C. 2744.02(A)(1) for political subdivisions.” *Wilson vs. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450. The Ohio Supreme Court has analyzed those exceptions as follows:

One of the exceptions, R.C. 2744.02(B)(2), establishes liability of political subdivisions for injuries caused by negligent acts performed by an employee with respect to proprietary functions. There is, however, no such general exception for governmental functions. Consequently, except as specifically provided in R.C. 2744.02(B)(1), (3), (4) and (5), with respect to governmental functions, political subdivisions retain their cloak of immunity from lawsuits stemming from employees’ negligent or reckless acts. See *Garrett v. Sandusky* (1994), 68 Ohio St. 3d 139. **There are no exceptions for the intentional torts of fraud and intentional infliction of emotional distress.**

*Id.* at 452 (emphasis added).

- B. The conflict among Ohio’s appellate courts regarding the applicability of R.C. 2744.09(B) to intentional tort claims against political subdivisions.

Until recently, the Fifth District’s characterization of the state of the law in Ohio was the prevailing view. “Ohio courts have consistently held that political subdivisions are immune under R.C. 2744.02 from intentional tort claims.” *Zieber v. Heffelfinger* (5<sup>th</sup>

Dist.), 2009 Ohio 1227, ¶27. More importantly, the Fifth District rejected the plaintiff-employee's argument that R.C. § 2744.09(B) permitted her intentional tort claim against the political subdivision employer (Richland County): "While Appellant's injuries arguably occurred within the scope of her employment, *we agree with the majority of other appellate courts* that 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[.] *Id.* at ¶29. The *Tenth* District had a similar observation in *Coats v. City of Columbus* (10<sup>th</sup> Dist.), 2007 Ohio 761, where the court held that "Ohio courts have traditionally and consistently held that since R.C. 2744.02 includes no provisions excepting intentional torts from the general rule of immunity, political subdivisions are immune from intentional tort claims" *Id.* at ¶14.

Some of the appellate districts have been fairly consistent in their application of the law. The *Sixth* District has held that "R.C. 2744.09(B) does *not* remove an employer's immunity for intentional torts as granted under Chapter 2744." *Villa v. Vill. of Elmore* (6<sup>th</sup> Dist.), 2005 Ohio 6649, ¶36 (emphasis added), citing *Terry v. Ottawa County Board of MRDD* (6<sup>th</sup> Dist. 2002), 151 Ohio App.3d 234, 2002 Ohio 7299, 783 N.E.2d 959. Likewise, in its one known decision, the *Seventh* District has reached the same conclusion. See *Fabian v. City of Steubenville* (7<sup>th</sup> Dist.), 2001 Ohio 3522, 2001 Ohio App. LEXIS 4533. Likewise, in *Oglesby v. City of Columbus* (10<sup>th</sup> Dist. 2001), 2001 Ohio App. LEXIS 438, discr. app. den. (2001), 92 Ohio St.3d 1418; 748 N.E.2d 550, which was a case presenting an intentional tort claim (intentional infliction of emotional distress) by one city employee against another city employee, the *Tenth*

District held that “It is well-settled that political subdivisions are not liable for intentional torts committed by their employees.”

Until its decision in the case *sub judice*, the Ninth District had consistently held “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.” *Ellithorp v. Barberton City Sch. Dist. Bd. of Educ.* (9<sup>th</sup> Dist. 1997), 1997 Ohio App. LEXIS 3053, discr. app. over’d (1997), 80 Ohio St.3d 1445, 686 N.E.2d 273; *Monesky v. Wadsworth* (9<sup>th</sup> Dist. 1996), 1996 Ohio App. LEXIS 1402. Subsequent to *Ellithorp* and *Monesky*, the Ninth District rejected intentional tort claims against political subdivisions/public employers. *See, e.g., Stoll v. Gardner* (9<sup>th</sup> Dist. 2009), 182 Ohio App.3d 214, 220, discr. app. over’d (2009), 122 Ohio St.3d 1506, 2009 Ohio 4233, 912 N.E.2d 109; *Thornton v. Summit Cty. Children Servs. Bd.* (9<sup>th</sup> Dist.), 2007 Ohio 4657, at ¶7-23 (applying immunity protection to a political subdivision's employee for defamation and intentional infliction of emotional distress); *Davis v. City of Akron* (9<sup>th</sup> Dist.), 2005 Ohio 3629, ¶1, discr. app. over’d (2005), 107 Ohio St.3d 1683; 2005 Ohio 6480; 839 N.E.2d 403; *Dolis v. City of Tallmadge* (9<sup>th</sup> Dist.), 2004 Ohio 4454, ¶6, discr. app. over’d (2004), 104 Ohio St.3d 1461; 2005 Ohio 204; 821 N.E.2d 578 (“[A]n employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside the scope of employment.”); *Bays v. Northwestern Local Sch. Dist.* (9<sup>th</sup> Dist.), 1999 Ohio App. LEXIS 3343, \*11-12 (court of appeals concluded that “an intentional tort committed by an employer against an employee is not included within the exception to immunity set forth in Section 2744.02(B)(4) of the Ohio Revised Code.” Based upon our decision in *Ellithorp*, appellants are immune from liability for Bays’

intentional tort claims.); *Lyren v. Village of Wellington* (9<sup>th</sup> Dist.), 1999 Ohio App. LEXIS 4031, \*3-4. The Ninth District's decision in this case overruled more than 20 years of precedent.

Other appellate districts have cases espousing both points of view depending on the panel of judges. In other words, the law has not been consistently applied within the appellate district.

The *Eleventh* District has held that “[I]ntentional tort claims are, by the express terms of the statute, not subject to any exception under R.C. 2744.02(B).” *Alden v. Kovar* (11<sup>th</sup> Dist.), 2008 Ohio 4302, ¶63; see also *Sabulsky v. Trumbull County* (11<sup>th</sup> Dist.), 2002 Ohio 7275, ¶18, discr. app. over’d (2003), 98 Ohio St.3d 1567 (“Ohio appellate courts have held that R.C. 2744.09 has no application to intentional tort claims.”); *Iberis v. Mahoning Valley Sanitary Dist.* (11<sup>th</sup> Dist.), 2001 Ohio 8809, at \*19 (holding that a claim of defamation was an intentional tort, entitling a political subdivision to immunity as set forth in R.C. Chapter 2744 and, therefore, defendant was immune from liability); *Iberis; LRL Properties v. Portage Metro. Housing Authority* (11<sup>th</sup> Dist. 1999), 1999 Ohio App. LEXIS 6130. “Because an intentional tort is not the result of negligence, an intentional tort is not an exception to the broad immunity generally enjoyed by political subdivisions.”). However, for a diametrically opposite point of view from the Eleventh District, see *Fleming v. Ashtabula Area City Sch. Bd. of Educ.* (11<sup>th</sup> Dist. 2008), 2008 Ohio 1892.

Prior to the *en banc* decision in *Sampson v. Cuyahoga Metro. Housing Auth.*, most of the *Eighth* District decisions found that the political subdivision was entitled to immunity from alleged intentional torts by one employee against another. In *Ventura v.*

*City of Independence* (8<sup>th</sup> Dist. 1998), 1998 Ohio App. LEXIS 2093, the Eighth District rejected a plaintiff-employee's argument that R.C. § 2744.09(B) creates an exception to immunity for political subdivision employer intentional torts. Subsequently, in *Nielsen-Mayer v. Cuyahoga Metro. Hous. Auth.* (8<sup>th</sup> Dist. 1999), 1999 Ohio App. LEXIS 4096, the Eighth District (citing *Ventura*) reached the same conclusion where the plaintiff-employee complained about abusive conduct directed at him by his supervisor. In rejecting the plaintiff-employee's intentional infliction of emotional distress claim, which was based upon co-employee conduct, the court of appeals found that immunity barred that intentional tort claim.

In *Chase v. Brooklyn City Sch. Dist.* (8<sup>th</sup> Dist. 2001), 141 Ohio App.3d 9, discr. app. denied (2001), 91 Ohio St. 3d 1529, 747 N.E.2d 253, the Eighth District rejected the plaintiff-employee's intentional tort claim. In so ruling, the court relied upon its prior decision in *Ventura, supra*, and the Ninth District's decision in *Ellithorp v. Barberton City Sch. Dist. Bd. of Educ.* (9<sup>th</sup> Dist. 1997), 1997 Ohio App. LEXIS 3053, discr. app. over'd (1997), 80 Ohio St.3d 1445, 686 N.E.2d 273, in holding that "R.C. 2744.09(B) does not create an exception to the immunity granted to political subdivisions by R.C. 2744.02(A)(1)."

In *Daniel v. Cleveland Mun. Sch. Dist.* (8<sup>th</sup> Dist.), 2004 Ohio 4632, discr. app. denied (2004), 104 Ohio St.3d 1441; 2004 Ohio 7033; 819 N.E.2d 1124, a plaintiff-employee sued the defendant-political subdivision employer for an assault and battery committed by another school district employee. The Eighth District nonetheless held "We agree that political subdivisions are not liable for the intentional torts of their employees." *Id.* at ¶14.

In *Young v. Genie Indus. United States* (8<sup>th</sup> Dist.), 2008 Ohio 929, the Eighth District relied upon the Ninth District's decision in *Ellithorp* to reject intentional tort claims against a political subdivision. Young argued that, because her injury occurred at work, her intentional tort claim "arises out of the employment relationship." *Id.* at ¶22. The Eighth District found *Ellithorp* to be good law. *Id.* at ¶18.

In contrast, *Davis v. City of Cleveland* (8<sup>th</sup> Dist.), 2004 Ohio 6621, stands for the proposition that R.C. § 2744.09(B) permits intentional tort claims against a political subdivision employer. Despite four prior case precedents from the Eighth District, the *Davis* court cited none of the foregoing cases and instead solely relied upon a Sixth District decision.

The federal courts, in applying Ohio law, have been consistent in finding that political subdivisions cannot be liable for an intentional tort committed by one employee against another. In *Kollstedt v. Princeton City Schs. Bd. of Educ.* (S.D. Ohio 2010), 2010 U.S. Dist. LEXIS 13522, the district court, applying Ohio law, opined that the Ohio Supreme Court's rationale in *Brady* operated to bar the employee's intentional tort claims against the school district:

Here, the weight of Ohio appellate authority holds that *Brady's* rationale applies to employer intentional torts outside the workers' compensation context and that Sections 2744.09(B) and (C) **cannot be read to mean that employer intentional torts arise out of the employment relationship** or the terms and conditions thereof.

Therefore, on the reasoning of *Brady* and the weight of Ohio appellate precedent applying it in the Chapter 2744 immunity context, the Court determines that the Ohio Supreme Court would conclude that Section 2744.09 does not except employer intentional torts from political subdivision immunity. Thus, because Princeton retains the immunity granted to it by Chapter

2744 of the Ohio Revised Code, the Court GRANTS Defendants' Motion with respect to Count III as to Defendant Princeton.

*Id.* (internal citations omitted); see also *Myers v. Del. County* (S.D. Ohio 2009), 2009 U.S. Dist. LEXIS 98143 (since plaintiff's defamation claim is in the nature of an intentional tort, and because political subdivisions are statutorily immune from such claims, dismissal of this claim against the county defendants is proper.); *Hale v. Vill. of Madison* (N.D. Ohio 2006), 2006 U.S. Dist. LEXIS 96420.

In *Kohler v. City of Wapakoneta* (N.D. Ohio 2005), 381 F. Supp.2d 692, the district court gave a more detailed analysis as to why a public employee could not sue his political subdivision employer for an intentional tort claim:

The Ohio Supreme Court, in *Brady*, quoted with approval Justice Douglas's dissent in *Taylor v. Academy Iron & Metal Co.*, which explained that: ***Injuries resulting from an employer's intentional torts, even though committed at the workplace . . . are totally unrelated to the fact of employment.*** When 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 an injury, ***the two parties are not employer and employee, but intentional tortfeasor and victim.*** *Taylor v. Acad. Iron & Metal Co.* (Ohio 1988), 36 Ohio St.3d 149, 522 N.E.2d 464, 476 (Douglas, J., dissenting).

*Id.* at 701. As such, the district court in *Kohler* concluded that "The weight of Ohio Appellate authority holds that *Brady* applies in the immunity arena and that § 2744.09(B). These decisions are consistent with this Court's holding that "reiterate[d] our firm belief that the legislature cannot, consistent with Section 35, Article II, enact legislation governing intentional torts that occur within the employment relationship, because such intentional tortious conduct **will always** take place outside that relationship." *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 634 (emphasis added). The same rationale should be applied throughout the State of Ohio.

C. Other legal rationales underlying the general principle that political subdivisions cannot be liable for the intentional torts of their employees.

To the extent that an employee like Varga is involved, what is the legal rationale for this extensive body of case law that a political subdivision cannot be liable for an employee's intentional tort against another employee?

First, "Traditional principles of agency are not applicable in considering a political subdivision's claim for immunity." *Friga v. City of E. Cleveland* (8<sup>th</sup> Dist.), 2007 Ohio 1716, ¶27, discr. app. denied (2007), 115 Ohio St.3d 1439, 2007 Ohio 5567, 875 N.E.2d 101; *City of Greenfield v. Schlupe* (4<sup>th</sup> Dist.), 2006 Ohio 531, ¶16. "Common law agency principles, however, are clearly trumped by the Political Subdivision Tort Liability Act." *Friga* at ¶27; see also *Griffits, supra*, 2009 Ohio 493, ¶9; *Lee v. City of Cleveland* (8<sup>th</sup> Dist. 2003), 151 Ohio App.3d 581, 586-587, 2003 Ohio 742, at ¶20, discr. app. denied (2003), 99 Ohio St.3d 1467; 2003 Ohio 3669; 791 N.E.2d 983 (rejected plaintiff's attempts to attach liability for his tort claims via the doctrine of *respondeat superior* based upon city's immunity). Instead, a political subdivision's responsibility for an employee's behavior is established by statute, not the common law doctrine of *respondeat superior*.

Second, R.C. § 2744.07(A)(2) provides that "Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the

scope of employment or official responsibilities.” In other words, it is not enough to allege that the employee acted within the scope of employment. For the employee to be indemnified by the political subdivision, the employee must also be acting in good faith.

By their very nature, being found liable for intentional tort claim does not lend itself to having acted in good faith. To prove a defamation claim and overcome the defense of qualified immunity and/or qualified privilege, a plaintiff must demonstrate by clear and convincing evidence that the communication was made with actual malice. In this case, Buck alleges that Varga and/or the Village “falsely and maliciously” accused Buck of committing criminal and other disreputable acts and spread those false allegations beyond the necessary people and institutions. Complaint at ¶¶ 1, 15. How can one act with actual malice and intentionally publish false statements, while at the same time act in good faith? The two concepts are mutually (and logically) exclusive.

Likewise, and by way of example, one of the elements of an intentional infliction of emotional distress claim is “extreme and outrageous” conduct, which the Ohio Supreme Court has elaborated on the meaning of that phrase as follows:

"It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"

*Finley v. First Realty Prop. Mgmt.* (9<sup>th</sup> Dist.), 2009 Ohio 6797, ¶35, citing *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374-75, 453 N.E.2d 666, quoting Restatement

of the Law 2d, Torts (1965) 73, Section 46(1), comment d. Can one commit an outrageous act, with tortious or almost criminal intent, in good faith? The answer is obviously no. In other words, R.C. § 2744.07(A)(2) is entirely consistent with the Ohio Supreme Court's admonition in *Brady, supra*, that "the legislature cannot, consistent with Section 35, Article II, enact legislation governing intentional torts that occur within the employment relationship, because such intentional tortious conduct **will always** take place outside that relationship." *Id.*, 61 Ohio St.3d at 634.

### CONCLUSION

The Village would request that this discretionary appeal be accepted on Proposition of Law No. I, and the Village presented an opportunity to brief the issue on the merits or, alternatively, that the matter be held for a decision in Sampson v. Cuyahoga Metro. Housing Auth., Ohio Supreme Court Case No. 2010-1561.

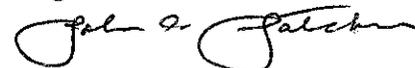
Respectfully submitted,



John D. Latchney (0046539)  
Counsel of Record for  
Appellant Village of Reminderville

### CERTIFICATE OF SERVICE

A copy of Appellant Village of Reminderville's Brief was served via regular U.S. Mail on this 14<sup>th</sup> day of February 2011 upon: Kenneth D. Myers, 6100 Oak Tree Blvd., Suite 200, Cleveland, Ohio 44131 *Attorney for Plaintiff-Appellee*; and Kenneth A. Calderone, Hanna, Campbell & Powell, LLP, 3737 Embassy Parkway, P.O. Box 5521, Akron, Ohio 44334, *Attorney for Defendant Varga*.



John D. Latchney (0046539)

STATE OF OHIO )  
COUNTY OF SUMMIT )

COURT OF APPEALS  
DANIEL M. HERRIGAN  
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IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

JEFFREY BUCK

SUMMIT COUNTY  
CLERK OF COURTS

C. A. No. 25272

Appellee

v.

VILLAGE OF REMINDERVILLE, et al.

Appellants

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CV 2009-11-8465

DECISION AND JOURNAL ENTRY

Dated: December 30, 2010

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DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Jeffrey Buck, chief of police for the Village of Reminderville, sued the Village and Sergeant Michael Varga for defamation. He alleged that Sergeant Varga emailed a letter to Village council members that contained false and defamatory accusations regarding his performance as police chief. He alleged that the Village improperly allowed the letter to circulate to other Village officials, improperly allowed it to be read aloud during a human resources committee meeting, and improperly made it a public record. He further alleged that Sergeant Varga's publication and the Village's republication of the letter was done maliciously with the intent to interfere with his employment relationship. The Village moved for judgment on the pleadings under Rule 12(C) of the Ohio Rules of Civil Procedure, arguing that it has immunity under Chapter 2744 of the Ohio Revised Code. The trial court denied its motion because it determined that "[t]here is an issue of fact as to whether the conduct in question arose

out of the employment relationship.” We affirm because the Village does not have immunity for an intentional tort arising out of its employment relationship with Mr. Buck and questions of fact exist regarding whether the intentional tort Mr. Buck alleged is causally connected to his employment.

#### POLITICAL SUBDIVISION IMMUNITY

{¶2} The Village’s assignment of error is that the trial court incorrectly denied its motion for judgment on the pleadings. It has argued that it has immunity under Chapter 2744 of the Ohio Revised Code for intentional tort claims asserted by its employees. Mr. Buck has not disputed that his defamation claim is an intentional tort claim.

{¶3} Although motions under Rule 12(B)(6) and (C) of the Ohio Rules of Civil Procedure are similar, Rule 12(C) motions “are specifically for resolving questions of law . . . .” *State ex rel. Midwest Pride IV Inc. v. Pontious*, 75 Ohio St. 3d 565, 570 (1996). Under Civil Rule 12(C), “dismissal is appropriate [if] a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.” *Id.* The rule “requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law.” *Id.* We review the trial court’s decision de novo. *Pinkerton v. Thompson*, 174 Ohio App. 3d 229, 2007-Ohio-6546, at ¶18.

{¶4} Determining whether a political subdivision has immunity under Chapter 2744 of the Ohio Revised Code generally involves a three-tiered analysis. *Lambert v. Clancy*, 125 Ohio St. 3d 231, 2010-Ohio-1483, at ¶8. Section 2744.09, however, provides that Chapter 2744 “does not apply to, and shall not be construed to apply to” certain actions. Under Section 2744.09(B),

political subdivision immunity does not apply to “[c]ivil actions by an employee . . . against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision[.]” Mr. Buck has argued that the Village does not have immunity under Chapter 2744 because his defamation claim arises out of his employment relationship.

{¶5} The Village has argued that Mr. Buck’s argument fails under this Court’s decision in *Ellithorp v. Barberton City School District Board of Education*, 9th Dist. No. 18029, 1997 WL 416333 (July 9, 1997). In *Ellithorp*, we determined that Section 2944.09(B) does not apply to intentional torts committed by a political subdivision employer because “[a]n employer’s intentional tort against an employee does not arise out of the employment relationship, but occurs outside of the scope of employment.” *Id.* at \*3; see also *Dolis v. City of Tallmadge*, 9th Dist. No. 21803, 2004-Ohio-4454, at \*2 (Aug. 25, 2004) (quoting *Ellithorp*, 1997 WL 416333 at \*3). In support of our decision, we cited *Brady v. Safety-Kleen Corp.*, 61 Ohio St. 3d 624 (1991), in which the Ohio Supreme Court held, in the context of a worker’s compensation action, that “[a] cause of action brought by an employee alleging intentional tort by the employer in the workplace is not preempted by Section 35, Article II of the Ohio Constitution, or by R.C. 4123.74 and 4123.741. While such 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.” *Id.* at paragraph one of the syllabus (approving and following *Blankenship v. Cincinnati Milacron Chems. Inc.*, 69 Ohio St. 2d 608, 613 (1982)); *Ellithorp*, 1997 WL 416333 at \*3. In *Blankenship*, the Ohio Supreme Court reasoned that “[n]o reasonable individual would . . . contemplate the risk of an intentional tort as a natural risk of employment.” *Blankenship*, 69 Ohio St. 2d at 613. It, therefore, concluded that employers are

not immune from liability for their intentional torts under Section 4123.74 of the Ohio Revised Code. *Id.*; see also *Brady*, 61 Ohio St. 3d at 634 (“When 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 an injury, the two parties are not employer and employee, but intentional tortfeasor and victim.”) (quoting *Taylor v. Acad. Iron & Metal Co.*, 36 Ohio St. 3d 149, 162 (1988) (Douglas, J., dissenting)).

{¶6} Mr. Buck has urged us to reconsider our holding in *Ellithorp* in light of the Ohio Supreme Court’s decision in *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St. 3d 227, 2003-Ohio-3373. In *Penn Traffic*, Virginia Ramsey was injured when she fell off a loading dock while working for Penn Traffic. She sued Penn Traffic and obtained a judgment against it for intentional tort. Penn Traffic filed a declaratory judgment action seeking a determination of its right to indemnification from its insurers. Its commercial general liability policy contained an exclusion regarding “bodily injury to an employee of the insured ‘arising out of and in the course of employment by the insured.’” *Id.* at ¶36. Penn Traffic argued that the exclusion did not apply because, under *Brady* and *Blankenship*, employer intentional torts occur outside the employment relationship. The Ohio Supreme Court disagreed, noting that, in *Blankenship*, “this court determined that the immunity bestowed upon employers under Ohio’s workers’ compensation laws does not reach intentional torts committed by an employer. The court reasoned that an employer’s intentional tort occurs outside the employment relationship. . . . But in *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90, 15 OBR 246, 472 N.E.2d 1046, this court clarified that an injured worker may both recover under the workers’ compensation system and pursue an action against his or her employer for intentional tort. Therefore, an injury that is the product of an

employer's intentional tort is one that also 'arises out of and in the course of' employment." *Penn Traffic Co.*, 2003-Ohio-3373, at ¶39.

{¶7} The Ohio Supreme Court explained: "*Blankenship* and *Jones* involve a common-law action for employer intentional tort as it relates to a workers' compensation claim. They do not involve analysis of the terms of a private insurance policy or the relationship between an employee and the employer's liability insurer. Although an employer intentional tort occurs outside the employment relationship for purposes of recognizing a common-law cause of action for intentional tort, the injury itself must arise out of or in the course of employment; otherwise, there can be no employer intentional tort." *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St. 3d 227, 2003-Ohio-3373, at ¶40. The Supreme Court concluded that, "[f]or purposes of the employer's insurance coverage, language in a [commercial general liability] policy that excludes injuries that 'arise out of or in the course of employment' merely means that the injury is causally related to one's employment." *Id.* at ¶41.

{¶8} In *Penn Traffic*, the Ohio Supreme Court distinguished *Blankenship* by saying that *Blankenship* focused on the intentional conduct of the employer while the commercial general liability policy focused on the injury suffered by the employee. *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St. 3d 227, 2003-Ohio-3373, at ¶40. The distinction is difficult to see considering that both cases involved the interpretation of substantially similar language, the workers' compensation immunity statute at issue in *Blankenship* requiring the Court to determine whether the poisoning Mr. Blankenship suffered was an "injury . . . received . . . by any employee in the course of or arising out of his employment" and the commercial general liability insurance policy at issue in *Penn Traffic* requiring the Court to determine whether Ms. Ramsey's injury was "bodily injury to 'an employee of the insured arising out of and in the course of

employment by the insured.” *Blankenship v. Cincinnati Milacron Chems. Inc.*, 69 Ohio St. 2d 608, 612 (1982) (quoting R.C. 4123.74); *Penn Traffic*, 2003-Ohio-3373, at ¶18. *Penn Traffic* established, however, that, just because an employer’s intentional tort does not arise out of the employment relationship for purposes of evaluating the employer’s immunity under Section 4123.74 of the Ohio Revised Code, does not mean that it does not arise out of the employment relationship in all contexts.

{¶9} It should be noted that, part of the Supreme Court’s rationale in *Blankenship* was that the “workers’ compensation Acts were designed to improve the plight of the injured worker, and to hold that intentional torts are covered under the Act would be tantamount to encouraging such conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act.” *Blankenship v. Cincinnati Milacron Chems. Inc.*, 69 Ohio St. 2d 608, 614 (1982). “[O]ne of the avowed purposes of the Act is to promote a safe and injury-free work environment. . . . Affording an employer immunity for his intentional behavior certainly would not promote such an environment, for an employer could commit intentional acts with impunity with the knowledge that, at the very most, his workers’ compensation premiums may rise slightly.” *Id.* at 615.

{¶10} Section 2744.09(B) of the Ohio Revised Code provides that “[t]his chapter does not apply to, and shall not be construed to 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[.]” Its emphasis on the fact that Chapter 2744 not only “does not apply to,” but “shall not be construed to apply to” demonstrates that the General Assembly intended Chapter 2744 to be construed liberally in regard to the civil action categories described by Section 2944.09(A)-(E). As the Supreme Court recognized in *Penn*

*Traffic*, an injury suffered by an employee because of his employer’s intentionally tortious conduct “must arise out of or in the course of employment; otherwise, there can be no employer intentional tort.” *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St. 3d 227, 2003-Ohio-3373, at ¶40. We, therefore, conclude that a claim by the employee of a political subdivision against the political subdivision for its intentionally tortious conduct may constitute a “civil action[ ] . . . relative to any matter that arises out of the employment relationship between the employee and the political subdivision” under Section 2744.09(B). See *Nagel v. Horner*, 162 Ohio App. 3d 221, 2005-Ohio-3574, at ¶19 (“[C]laims 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.’”) (quoting R.C. 2744.09(B)).

{¶11} Section 2744.09(B) is designed to allow political subdivision employees to recover against their employers, who would otherwise be entitled to immunity under Chapter 2744 of the Ohio Revised Code. If intentional torts were not within the scope of Section 2744.09(B)’s immunity exclusion, it would be, as the Ohio Supreme Court explained in *Blankenship*, “tantamount to encouraging such [intentionally tortious] conduct.” *Blankenship v. Cincinnati Milacron Chems. Inc.*, 69 Ohio St. 2d 608, 614 (1982). “Affording an employer immunity for his intentional behavior certainly would not promote [a safe work] environment, for an employer could commit intentional acts with impunity . . . .” *Id.* at 615.

{¶12} Our analysis is consistent with that of several other districts. Before *Penn Traffic*, most Ohio district courts, following *Blankenship* and *Brady*, concluded that employer intentional torts do not arise out of the employment relationship. *Terry v. Ottawa Bd. of Mental Retardation and Developmental Disabilities*, 151 Ohio App. 3d 234, 2002-Ohio-7299, at ¶21; *Chase v. Brooklyn City Sch. Dist.*, 141 Ohio App. 3d 9, 19 (2001); *Stanley v. City of Miamisburg*, 2d Dist.

No. 17912, 2000 WL 84645 at \*7-8 (Jan. 28, 2000); *Sablusky v. Trumbull County*, 11th Dist. No. 2001-T-0084, 2002-Ohio-7275, at ¶18; *Fabian v. City of Steubenville*, 7th Dist. No. 00 JE 33, 2001 WL 1199061 at \*3-4 (Sept. 28, 2001); *Engleman v. Cincinnati Bd. of Educ.*, 1st Dist. No. C-000597, 2001 WL 705575 at \*4-5 (June 22, 2001). But see *Marcum v. Rice*, 10th Dist. Nos. 98AP-717, 98AP-721, 98AP-718, 98AP-719, 1999 WL 513813 at \*6-7 (July 20, 1999). After *Penn Traffic*, however, some of those districts have reexamined the issue and have also concluded that *Blankenship* and *Brady* do not act as a per se bar to intentional tort claims by political subdivision employees against their employers. *Sampson v. Cuyahoga Metro. Hous. Auth.*, 188 Ohio App. 3d 250, 2010-Ohio-3415, at ¶33 (en banc); *Nagel v. Horner*, 162 Ohio App. 3d 221, 2005-Ohio-3574, at ¶18; *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 1st Dist. No. C-090015, 2009-Ohio-6801, at ¶11-13; *Fleming v. Ashtabula Area City Sch. Dist. Bd. of Educ.*, 11th Dist. No. 2006-A-0030, 2008-Ohio-1892, at ¶41. Other districts have continued to apply *Brady* and *Blankenship* to political subdivision immunity cases, but most of their decisions have not considered *Penn Traffic*, relying only on the cases resolved before it. See *Zieber v. Heffelfinger*, 5th Dist. No. 08CA0042, 2009-Ohio-1227, at ¶29 (no discussion of *Penn Traffic*); *Coats v. Columbus*, 10th Dist. No. 06AP-681, 2007-Ohio-761, at ¶15 (same); *Coolidge v. Riegle*, 3d Dist. No. 5-02-59, 2004-Ohio-347, at ¶30 (same). But see *Williams v. McFarland Props. LLC*, 177 Ohio App. 3d 490, 2008-Ohio-3594, at ¶18 (concluding that *Penn Traffic* is limited “to situations involving the applicability of recovery under a private insurance policy.”) (quoting *Thayer v. W. Carrollton Bd. of Educ.*, 2d Dist. No. 20063, 2004-Ohio-3921, at ¶17).

¶13 In *Engleman v. Cincinnati Board of Education*, 1st Dist. No. C-000597, 2001 WL 705575 (June 22, 2001), limited by *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 1st Dist. No. C-090015, 2009-Ohio-6801, the First District reasoned that, to include intentional torts

under Section 2744.09(B) “would frustrate the general statutory purpose of conferring immunity on political subdivisions . . . [because] [i]t would render meaningless R.C. 2744.02(B) and 2744.03(A)(2), which provide the exceptions and defenses to immunity for intentional acts committed by an employee of a political subdivision.” We disagree with that analysis because it ignores the fact that Section 2744.02(B) and 2744.03(A)(2) apply to cases brought by non-employees of political subdivisions.

{¶14} Another concern that courts have had about intentional tort claims by political subdivision employees has to do with the interplay between Sections 2744.09(B) and 4123.74 of the Ohio Revised Code. *Hahn v. Groveport*, 10th Dist. No. 07AP-27, 2007-Ohio-5559, at ¶24; *Schmitz v. Xenia Bd. of Educ.*, 2d Dist. No. 2002-CA-69, 2003-Ohio-213, at ¶19. According to those courts, the statutes create a Catch-22. As described by the Tenth District, “[o]n the one hand, if [the employee’s] injury does not arise out of her employment, R.C. 2744.09(B) is not available to remove plaintiffs’ claim from the general grant of immunity afforded defendant as a political subdivision pursuant to R.C. 2744.02(A)(1). On the other hand, if [the] injury does arise out of her employment, defendant is immune from tort liability pursuant to R.C. 4123.74, which provides, in pertinent part, ‘[e]mployers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law . . . for any injury . . . received . . . by any employee in the course of or arising out of employment . . . occurring during the period covered by such premium so paid into the state insurance fund . . . .’” *Hahn*, 2007-Ohio-5559, at ¶24; *Schmitz*, 2003-Ohio-213, at ¶19 (“Considering the municipal immunity and workers’ compensation immunity statutes together, there appear to be two mutually exclusive possibilities. Either an injury received by an employee arises out of his employment, in which event the employer is entitled to immunity under R.C. 4123.74, or the injury does not arise out of his

employment, in which event the exception to municipal immunity provided for in R.C. 2744.09(B) does not apply.”). The Village has not argued that it is entitled to judgment on the pleadings under Section 4123.74 of the Ohio Revised Code if Mr. Buck’s injuries arose out of his employment. We, therefore, do not have to address that issue at this time. We observe, however, that just because Sections 2744.09(B) and 4123.74 contain some similar language, does not mean they have the same meaning, especially in light of their different legislative purposes.

{¶15} Mr. Buck’s complaint alleged that Sergeant Varga’s letter made false and defamatory accusations about his performance as chief of police, damaged his reputation, and “injure[d] [him] in his trade or occupation.” Viewing Mr. Buck’s allegations in a light most favorable to him, we conclude that his intentional defamation claim may relate to his employment under Section 2744.09(B). See *Nagel v. Horner*, 162 Ohio App. 3d 221, 2005-Ohio-3574, at ¶19. The trial court, therefore, correctly concluded that the Village failed to establish that it has political subdivision immunity under Chapter 2744 of the Ohio Revised Code and was entitled to judgment on the pleadings under Rule 12(C) of the Ohio Rules of Civil Procedure. The Village’s assignment of error is overruled.

#### CONCLUSION

{¶16} To the extent *Ellithorp v. Barberton City School District Board of Education*, 9th Dist. No. 18029, 1997 WL 416333 at \*3 (July 9, 1997) and *Dolis v. City of Tallmadge*, 9th Dist. No. 21803, 2004-Ohio-4454, at \*2 (Aug. 25, 2004), held that a political subdivision employer’s intentional tort can never be subject to the political subdivision immunity exclusion under Section 2744.09(B) of the Ohio Revised Code, they are overruled. The judgment of the Summit County Common Pleas Court is affirmed.

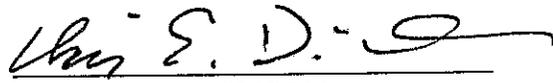
Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

  
 CLAIR E. DICKINSON  
 FOR THE COURT

MOORE, J.  
CONCURS IN JUDGMENT ONLY, SAYING:

{¶17} I concur in most of the majority opinion. I do not join in paragraphs 13 and 14, which I regard as unnecessary dicta.

CARR, J.  
DISSENTS, SAYING:

{¶18} I respectfully dissent as I would continue to follow our prior precedent in *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), 9th Dist. No. 18029, and *Dolis v. Tallmadge*, 9th Dist. No. 21803, 2004-Ohio-4454, at ¶6.

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