

ORIGINAL

IN THE SUPREME COURT OF OHIO

DARRELL SAMPSON,	:	
	:	Case No. 10-1561
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Eighth District Court of Appeals
	:	Cuyahoga County, Ohio
CUYAHOGA METROPOLITAN	:	
HOUSING AUTHORITY, et al.,	:	Court of Appeals
	:	Case No. 09 093441
Defendants-Appellants.	:	

BRIEF OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF APPELLANTS
CUYAHOGA METROPOLITAN HOUSING AUTHORITY, ET AL.

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Only negligent acts of a political subdivision, according to the express language of R.C. 2744.02(B), are exempt from statutory immunity and R.C. 2744.09(B) does not preclude statutory immunity 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." (<i>Blankenship v. Cincinnati Milacron Chemicals, Inc.</i> , 69 Ohio St.2d 608, 433 N.E.2d 572, construed and applied.)	
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INTRODUCTION

The Ohio Municipal League (“League”), as amicus curiae on behalf of the Cuyahoga Metropolitan Housing Authority (“CMHA”), urges this Court to reverse the decision in *Sampson v. Cuyahoga Metropolitan Housing Authority*, 2010-Ohio-3415.

A political subdivision, generally, is not liable for damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function. R.C. 2744.02(A)(1). Certain exclusions from the application of R.C. Chapter 2744 are set forth in R.C. 2744.09. One of these exclusions prohibits the application of R.C. Chapter 2744 to “[c]ivil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises of the employment relationship between the employee and the political subdivision.” R.C. 2744.09(B). It is this exclusion that is the focus of the case. The Eighth District held, contrary to established precedent, that R.C. 2744.09(B) prohibited CMHA from invoking the benefits of R.C. Chapter 2744 immunity. This judgment is erroneous and should be reversed.

The Eighth District held that R.C. 2744.09(B) applies to intentional torts allegedly committed by an employer against an employee. Consequently, the lower court determined CMHA was not entitled to R.C. Chapter 2744 immunity.

This erroneous interpretation of R.C. 2744.09(B) is in direct conflict with the intent of the General Assembly, prior law established by this court, and the developed law of other appellate districts.

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 Merit Brief filed by CMHA.

ARGUMENT

Proposition of Law No. 1: Only negligent acts of a political subdivision, according to the express language of R.C. 2744.02(B), are exempt from statutory immunity and R.C. 2744.09(B) does not preclude statutory immunity 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. Chapter 2744 Three Tiered Analysis

The following three tiered analysis is used to determine if an Ohio political subdivision is immune from tort liability:

R.C. Chapter 2744 sets out the method of analysis, which can be viewed as involving three tiers, for determining a political subdivision's immunity from liability. First, R.C. 2744.02(A)(1) sets out a general rule that political subdivisions are not liable in damages. In setting out this rule, R.C. 2744.02(A)(1) classifies the functions of political subdivisions into governmental and proprietary functions and states that the general rule of immunity is not absolute, but is limited by the provisions of R.C. 2744.02(B),

which details when a political subdivision is not immune. Thus, the relevant point of analysis (the second tier) then becomes whether any of the exceptions in R.C. 2744.02(B) apply. Furthermore, if any of R.C. 2744.02(B)'s exceptions are found to apply, a consideration of the application of R.C. 2744.03 becomes relevant, as the third tier of analysis.

Greene County Agricultural Society v. Liming (2000), 89 Ohio St.3d 551, 556-557.

R.C. 2744.02(B) Exceptions Limited to Negligent Acts

The second tier of the analysis requires a review of whether any of the exceptions set forth in R.C. 2744.02(B) apply. The express language of R.C. 2744.02(B) limits the exceptions to the following: **negligent** operation of any motor vehicle by employees when the employees are engaged within the scope of their employment (R.C. 2744.02(B)(1)); **negligent** performance of acts by employees with respect to proprietary functions (R.C. 2744.02(B)(2)); **negligent** failure to keep public roads in repair and other **negligent** failure to remove obstructions from public roads (R.C. 2744.02(B)(3)); certain **negligence** of employees that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function (R.C. 2744.02(B)(4)); and liability is expressly imposed upon a political subdivision by another section of the Revised Code (R.C. 2744.02(B)(5)). Exceptions to R.C. Chapter 2744, therefore, are limited to instances where liability is expressly imposed for negligent acts of a political subdivision. The General Assembly did not include “intentional acts” of a political subdivision in any exceptions to R.C. 2744 immunity under R.C. 2744.02(B), and political subdivisions, generally, are immune for tort liability for alleged intentional torts. See, e.g., *Wilson v. Stark County Department of Human Services* (1994), 70 Ohio St.3d 450, 639 N.E.2d 105.

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) expressly 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.)

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

In *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 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 the workers’ compensation laws, established in the Ohio Constitution and the Ohio Revised Code. In reviewing the 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* (1991), 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.)

The Eighth District concluded that "the reasoning in *Brady*, which held that intentional torts do not arise out of the employment relationship, is inapplicable because *Brady* dealt solely with workers' compensation law." *Sampson* at ¶ 34. This conclusion, however, is erroneous as this Court, in *Brady*, did not limit its holding to intentional conduct and claims involving the workers compensation system. This Court stated "intentional tortious conduct will **always** take place outside of the relationship." *Brady* at 634.

This Court, in *Brady*, described the employment relationship when an intentional tort occurs as follows: "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.” *Brady* at 634.

An intentional tort that occurs in an employment context, therefore, nullifies the employer – employee relationship and creates a new relationship: intentional tortfeasor and victim. An action between an intentional tortfeasor and victim cannot arise out of or be part of an employment relationship, so R.C. 2744.09(B) is not applicable in such cases.

The Application of *Brady* by Other Appellate Courts

The First District, in *Engleman v. Cincinnati Board of Education*, 1st Dist. No. C-000597, 2001 WL 705575 (June 22, 2001), noting that “intentional conduct is other than negligent,” held that no exception to tort immunity was applicable when the plaintiff, a public employee, raised an intentional tort claim against the public employer. *Engleman* at *4.¹

The Second District, in *Schmitz v. Xenia Bd. of Educ.*, 2d Dist. No.2002-CA-69, 2003-Ohio-213, held that a cause of action for employer intentional tort does not fall within an exception to governmental immunity. The Second District, in *Stanley v. City of Miamisburg*, 2000 WL 84645 (Ohio App. 2 Dist.), held that an employer intentional tort claim against a City does not arise out of the employment relationship and, therefore, does not prevent the application of Chapter 2744 immunity.

The Fifth District, in *Zieber v. Heffelfinger*, 5th Dist. No. 08CA0042, 2009-Ohio-1227, noting that “Appellant’s injuries arguably occurred within the scope of her employment,” held that an employer intentional tort is not excepted under R.C. 2744.09(B) from the statutory grant of immunity to political subdivisions as “an employer’s intentional tort against an employee does

¹ *Engleman* was limited by *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 1st Dist. No. C-090015, 2009-Ohio-6801, which is pending before this court on its merits in Supreme Court Case No. 2010-218.

not arise out of the employment relationship, but occurs outside the scope of employment.”
Zieber at ¶ 29.

The Sixth District, in *Terry v. Ottawa Bd. of Mental Retardation and Developmental Disabilities*, 151 Ohio App.3d 234, 2002-Ohio-7299, 783 N.E.2d 959, declined “to depart from established appellate law and find that R.C. 2744.09(B) does not except an employer intentional tort from the immunity granted under the Political Subdivision Tort Liability Act.” *Terry* at ¶ 21.

The Seventh District, in *Fabian v. Steubenville* (Sept. 28, 2001), Jefferson App. No. 00 JE 33, 2001 WL 1199061, held that R.C. 2744.09(B) does not strip a political subdivision of immunity when a plaintiff asserts claims for intentional torts as “*by its nature* an intentional tort cannot arise out of the employment relationship.” *Fabian* at *3. (Emphasis in original.)

The Ninth District, in *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), Summit App. No. 18029, 1997 WL 416333), noting that negligent acts are not reckless or intentional acts, held that “[b]ecause Section 2744.09(B) includes no specific exceptions for intentional torts,” R.C. 2744.09(B) is inapplicable to an intentional tort claim asserted by an employee. *Ellithorp* at *3.²

The Eleventh District, in *Sabulsky v. Trumbull Cty.*, Trumbull App. No. 2001-T-0084, 2002-Ohio-7275, 2002 WL 31886686, noting that “[b]y the express language of the statute, only negligent acts of a political subdivision are exempted from statutory immunity,” held that R.C. 2744.09(B) does not apply to intentional torts. *Sabulsky* at ¶ 14. In its analysis, the Eleventh District concluded that “to hold that intentional tort claims arise out of the employment

² The Ninth District has subsequently revisited the *Ellithorp* decision, determining that R.C. 2744.09(B) precludes the application of Chapter 2744 immunity in a case of defamation regarding an employee. That case is pending before this court. *Buck v. Reminderville* (December 30, 2010) Summit County Court of Appeals Case No. 25272, 2010-Ohio-6497, Ohio Supreme Court Case No. 2011-0258.

relationship *** would frustrate the general statutory purpose of conferring immunity on political subdivisions.” *Sabulsky* at ¶ 19.

The Twelfth District, in *Williams v. McFarland Properties, L.L.C.*, 177 Ohio App.3d 490, 2008-Ohio-3594, 895 N.E.2d 208, held that R.C. 2744.09(B) does not apply as plaintiff’s complaint, against a political subdivision, alleged solely an employer intentional tort.

Other appellate courts, therefore, have correctly applied this Court’s “intentional torts will always take place outside the employment relationship” rationale and concluded that the exception set forth in R.C. 2744.09(B) do not apply to employer intentional torts and, therefore, political subdivisions are entitled to R.C. Chapter 2744 immunity.

All of Appellee’s Claims are Unrelated to the Fact of Employment

This Court, in *Brady*, held that workplace “*injuries are totally unrelated to the fact of employment*” and, as previously noted, concluded that when such injuries occur a new relationship: tortfeasor and victim. *Brady* at 634. (Emphasis in original.)

All of Appellee’s claims (abuse of process, intentional infliction of emotional distress, and negligent misidentification) are based upon allegations of intentional misconduct, conduct other than negligent conduct, and arise from CMHA’s criminal investigation and arrest of Appellee. These alleged torts arose not out of an employer-employee relationship, but out of a law enforcement agency–suspect relationship. Appellee’s claims of intentional misconduct are *totally unrelated to the fact of employment* and occur in an alleged tortfeasor and victim relationship.

Appellee, an employee of a political subdivision, should not be granted special treatment for claims that are unrelated to his employment relationship to CMHA. Consequently, the

alleged intentional tort claims by an employee of a political subdivision should be subject to an immunity analysis under R.C. Chapter 2744.

CONCLUSION

Based upon the foregoing, the League respectfully requests this Court to reverse the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Stephen J. Smith', written over a horizontal line.

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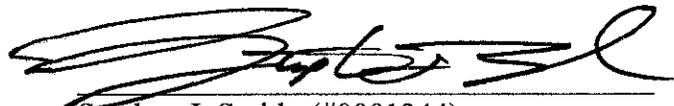
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CERTIFICATE OF SERVICE

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 7th day of March, 2011 to:

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