ORIGINAL

IN THE SUPREME COURT OF OHIO
Case No. 2010-1561

DARRELL SAMPSON, Plaintiff-Appellee, v. CUYAHOGA METROPOLITAN HOUSING AUTHORITY, et al., Defendants-Appellants.	)))))))))	On appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Case No. 09-093441

BRIEF OF *AMICI CURIAE* FRATERNAL ORDER OF POLICE OF OHIO, INC., FRATERNAL ORDER OF POLICE, CAPITAL CITY LODGE NO. 9, AKRON FIREFIGHTERS IAFF LOCAL 330, AND OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE DARRELL SAMPSON

Nancy C. Shuster (0020690)
**Counsel of Record*
2913 Clinton Avenue
Cleveland, Ohio 44113
(216) 348-1100, FAX (216) 348-0013
ss@apk.net

Counsel for Plaintiff-Appellee

Aretta K. Bernard (039116)
Stephen W. Funk (0058506)
**Counsel of Record*
Karen D. Adinolfi (0073693)
ROETZEL & ANDRESS, LPA
222 South Main Street
Akron, Ohio 44308
(330) 376-2700, FAX (330) 376-4577
abernard@ralaw.com; sfunk@ralaw.com
kadinolfi@ralaw.com

Counsel for Defendants-Appellants

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Christina M. Royer (0073695)
*Counsel Of Record
CHRISTINA M. ROYER, LTD.,
ATTORNEY AT LAW
635 West Lakeside Avenue, Suite 605
Cleveland, Ohio 44113
(440) 526-9797
Fax: (216) 404-5958
croyer@croyerlaw.com

Frederick M. Gittes (0031444)
Jeffrey P. Vardaro (0081819)
THE GITTES LAW GROUP
723 Oak Street
Columbus, Ohio 43205
(614) 222-4735
Fax: (614) 221-9655
fgittes@gitteslaw.com

Paul L. Cox (0007202)
Chief Counsel
FRATERNAL ORDER OF POLICE OF OHIO, INC.
222 East Town Street
Columbus, Ohio 43215
Tel.(614) 224-5700
Fax (614) 224-5775
pcox@fopohio.org

Russell E. Carnahan (0011801)
HUNTER, CARNAHAN, SHOUB & BYARD
3360 Tremont Road, 2nd Floor
Columbus, Ohio 43221
Telephone: (614) 442-5626
Fax: (614) 442-5625
rcarnahan@hcands.com

Counsel for Amici Curiae Fraternal Order of Police of Ohio, Inc., Fraternal Order Of Police, Capital City Lodge No. 9, Akron Firefighters IAFF Local 330, and Ohio Employment Lawyers Association

Stephen L. Byron (0055657)
*Counsel of Record
Rebecca K. Schaltenbrand (0064817)
SCHOTTENSTEIN ZOX & DUNN CO., LPA
4230 State Route 306, Suite 240
Willoughby, OH 44094
Phone: (440) 951-2303
Fax: (216) 621-5341
sbyron@szd.com

John Gotherman (0000504)
OHIO MUNICIPAL LEAGUE
175 S. Third Street, #510
Columbus, OH 43215-7100
Phone: 614) 221-4349
Fax: (614) 221-4390
jgotherman@columbus.rr.com

Stephen J. Smith (0001344)
SCHOTTENSTEIN ZOX & DUNN CO., LPA
250 West Street
Columbus, OH 43215
Phone: (614) 462-2800
Fax: (614) 462-5135
ssmith@szd.com

Counsel for Amicus Curiae The Ohio Municipal League

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Fraternal Order of Police of Ohio, Incorporated (hereinafter "F.O.P. Ohio"), is an organization consisting of over 22,000 law enforcement officers in the State of Ohio. F.O.P. Ohio is dedicated to the representation of its membership for a multitude of purposes.

The Fraternal Order of Police, Capital City Lodge No. 9 (hereinafter "F.O.P. Lodge 9"), represents over 4,000 full-time professional law enforcement officers in central Ohio, who are employed by 29 different local government agencies. F.O.P. Lodge 9 is the fifth largest local F.O.P. lodge in the United States, and the services it provides to members include critical incident response and legal defense, and representation in collective bargaining, labor relations, and contract enforcement. F.O.P. Lodge 9 is obligated by the terms of its Constitution and Bylaws, its contracts, and the Ohio Revised Code to fairly represent its members with respect to their employment relationships with their employers.

F.O.P. Ohio and F.O.P. Lodge 9 are interested in this case because their members will be directly affected by the Court's determination of whether political subdivisions that engage in intentionally tortious conduct against their police officers will be immune from suit. Police officers, and other public employees, have a sworn duty to fully and fairly enforce State and local laws, and they must be able to do so without fear of reprisal. As such, R.C. 2744.09 must not be interpreted to preclude legal recourse for police officers and other public employees, who may be subjected to intentionally tortious conduct by their own employers.

Akron Firefighters IAFF Local 330 (hereinafter "Akron Firefighters") is a labor organization that represents approximately 350 uniformed fire personnel for the City of Akron. All of its members are public employees who will be affected by this Court's decision regarding the accountability of public employers when they commit common-law intentional torts against

their employees. As a matter of policy, Akron Firefighters believe that firefighters who risk their lives frequently to protect the public should not be without meaningful remedies if their employers subject them to intentionally tortious conduct.

The Ohio Employment Lawyers Association (OELA) is a statewide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment, and civil rights matters. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism and ethics. The aim of OELA's amicus participation is to cast light not only on the legal issues presented in a given case, but also on the practical effect and impact that a case may have on Ohio's workers. OELA recognizes that the General Assembly took pains to ensure that employees of political subdivisions have fair and adequate remedies for common-law intentional torts by their employers, and that political subdivisions are accountable for torts committed against their employees in their capacity as employers.

For the reasons outlined in this brief, all of the amici believe the General Assembly carefully crafted Chapter 2744 to place public employers in the same position with respect to liability for common-law intentional torts committed against their employees as private employers, and to ensure that the public employees have the same common-law remedies as their counterparts in the private sector.

STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and the Statement of Facts contained in the merit brief of Plaintiff-Appellee Darrell Sampson.

SUMMARY OF ARGUMENT

The statutory scheme for political subdivision immunity adopted by the Ohio General Assembly unequivocally withholds immunity for common-law intentional torts committed by political subdivisions against their employees. The General Assembly understood, as this Court must, that immunizing such tortious conduct effectively sanctions it. Equally important, permitting subdivision immunity for common-law intentional torts would deprive public employees of common-law remedies available to all other employees in Ohio and deny public employees any meaningful remedy in most such cases. The General Assembly's scheme also ensures that public employers have the same accountability for common-law intentional torts involving their employees as private employers do.

Ohio Revised Code Section 2744.09(B) withholds immunity with respect to "[c]ivil actions by an employee . . . relative to any matter that *arises out of the employment relationship* between the employee and the political subdivision." (emphasis added). Appellants Cuyahoga Metropolitan Housing Authority, et al., (hereinafter collectively "CMHA") and its *amicus curiae*, Ohio Municipal League, ask this Court to hold that intentionally tortious conduct, by definition, does not "arise[] out of the employment relationship" for purposes of the statute. Their argument, which draws on a misinterpretation of several decisions of this Court in the context of workers' compensation, ignores the plain meaning of the words of the statute, reinterprets the statute so as to deprive Section 2744.09(B) of any meaning, and disregards this Court's decision in *Penn Traffic Co. v. AIU Insurance Co.*, 99 Ohio St. 3d 227, 2003-Ohio-3373—a decision interpreting the precise words at issue here.

First, and perhaps most important, this Court should acknowledge that, as noted recently in *Zumwalde v. Madeira & Indian Hill Joint Fire District*, 2011-Ohio-1603, the words of Section

2744.09(B) are clear and unambiguous. The words "any matter that arises out of the employment relationship" require no in-depth analysis. That phrase encompasses any claim that is "causally related to one's employment." *Penn Traffic Co.*, 2003-Ohio-3373, at ¶ 41. Applying ordinary principles of statutory construction, these words mean what they say; they have no specialized meaning for these purposes.

To the extent that any further construction is required, the structure of Section 2744.09 is significant. In that section, the General Assembly codified five key exceptions to the political subdivision immunity provided in Chapter 2744. Two of the five exceptions address employment-related claims—thereby withholding immunity from political subdivisions when they act as employers, and placing them on the same footing as private employers with respect to claims by their employees. Consistent with this purpose, Chapter 2744 is completely devoid of provisions relating to employment-related claims by political subdivision employees other than Section 2744.09's provisions withholding immunity for such claims.

Ignoring this core purpose of Section 2744.09, CMHA and its amicus ask this Court to amend Section 2744.09(B) out of the statute. Claims by employees against their employers all fall into a limited number of categories. First, employees may bring various forms of actions based on the terms and conditions of their employment: for instance, actions based on wages and hours, contractual actions, and actions arising from discrimination that alters the terms and conditions of an employee's employment. Per division (C) of Section 2744.09, these claims are exempt from political subdivision immunity. Second, employees may seek compensation when they are physically injured at work through non-intentional conduct. Such compensation, however, can come only from the workers' compensation system, regardless of any political subdivision immunity. OHIO REV. CODE ANN. § 4123.74 (Anderson 2010). Finally, as here,

employees may suffer physical or non-physical injuries resulting from intentionally tortious conduct. If division (B) of Section 2744.09 does not address this final category of claims, it is difficult to contemplate what claims this division does address. CMHA and its amicus propose an interpretation that would render this provision utterly superfluous, contrary to established principles of statutory construction.

This unworkable interpretation arises entirely from a misreading of this Court's precedent related to "employer intentional torts" and the workers' compensation system. In *Blankenship v. Cincinnati Milacron Chems., Inc.* (1982), 69 Ohio St. 2d 608, *Jones v. VIP Development Co.* (1984), 15 Ohio St. 3d 90, and *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St. 3d 624, this Court stated that intentional torts committed by employers against their employees "breach" the employment relationship for purposes of workers' compensation immunity.

As the Court stated in *Brady*, in this sense, such employer intentional torts "necessarily occur[] outside the employment relationship." 61 Ohio St. 3d 624, at syllabus. These holdings were adopted in the context of determining the extent of the constitutional compromise involved in the workers' compensation system, and addressed whether such torts were contemplated in that compromise. *Blankenship*, *Brady*, and *Jones* all held that they were not—that employers can be held accountable for intentionally injuring their employees, and are not immunized from such accountability, as is the case for unintentional workplace injuries.

But these cases also held that employees injured by intentionally tortious conduct are entitled to ordinary workers' compensation remedies. By definition, this means such injuries are "received in the course of, and arising out of, the injured employee's employment." OHIO REV. CODE ANN. § 4123.01 (Anderson 2010) (defining "injury" for purposes of workers' compensation). CMHA and its amicus seize upon one aspect of *Brady*, *Blankenship*, and *Jones*,

while ignoring the unequivocal holdings that physical injuries resulting from torts in the workplace, even when those torts are intentional and thus breach the employment relationship, still arise from and occur in the course of that relationship for the purposes of determining whether an employee can receive compensation.

Consistent with these decisions, this Court, in *Penn Traffic*, explained that the phrase "arising out of and in the course of employment" encompasses any claim "causally related to one's employment." The Court stated, "[a]lthough 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." 2003-Ohio-3373, at ¶ 40. There is no reason to interpret the words examined by the Court in *Penn Traffic* differently here. The General Assembly intended to withhold immunity as to political subdivision employees' common-law intentional tort claims that are causally related to their employment.

Because the Eighth Appellate District's en banc decision interpreted the statute consistent with the meaning intended by the Ohio General Assembly, and in a manner consistent with this Court's prior holdings, F.O.P. Ohio, F.O.P. Lodge 9, Akron Firefighters, and OELA, as *amici curiae* in support of Plaintiff-Appellee Darrell Sampson, respectfully request that this Court affirm the lower court's decision in this case.

ARGUMENT

PROPOSITION OF LAW: PURSUANT TO R.C. 2744.09(B), POLITICAL SUBDIVISIONS HAVE NO IMMUNITY UNDER CHAPTER 2744 AGAINST ACTIONS FILED BY SUBDIVISION EMPLOYEES FOR COMMON-LAW INTENTIONAL TORTS THAT ARE CAUSALLY CONNECTED TO AN EMPLOYEE'S EMPLOYMENT.

Chapter 2744 of the Ohio Revised Code codifies principles of sovereign immunity for political subdivisions in the State of Ohio. *See generally* OHIO REV. CODE ANN. Ch. 2744 (Anderson 2010). Chapter 2744 was enacted in 1985, and sets forth the circumstances under which political subdivisions, their departments and agencies, and their employees are immune from liability for their actions. *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, __ Ohio St. 3d __, Slip Op. No. 2011-Ohio-1603, ¶ 10 (decided April 7, 2011).

Although this Court has recognized that the broad statutory purpose of Chapter 2744 is "the preservation of the fiscal integrity of political subdivisions," it is important to note that the General Assembly also saw fit to incorporate into the statutory scheme certain exceptions to this immunity – circumstances where a political subdivision may indeed be held liable for its actions. *E.g., Wilson v. Stark Cty. Dep't of Human Serv's*, 70 Ohio St. 3d 450, 453, 1999-Ohio-394; *Zumwalde*, 2011-Ohio-1603, at ¶ 10.

Specifically, in R.C. 2744.09, the Legislature codified its decision to allow political subdivisions to be held accountable for their actions when they are acting as employers, by excepting employment claims from the general immunity provisions. According to the General Assembly, Chapter 2744 does not apply to:

- Civil actions by an employee, or the collective bargaining representative of an employee . . . relative to ***any matter*** that arises out of the employment relationship between the employee and the political subdivision; and

- Civil actions by an employee . . . relative to wages, hours, conditions, or ***other terms*** of employment.

OHIO REV. CODE ANN. § 2744.09(B), (C) (Anderson 2010) (emphasis added).

A. R.C. 2744.09(B) clearly and unambiguously divests political subdivisions of immunity with respect to employment-based claims by their employees.

The primary goal of statutory construction is to give effect to the intent of the General Assembly. *E.g., State v. Wilson*, 77 Ohio St. 3d 334, 336, 1997-Ohio-35. Unless a statute is ambiguous, legislative intent must be determined from the language of the statute itself. OHIO REV. CODE ANN. § 1.49 (Anderson 2010) ; *see also, e.g., Bryan v. Hudson* (1997), 77 Ohio St. 3d 376, 380. The General Assembly has mandated that "words and phrases shall be . . . construed according to the rules of grammar and common usage." OHIO REV. CODE ANN. § 1.42 (Anderson 2010). If a particular word or phrase has acquired a "technical or particular" meaning, whether by legislative definition or otherwise, only then will such technical or particular meaning apply. *See id.*

As this Court recently recognized, the language of R.C. 2744.09(B) is "clear and unambiguous on its face and requires no interpretation." *Zumwalde*, 2011-Ohio-1603, at ¶ 24. In *Zumwalde*, the Court considered whether employment claims alleged against an individual employee of the political subdivision were covered under R.C. 2744.09(B). *Id.* Answering this question in the negative, this Court concluded that it could not engage in a statutory analysis that would require the insertion of a new word into the text of R.C. 2744.09(B). *Id.*

In this case, this Court must determine whether R.C. 2744.09(B) withholds immunity from political subdivisions as to employment-based common-law intentional tort actions brought by their employees. R.C. 2744.09 states that the entirety of Chapter 2744 is inapplicable to five enumerated types of claims, meaning that there is no immunity from these claims under any

circumstances, and that the three-tiered immunity analysis contained in the rest of the Chapter does not apply to these claims.

Of these five enumerated exceptions to immunity in Section 2744.09, the General Assembly included two that relate to the employment relationship, divisions (B) and (C). The fact that two of the five immunity exceptions to political-subdivision immunity relate to the employment relationship underscores the General Assembly's intent to remove the cloak of immunity when political subdivisions act as employers.

Specifically, the plain language of R.C. 2744.09(B) states that political subdivisions are not immune from claims "relative to any matter that arises out of the employment relationship" between the subdivision and its employees. Notably, nothing in the plain language of R.C. 2744.09(B) creates any exception for claims predicated on intentional tortious conduct, versus other kinds of conduct that cause harm to employees. In fact, carving such conduct out of R.C. 2744.09(B) would require this Court to insert language into the statute that simply is not there, contrary to the holding in *Zumwalde*.

In addition, construing the phrase "arising from the employment relationship" according to common usage – as required by R.C. 1.42 – does not permit an interpretation of R.C. 2744.09(B) that excludes claims for certain types of conduct. In common usage, the term "arise" means, *inter alia*, "to originate from a source." MERRIAM-WEBSTER DICTIONARY, available at http://www.m-w.com. Thus, it is clear that the General Assembly intended that political subdivisions be held to answer in court for unlawful conduct that "originates from" the employment relationship.

This easily defined phrase, "arising from the employment relationship," stands in contrast to narrower, more technical language used elsewhere in the statute. For instance, in R.C.

2744.03(A)(6)(a), the General Assembly used, instead, the technical, legal term "scope of employment" – a phrase that is narrower than the phrase "arising from the employment relationship," and inextricable from well-established case law involving the doctrine of *respondeat superior* – to limit the circumstances under which political subdivision employees are liable for their own tortious conduct. The General Assembly could have, but did not, use this term to define the circumstances under which political subdivisions enjoy immunity from common-law, employment-based claims brought by their employees. Absent such technical language, this Court must interpret the words "arising from the employment relationship" according to their ordinary meaning.

B. The Appellants' interpretation of R.C. 2744.09(B) would render the provision superfluous and incompatible with the framework of Chapter 2744, contrary to established principles of statutory construction.

1. Under CMHA's interpretation, there would be no claims falling within the scope of division (B) of Section 2744.09 that are not already covered by other provisions.

When it interprets statutory provisions, a court must remain mindful that the General Assembly is "not presumed to do a vain or useless thing, and that when language is inserted in a statute, it is inserted to accomplish some definite purpose." *E.g., State v. Wilson* (1997), 77 Ohio St. 3d 334, 336. In fact, as the Legislature itself has directed, when courts interpret statutory enactments, it is "presumed that the entire statute is intended to be effective," and that a "just and reasonable result is intended." OHIO REV. CODE ANN. § 1.47(B), (C) (Anderson 2010) This means that a reviewing court "cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the [Legislature]." *Wilson*, 77 Ohio St. 3d at 336.

In addition to asking this Court to insert non-existent words and phrases into the otherwise unambiguous language of R.C. 2744.09(B), CMHA and its *amicus* ask this Court to adopt a statutory interpretation of this provision that would effectively write it out of the Ohio Revised Code. It is difficult to envision what claims an employee would have against a political-subdivision employer that "arise from the employment relationship" and that would fall within the coverage of R.C. 2744.09(B) as CMHA and its *amicus* interpret it.

Claims by employees against their employers fall into three essential categories. In the first category are claims based on the terms and conditions of an employee's employment. For instance, an employee may bring an action to enforce an employment contract, to challenge the wages and hours of his or her employment, or a denial of employment-related benefits. In addition, under federal and Ohio law, an employee may bring an action against an employer when unlawful discrimination alters the terms and conditions of the employee's employment. *See* OHIO REV. CODE ANN. § 4112.02(A) (Anderson 2010) (prohibiting discrimination "with respect to hire, tenure, terms, conditions, or privileges of employment"); *Meritor Savings Bank v. Vinson* (1986), 477 U.S. 57, 67 (holding that sexual harassment is actionable under federal law where it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment" (quotations omitted)); *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 175-77, 2000-Ohio-128 (applying *Meritor*'s "alter the conditions of [the victim's] employment" standard to Chapter 4112 discrimination claims). Per division (C) of Section 2744.09, which states that Chapter 2744 does not apply to "[c]ivil actions by an employee . . . relative to wages, hours, conditions, or other terms of employment," the General Assembly has withheld immunity from political subdivisions for all of the claims encompassed by this first category of employment-related actions.

A second category of claims by employees against their employers involves physical injuries occurring at work through accidental or otherwise unintentional circumstances. All such injuries are compensable, but only through the workers' compensation system. *See* OHIO REV. CODE ANN. § 4123.74 (Anderson 2010) (providing immunity from civil actions for all employers who comply with the provisions of the workers' compensation system). Political subdivision immunity has no bearing on such claims.

The last category of claims by employees against their employees related to their employment consists of circumstances where, as here, employees have suffered harm as a result of their employers' intentional conduct. CMHA and its *amicus* propose that such claims are not covered by Section 2744.09(B). But that interpretation would render this provision utterly superfluous: because all of the claims in the first two categories are either excluded from Chapter 2744 under Section 2744.09(C) or subsumed by the workers' compensation system under Section 4123.74, there would be no set of claims addressed by Section 2744.09(B), and the entire division would be a nullity. Because such an interpretation is contrary to principles of statutory construction, this Court must not adopt such an interpretation.

2. *CMHA's interpretation of R.C. 2744.09(B) is incompatible with the framework of Chapter 2744.*

Moreover, the interpretation of R.C. 2744.09(B) suggested by CMHA and its *amicus* is incompatible with the remainder of Chapter 2744, a result that is likewise contrary to principles of sound statutory construction. If none of the provisions of R.C. 2744.09 apply to remove immunity, courts generally engage in a three-tiered analysis of immunity, starting with the issue of whether the political subdivision is engaging in a "governmental" or "proprietary" function. *E.g., Colbert v. Cleveland*, 99 Ohio St. 3d 215, 216, 2003-Ohio-3319; OHIO REV. CODE ANN. § 2744.02(A) (Anderson 2010). If so, then the political subdivision enjoys immunity from claims

arising from such functions, unless one or more of the exceptions codified at R.C. 2744.02(B) remove that immunity. If the subdivision is not immune by operation of R.C. 2744.02(B), then it may raise the various immunities and defenses set forth in R.C. 2744.03 to avoid liability.

If the General Assembly had drafted R.C. 2744.09(B) to exclude claims by employees based on unlawful and intentional tortious conduct, then the three-tiered analysis described above would apply to such claims. Thus, it would have to be determined whether employing individuals is a "governmental" or "proprietary" function. If so, then the exceptions in R.C. 2744.02(B) may apply; if not, then the defenses in R.C. 2744.03 may apply.

Notably, the definitions of "governmental" and "proprietary" functions say nothing about political subdivisions acting as employers, and the exceptions to immunity codified at R.C. 2744.02(B) do not address claims made by employees or the acts of the political subdivision in connection with its role as an employer. Likewise, the defenses and immunities contained in R.C. 2744.03 have nothing to do with the employment relationship between the subdivision and its own employees. The only provision in R.C. 2744.03 that addresses this relationship is (A)(6), which states that individual employees acting within the scope of their employment are immune.

It is significant that, with the exception of Section 2744.09, the entire statutory scheme of Chapter 2744 is devoid of provisions relating to immunity, exceptions, and defenses to claims against political subdivisions made by their employees. If the General Assembly had not intended to remove these claims from the ambit of Chapter 2744 altogether – by way of R.C. 2744.09(B) and (C) – it surely would have included such provisions *somewhere* in the statutory scheme provisions. The omission is glaring and instructive: because the Legislature intended that political subdivisions remain liable for injuries caused when they act as employers, it enacted R.C. 2744.09 to remove immunity from such claims.

C. This Court's prior decisions make it clear that R.C. 2744.09(B) withholds immunity from political subdivisions for employment-based common-law intentional tort claims.

1. CMHA's argument misinterprets the Court's prior precedents related to workers' compensation immunity.

The extreme and illogical interpretation put forward by CMHA and its *amicus* arises entirely from a misreading of this Court's much-analyzed precedents related to "employer intentional torts" and the workers' compensation system. These precedents, *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St. 2d 608, *Jones v. VIP Development Company* (1984), 19 Ohio St. 3d 90, and *Brady v. Safety-Kleen Corp* (1991), 61 Ohio St. 3d 624, recognized and analyzed the right of employees to hold their employers accountable beyond the remedies permitted by the workers' compensation system for intentionally-caused physical injuries in the workplace. That right has since been codified, albeit under limited circumstances, at R.C. 2745.01, as noted in this Court's decision in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 253-262, 2010-Ohio-1027.

In *Blankenship*, *Jones*, and *Brady*, the Court provided an interpretation of R.C. 4723.74 – the statutory provision immunizing employers from tort liability for workplace injuries – that permitted employees to bring tort actions for intentionally caused physical injuries. The Court's reasoning was that Section 4123.74 provided immunity only for injuries an employee suffered "in the course of or arising out of his employment." According to the Court, however, as stated in *Brady*, when an employer intentionally harms its employee, it "effects a complete breach of the employment relationship," in that an employee does not contemplate the risk of intentionally harmful conduct when he or she agrees to work for an employer. 61 Ohio St. 3d at 634. Thus, as set out in the syllabus, employer intentional torts "necessarily occur[] outside the employment relationship," and the immunity in Section 4123.74 does not apply to such conduct. This is the

language relied upon entirely by CMHA and its *amicus* to argue that Section 2744.09(B) does not apply to common-law intentional torts committed by employers against their employees.

But this interpretation ignores the full scope of the holdings of these cases. In *Jones*, the Court reaffirmed *Blankenship*'s statement that Section 4123.74 does not bar intentional tort claims, and its reasoning, but the Court also held that workers were entitled to recover ordinary workers' compensation benefits for the same, intentionally caused injuries. *Jones*, 19 Ohio St. 3d 90, at syllabus. This Court therefore concluded that these injuries, while effecting a "breach" of the employment relationship, were nevertheless "received in the course of, and arising out of, the injured employee's employment." *See* OHIO REV. CODE ANN. § 4123.01 (Anderson 2010) (defining the term "injury" for purposes of workers' compensation to include only injuries arising out of employment).

In context, *Blankenship*, *Brady*, and *Jones* stand for the proposition that, for the purpose of defining the outer limits of workers' compensation immunity, and the scope of the great workers' compensation compromise, employees do not forego their right to full compensation for intentionally-caused injuries by participating in the workers' compensation system. But this proposition does not change the simple fact that injuries that occur at work, that are caused by an employer's conduct, and that are causally connected to the existence of an employer-employee relationship necessarily occur "in the course of, and arising out of" that relationship.

2. This Court's subsequent precedents recognize that intentionally harmful employer conduct arises from the employment relationship where it is "causally related" to an employee's employment.

In *Penn Traffic Co. v. AIU Insurance Co.*, this Court explained these two distinct, but consistent, aspects of *Blankenship, Jones*, and *Brady* with respect to claims "arising out of and in the course of employment." 99 Ohio St. 3d 227, 2003-Ohio-3373. In *Penn Traffic*, the Court

considered the scope of an insurance policy provision that excluded claims "arising out of and in the course of employment." The *Penn Traffic* Court acknowledged that *Blankenship* and *Brady* stated that employer intentional torts occur outside the scope of employment, but it also acknowledged the holding in *Jones* 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*, 2003-Ohio-3373, at ¶ 39. The Court continued, "[a]lthough 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." *Id.* at ¶ 40. Thus, this Court held that the phrase "arise out of or in the course of employment" means that the injury is "causally related to one's employment." *Id.* at ¶ 41.

There is no basis for applying a different definition to the same language in Section 2744.09(B), as has been recognized by Ohio appellate courts. In *Buck v. Reminderville*, the Ninth District analyzed *Penn Traffic* and found that its holding applied specifically to the context of public-employer immunity in R.C. 2744.09(B). *See generally* (9th Dist. App.), 2010-Ohio-6497, *overruling Ellithorp v. Barberton City Sch. Dist. Bd. of Educ.*, Ninth Dist. App. No. 18029, 1997 WL 416333, and *Dolis v. City of Tallmadge* (9th Dist. App.), 2004-Ohio-4454.[1]

In *Buck*, the police chief of the Village of Reminderville sued his public employer for defamation, to which the Village raised the issue of political-subdivision immunity. *Id.* In holding that R.C. 2744.09(B) divested Reminderville of immunity from Mr. Buck's claim, the

[1] It should be noted that, in reference to CMHA's citation of *Ellithorp*, CMHA and its *amicus* have failed to recognize that the Ninth District explicitly overruled that case in *Buck*. This Court has been asked to review *Buck*, but it has not been accepted for review at this time.

Court of Appeals reasoned that "just because an employer's intentional tort does not arise out of the employment relationship for purposes of evaluating an employer's immunity under [R.C.] 4123.74, does not mean that it does not arise out of the employment relationship ***in all contexts***." *Id.* at ¶ 8 (emphasis added). The *Buck* court also noted that many of the appellate court decisions holding R.C. 2744.09(B) inapplicable to intentionally tortious conduct were decided before *Penn Traffic*, or did not consider *Penn Traffic*, and that many courts have now reconsidered the issue in light of *Penn Traffic* and reversed those holdings. *See id.* at ¶ 12.

The Fourth District Court of Appeals reached a similar conclusion in *Nagel v. Horner*, 162 Ohio App. 3d 221, 2005-Ohio-3574. Analyzing the application of Chapter 2744 to retaliation and hostile work environment claims brought by a public employee, the *Nagel* court stated, "we are not persuaded that the legislature intended to engraft the Supreme Court's interpretation of the workers' compensation scheme onto its general statutory provisions for political-subdivision immunity." *Id.* at ¶ 18. The Court adopted *Penn Traffic*'s "causally connected" standard for determining whether claims "arise out of the employment relationship," and held that "[r]egardless 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." *Id.* at ¶ 1.[2]

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[2] While *Nagel* is instructive in that it analyzes whether intentionally harmful conduct can arise out of the employment relationship, the amici acknowledge, as CMHA points out at footnote 4 of its Merit Brief, that discrimination cases present a separate question and are not controlling here. As noted above, employment discrimination claims are not intentional tort claims; they are claims addressing conduct that alters the "terms, conditions, or privileges of employment." R.C. § 4112.02(A); *see also Meritor Savings Bank* (1986), 477 U.S. 57; *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, at ¶¶ 17-20 (noting contractual nature of alterations to terms or conditions of at-will employment).

D. The withholding of immunity for employment-based common-law intentional tort claims places political subdivisions and their employees on equal footing with their private sector counterparts.

Acknowledging the applicability of Section 2744.09(B) to common-law intentional torts that are causally connected to political subdivision employees' employment effectuates the purpose of the General Assembly to place political subdivisions on equal footing with private-sector employers when those subdivisions act as employers. Under the analysis advocated by CMHA and its *amicus*, subdivision employees, unlike their private-sector counterparts, would have no meaningful recourse for intentionally harmful conduct they suffer as a direct result of their status as public employees. *See Buck v. Reminderville*, 2010-Ohio-6497, at ¶ 11 (stating that "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," and that to exclude intentional torts from its coverage would be "tantamount to encouraging such intentionally tortious conduct" (quotations omitted)).

The "causal connection" rule adopted in *Penn Traffic* ensures a proper balance between the interests of political subdivisions in governmental immunity and the availability of effective relief for public employees who suffer harm from employment-based common-law intentional torts. As the en banc opinion below noted, this rule maintains the immunity of political subdivisions from liability for harm that their employees suffer unrelated to their status as employees. *See Sampson v. Cuyahoga Metro. Hous. Auth.* (8th Dist. en banc), 188 Ohio App.3d 250, 2010-Ohio-3415, at ¶¶ 25-27 (distinguishing cases in which political-subdivision employees made claims that did not arise from their employment).

In addition, while the General Assembly has withheld immunity from political subdivisions in their capacity as employers, nothing in the statute deprives such political

subdivisions of their common-law defenses to employees' tort claims, and they are afforded the same such defenses as private employers. In contrast, adopting the position advocated by CMHA and its *amicus* would create a scenario in which employee suits against political subdivisions are allowed for almost every type of employment-related dispute *except* those involving the most serious and injurious acts by unscrupulous public employers. The General Assembly carefully crafted Chapter 2744 to avoid such absurd results. This Court should reject CMHA's request that it amend the General Assembly's enactment.

CONCLUSION

For all of the foregoing reasons, F.O.P.-Ohio, F.O.P. Lodge 9, Akron Firefighters, and OELA, as *amici curiae* in support of Plaintiff-Appellee Darrell Sampson, urge this Court to affirm the en banc decision of the Eighth Appellate District.

Respectfully submitted,

Christina M. Royer by FMG

Christina M. Royer (0073695)
(per telephone authority)
**Counsel Of Record*
CHRISTINA M. ROYER, LTD.,
ATTORNEY AT LAW
635 West Lakeside Avenue, Suite 605
Cleveland, Ohio 44113
(440) 526-9797
Fax: (216) 404-5958
croyer@croyerlaw.com

Frederick M. Gittes

Frederick M. Gittes (0031444)
Jeffrey P. Vardaro (0081819)
THE GITTES LAW GROUP
723 Oak Street
Columbus, Ohio 43205
(614) 222-4735
Fax: (614) 221-9655
fgittes@gitteslaw.com

Paul L. Cox by FMG

Paul L. Cox (0007202)
(per telephone authority)
Chief Counsel
FRATERNAL ORDER OF POLICE OF OHIO, INC.
222 East Town Street
Columbus, Ohio 43215
Tel.(614) 224-5700
Fax (614) 224-5775
pcox@fopohio.org

Russell E. Carnahan by FMG

Russell E. Carnahan (0011801)
(per telephone authority)
HUNTER, CARNAHAN, SHOUB & BYARD
3360 Tremont Road, 2nd Floor
Columbus, Ohio 43221
Telephone: (614) 442-5626
Fax: (614) 442-5625
rcarnahan@hcands.com

Counsel for Amici Curiae Fraternal Order of Police of Ohio, Inc.,
Fraternal Order Of Police, Capital City Lodge No. 9,
Akron Firefighters IAFF Local 330, and
Ohio Employment Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of April, 2011, a copy of the foregoing was served upon the following by regular U.S. mail, postage pre-paid:

Nancy C. Shuster, Esq.
2913 Clinton Avenue
Cleveland, Ohio 44113

Counsel for Plaintiff-Appellee Darrell Sampson

Stephen W. Funk, Esq.
Aretta K. Bernard , Esq.
Karen D. Adinolfi, Esq.
ROETZEL & ANDRESS, LPA
222 South Main Street
Akron, Ohio 44308

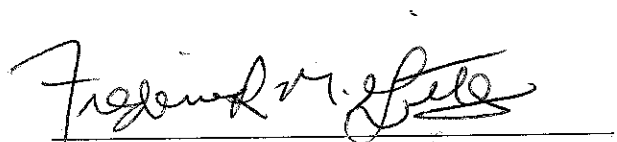
Counsel for Defendants-Appellants

Stephen L. Byron, Esq.
Rebecca K. Schaltenbrand, Esq.
SCHOTTENSTEIN, ZOX & DUNN CO., LPA
4230 State Route 306, Suite 240
Willoughby, OH 44094

Stephen J. Smith, Esq.
SCHOTTENSTEIN ZOX & DUNN CO., LPA
250 West Street
Columbus, OH 43215

John Gotherman, Esq.
OHIO MUNICIPAL LEAGUE
175 S. Third Street, #510
Columbus, OH 43215-7100

Counsel for Amicus Curiae Ohio Municipal League



Frederick M. Gittes (0031444)