

ORIGINAL

No. 10-1561

IN THE SUPREME COURT OF OHIO

DARRELL SAMPSON

Appellee,

v.

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

Appellants.

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

Court of Appeals
Case No. 09-093441

MERIT BRIEF OF APPELLEE DARRELL SAMPSON

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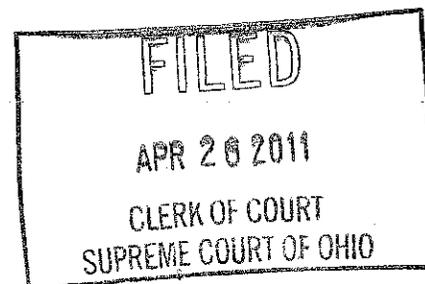


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I. INTRODUCTION

The answer to the question whether R.C. 2744.09 applies to deny immunity to Appellant Cuyahoga Metropolitan Housing Authority (CMHA) and conversely to permit Mr. Sampson's claims is answered in the response to two questions: (1) was Mr. Sampson an employee of CMHA at the time his claims arose, and (2) did they arise out of his employment relationship with CMHA.

The answer to the first is agreed. He was an employee at the time.

The answer to the second depends on whether this Court adopts the plain language of R.C. 2744.09 that Chapter 2744 does not apply to, and shall not be construed to apply to civil actions by an employee relative to any matter that arises out of the employment relationship between the employee and the political subdivision.

In answering question two for this case, this Court need not decide whether R.C. 2744.09(B) permits all civil actions, but only whether this case arose out of the employment relationship. That answer does not depend on whether the tort alleged constitutes a negligent breach of duty or contains an element of intention. The identity of the tort is not a factor. The circumstances from which the tort arose decide the question. There is no per se rule.

As eight judges of the Eighth District agreed, Mr. Sampson's "claims clearly arose out of his employment relationship" and R.C. 2744.09(B) applies to permit his claims against CMHA to go forward. (See Appx. 1, p. 23.) The record reflects and CMHA does not deny the operative facts which permit the claims to proceed.

II. PROCEDURAL HISTORY

On August 31, 2006, Mr. Sampson filed suit against Defendants CMHA, Lt. Ronald J. Morenz of the CMHA Police (the investigating officer), Chief of CMHA Police Anthony

Jackson, and CMHA Executive Director George Phillips (the decision makers) for intentional (Count 1) and also negligent (Count 2) infliction of serious emotional distress and abuse of process (Count 3). On October 16, 2006, the Complaint was amended to add Count 4, a claim for negligent misidentification under *Breno v. City of Mentor*, 8th District No. 81861, 2003-Ohio-4051 and *Wigfall v. Society National Bank*, 107 Ohio App.3d 667, (6th App. Dist., Lucas County, December 8, 1995).

The trial court denied CMHA's Motion to Dismiss Counts 1, 3, and 4 on immunity grounds on October 2, 2007 but granted CMHA's Motion to Dismiss the claim for negligent infliction of emotional distress as not recognized by Ohio law. On December 12, 2008, all Defendants moved for summary judgment, again on the ground of sovereign immunity. The trial court denied this motion as well, and on July 8, 2009, Defendants appealed to the Eighth District Court of Appeals pursuant to R.C. 2744.02(C).

The Eighth District, in an opinion released March 25, 2010, affirmed the judgment of the trial court, denying immunity to all Defendants. (See Appx. 30.) Defendants then moved for reconsideration or certification to this Court or in the alternative for an en banc opinion. In an opinion released on July 22, 2010, the Eighth District en banc affirmed the panel opinion, yet again denying immunity to all Defendants. (See Appx. 1.)

Defendants then applied to this Court for certiorari on two Propositions of Law: (1) R.C. 2744.09 does not create an exception to political subdivision immunity for intentional tort claims alleged by a public employee; and (2) evidence of alleged errors in the investigation was not sufficient to establish wanton or reckless conduct under R.C. 2744.03(A)(6). On December 15, 2010, this Court accepted jurisdiction on the first Proposition of Law. CMHA moved for

reconsideration of the second on December 27, 2010 and on February 16, 2011 this Court again denied jurisdiction on the second Proposition of Law.

III. STATEMENT OF THE FACTS

Plaintiff-Appellee Darrell Sampson grew up in CMHA's Garden Valley Project and in December 1988, at the age of 22, he went to work for CMHA as a Groundskeeper (Supp. 59.) He was promoted to Serviceman IV in 1989 and in 2000 to Serviceman V Plumber, the job he performed until his termination. (*Id.*) At the time, Mr. Sampson's three sons were 9, 15, and 18. He was the volunteer coach of all three sons' basketball teams. (*Id.*) Mr. Sampson had never been arrested or charged with any offense and had never been warned or disciplined at work. He was proud of the example he set for his sons. (Supp. 60.)

For fourteen years Mr. Sampson served as Union Steward and as Assistant Chief Steward of Local 47, SEIU. (Supp. 59.) He looked forward to beginning what he anticipated would be long service as Chief Steward on September 1, 2004, when he was scheduled to replace the respected, long time Chief Steward who was retiring that day. (*Id.*)

But on August 31, 2004, when he reported to work at the warehouse as directed by CMHA, he was called to the podium and handcuffed in front of more than 200 fellow employees. (See Supp. 132, Tr. 81-83.) He was terminated by CMHA on October 15, 2004.

Mr. Sampson's position as a plumber for the CMHA Property Maintenance Department required the use of various types of vehicles to respond to CMHA service calls and emergencies throughout the county. CMHA assigned these vehicles to plumbers on a daily basis. (Supp. 59.) All CMHA vehicles were fueled using gasoline credit cards ("gas cards") kept in various vehicles. Personal identification numbers ("PINs") for the gas cards were issued and assigned by CMHA. (Supp 114, Tr. 78; Supp. 115, Tr. 112.) The gas cards were issued by Wright Express,

an independent payment processing company, and assigned to vehicles by CMHA. (Supp. 64, Tr. 27-28.)

Although there should have been a gas card in each vehicle, some vehicles did not have a card. (Supp. 73.) CMHA instructed the plumbers to use a card from a different vehicle if there was not a card in the one they were driving. (Supp. 106.) Although each plumber should have had his own PIN to use with the cards, some plumbers did not have a PIN, or their PIN did not work. (Supp. 59.) Two plumbers were explicitly instructed by CMHA management to use Mr. Sampson's PIN to fuel whatever vehicle they were using because they had not received working PINs - despite requesting them for over a year. (Supp. 59, 71, 72, 87, 104.)

On September 11, 2003, after an internal audit of painter overtime, CMHA began an investigation of painter McClain for painting private homes on CMHA time, including charged overtime. (Supp. 153, Tr. 50.) CMHA Sgt. Raymond Morgan, Chief of Internal Affairs, was assigned to the investigation. (Supp. 153, Tr. 49.) Sgt. Morgan, with another CMHA detective and a Special Agent, Office of HUD Inspector General, surveilled Mr. McClain and two additional suspected employees for three and a half months. (Supp. 153, 49-50.) Among other things, they kept surveillance and activity logs, gathered documents including personnel files, and photographed the houses where employees were seen performing side jobs. (Id.) After being photographed in the act, two employees agreed to cooperate and in counseled interviews implicated others. (Supp. 155, Tr. 57.) After several additional months of surveillance, interviews, photographs, and videos, the investigation (nicknamed "Project Overworked") was completed in early August after approximately ten months of work. (Supp. 154, Tr. 56-57.) Seven painters, including the initial targets, were arrested on August 31, 2004, indicted, and pled guilty. (Supp. 153, Tr. 52-53.)

On July 20, 2004, after receiving an anonymous tip on the CMHA TIPS Hotline accusing plumber Roan of using a CMHA gas card to fuel his personal vehicle, CMHA began an investigation of all plumbers. (Supp. 64, Tr. 25; Supp 75; Supp. 114, Tr. 79.) This internal investigation was assigned to Lt. Ronald J. Morenz of the CMHA Police Detective Bureau, rather than to Internal Affairs. (Supp. 98.) According to Morenz, at the direction of CMHA Executive Director George Phillips, he included the entire plumbing department in the investigation. (Supp. 114, Tr. 78.)

His investigation lasted barely five weeks. He worked alone and collected minimal information, never interviewing any plumber or their supervisor, conducting any surveillance or checking vehicles for gas cards before he concluded the investigation. (Supp. 98; Supp. 114, Tr. 77, 80; Supp 122, Tr. 184; Supp. 127, Tr. 230). After this abbreviated inquiry, Morenz came to the erroneous conclusion that all plumbers had a PIN number and that each vehicle had a gas card. (Supp. 64, 94, 98.) It appeared from the credit card reports that some vehicles had been fueled beyond their capacity, and it appeared as though some employees had purchased a great deal of gasoline. (Supp. 41.) Morenz made no attempt to verify this appearance through surveillance or interviews and (Supp.116, Tr. 124.) just in time, only days before the arrests were scheduled, Morenz concluded his investigation. (Supp. 127, Tr. 230.)

In January 2004, George Phillips had become Executive Director of CMHA. (Supp. 140, Tr. 9.) CMHA Police Chief Anthony Jackson reported to Director Phillips. (Supp. 141, Tr. 12.) Chief Jackson kept Director Phillips apprised of criminal activity, investigations, and arrests. (Supp. 142, Tr. 34-35.)

Sometime prior to the arrests, Director Phillips and Chief Jackson met a few times regarding the evidence collected by Morgan and Morenz in their respective investigations of the

painters and the plumbers. (Supp. 129, Tr. 61-64.) Director Phillips saw no written reports about the plumber investigation and did not inquire as to whether any of the plumbers had been interviewed or as to their criminal backgrounds, if any. (Id.) At some point, Morenz concluded his investigation and presented the case to Director Phillips who gave Morenz the affirmative to continue. (Supp. 144, Tr. 67-68.) Director Phillips relied only on what Chief Jackson and “some of the officers” told him and he received no other reports (written or verbal) from anyone. (Id.; See, also, Supp. 146, Tr. 74.)

During the last week of August 2004, Director Phillips and Chief Jackson decided that they would call a special meeting of all two hundred maintenance employees at the CMHA warehouse at 4700 Lakeside in Cleveland and arrest the plumbers and painters at the meeting. (Supp. 122, Tr. 182-184; Supp. 131, Tr. 79.) The Arrest Plan was put into writing on August 27, 2004. (Supp. 131, Tr. 79-80.) In the process, they decided to issue a press release and schedule a press conference. (Supp. 133, Tr. 85.)

Sometime on August 30, 2004, the plumbers were each told to go directly to the CMHA warehouse on Lakeside the next morning for a meeting, instead of punching in and collecting work orders and tools at the plumbers’ shop on Quincy Avenue as they all did each morning. (Supp. 61.)

Mr. Sampson arrived at the warehouse at around 8:15 a.m. (Supp. 59.) When he entered, there were about 200 CMHA employees already present, and Director Phillips was speaking. (Id.) Director Phillips said, “We’re ready.” (Supp. 59, 61.) After a pause, Sgt. Morgan began to call out 13 names (7 painters and 6 plumbers), including Mr. Sampson who had thought that it was possible that he was getting an award of some kind. (Supp. 59.) When all the names had been called, Morgan announced to the room that these men were under arrest for theft. (Supp.

59, 61.) One by one, each of the 13 was handcuffed by CMHA police in view of the watching crowd. (Id. See, also, Supp. 124, Tr. 198.) As they were led away, Director Phillips announced: "This is what happens when you steal from CMHA residents." (Supp. 59-60, 61-62.) Mr. Sampson begged the officers to handcuff him in the front because he was claustrophobic and because his hands would not come together behind his back, but they refused. (Id.)

Handcuffed, the arrestees were marched past a partial wall (still viewable by the crowd) to be photographed and booked. They were then marched in a line out of the warehouse truck door to CMHA police vehicles and waiting television cameras. (Supp. 59-60, 61-62, 73, 76, 83.) Mr. Sampson was filmed and shown full face that night on Channel 3 trying to turn from the cameras. (Supp. 60, 78-79.) There were no warrants and no justification for arrest under Ohio Crim.R. 4(A)(1)¹. (Supp. 123, Tr. 190.)

The men were transported to the Justice Center. Some, including Mr. Sampson, were taken from the Justice Center to precinct jails. (Supp. 60.) The next day, they were released without charge and without bond. They were placed on administrative leave by CMHA. (Supp. 60.)

A press conference in CMHA's Board Room was scheduled immediately after the arrests. (Supp. 17.) A press release to publicize the arrests was issued. (Supp. 18.) The Press Release announced: "The arrest of 13 employees on suspicion of bribery, theft in office, forgery, tampering with government records, complicity and misuse of agency equipment. The arrests, which were the result of a nine-month long investigation known as Operation Overworked [the painter - not the plumber - investigation] were made during a staff meeting with maintenance workers at CMHA's Maintenance facility, 4700 Lakeside Avenue." (Id.) Local news articles

¹ *** "The issuing authority shall issue a summons instead of a warrant . . . when issuance of a summons appears reasonably calculated to ensure the defendant's appearance."

quoted CMHA Director Phillips saying, "These arrests send a clear message that we are not going to tolerate employees trying to circumvent the system to steal time, money, or supplies to the detriment of the people we are here to serve." (Supp. 12.) It was the largest "roundup" in Chief Jackson's 10 years at CMHA. (Supp. 13.)

On September 30, 2004, Morenz testified to the Grand Jury. (R. 54, Opposition – Ex. 5, 3/29/2005 Morenz Report [Morenz Trans. pg. 217]) On October 7, 2004, the plumbers were indicted for Theft, Misuse of Credit Cards, and Theft in Office. (Supp. 9.) Mr. Sampson was officially terminated by CMHA on October 15, 2004. (Supp. 11, 60.)

On January 21, 2005, three months after Mr. Sampson's indictment, and approximately five months after CMHA's five week investigation ended with the plumbers' arrests, Morenz issued a report detailing "deficiencies" in CMHA administration that made it impossible to show whether there was any malfeasance on the part of the plumbers. (R. 54, Opposition – Ex. 19, 1/21/2005 Morenz Report [Morenz Trans. pgs. 135-140, 145-147]) On January 21, 2005, Morenz said "(1) Wright Express Credit Cards [the gas cards] are not being left in the vehicles...; (2) Wright Express Credit Cards are used from one vehicle to fuel another due to missing gas cards...; (3) There is no reporting system for lost/missing cards – no one can definitively state when a card was reported lost...; (4) PIN's are not being kept confidential by employees...; [and] (5) Not all employees are issued PIN's as they are hired, some take over 1 year..." (See R. 54, Opposition – Ex. 5 (pp. 8-9) and Ex. 19)

From January until March 2005, as each plumber came up for his separate trial, the prosecution dismissed each case with prejudice. (See Supp. 10.) Mr. Sampson's trial, the fifth of the six plumbers, was scheduled to begin on February 2, 2005. (*Id.*) On that day after pending nearly six months, the charges were dismissed with prejudice by the State. (*Id.*)

Mr. Sampson contested his termination through the grievance procedure. On November 22, 2005, an arbitration was held. (Supp. 81.) Even though the criminal cases had long been dismissed and the deficiencies reported, Morenz testified against Mr. Sampson at the arbitration, still claiming that there were unexplained discrepancies which implicated him. (Supp. 86.) After all the evidence was heard, the Arbitrator said:

In the face of the evidence, the arbitrator finds that the preponderance of the evidence shows no theft of gasoline at all, much less any evidence that the grievant was guilty of such theft. Accordingly there is no just cause for this discharge.

(Supp. 107.) The arbitrator ordered that Mr. Sampson be reinstated. He returned to work in March 2006. (Supp. 108.) But neither Mr. Sampson nor the job he returned to were the same. (Supp. 60.) The job was not the job he left. He was given less interesting and less difficult assignments and was not permitted to travel between estates. (Id.) He was not permitted to get his own tools and equipment to complete his assignments. (Id.) He became physically ill and eventually sought treatment. He received a diagnosis of post traumatic stress disorder. (Id.)

III. ARGUMENT IN OPPOSITION

APPELLANT'S PROPOSITION OF LAW: R.C. 2744.09(B) does not create an exception to political subdivision immunity for common law intentional tort claims alleged by a public employee.

APPELLEE'S RESPONSE: There is no language in R.C. 2744.09(B) excluding intentional torts from the application of chapter 2744. Intentional torts can, and in this case did, arise out of the employment relationship in the context of R.C. 2744.09(B).

- A. **Because the Language of R.C. 2744.09(B) Is Clear That A Political Subdivision Is Not Immune From Claims That Arise Out Of The Employment Relationship, It Is Not Necessary To Construe The Meaning.**

Chapter 2744 of the Ohio Revised Code addresses the question of when political subdivisions, their departments, agencies, and employees are immune from liability for their

actions. R.C. 2744.01 *et seq.*; *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, Slip Opinion No. 2011-Ohio-1603, at ¶10. Chapter 2744 also contains certain exceptions to that immunity. See, *e.g.*, R.C. 2744.02, 2744.03, and R.C. 2744.09. The exception stated in section 2744.09(B) operates to remove Chapter 2744 immunity that arise out of the employment relationship between a political subdivision and its public employees. That section 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* *

* [Emphasis added]

R.C. 2744.09(B).

In the face of these words, Appellant argues that a plain reading of R.C. 2744.09(B) is insufficient to discern the meaning. To support its argument, Appellant asks the Court to superimpose the definition of intentional tort used in a body of case law unrelated to political subdivision immunity – specifically workers’ compensation law – onto the meaning of the statute. (See Appellant’s Merit Brief at 13.)

Mr. Sampson’s position – that in this case, this Court need not (and should not) look further than the statute itself – is supported by long-established law on statutory construction. This Court has held repeatedly that the language of a statute is to be given its plain meaning, and if the words are unambiguous, the court is not permitted to resort to the principals of statutory construction to change it or bolster it.

[T]he primary goal in construing a statute is to ascertain and give effect to the intent of the legislature. In interpreting a statute, this court has held that the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from

ambiguity and doubt, and express plainly, clearly, and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation.

State v. Chappell, 127 Ohio St.3d 376, 2010-Ohio-5991, at ¶15-16.

Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses [*sic*] the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such as statute speaks for itself.

Jasinsky v. Potts (1950), 153 Ohio St. 529, 533, citing to 50 American Jurisprudence, 205, Section 225. The Court pointed out that "...many years ago this court held that, 'where the words of a statute are plain explicit and unequivocal, a court is not warranted in departing from their obvious meaning.'"

The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.

Quoting Ohio Jurisprudence, the Court continued,

Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation. To interpret what is already plain is not interpretation, but legislation, which is not the function of the courts, but of the general assembly. *** An unambiguous statute is to be applied, not interpreted. See, also, *ibid*, 488, 490, Sections 267-268.

Sears v. Weimer (1944), 143 Ohio St. 312, 316.

Following a primary rule of statutory construction, we must apply a statute as it is written when its meaning is unambiguous and definite. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. Of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519. See, also, *Morgan v. Ohio Adult Parole Auth.* (1994), 68 Ohio St.3d 344, 347, 626 N.E.2d 939. . .

Portage County Bd. of Comm'rs v. Akron, 109 Ohio St.3d 106, 2006-Ohio-954, at ¶52.

R.C. 2744.09(B) could not be more plainly written, and in fact, has already been found by this Court to be clear and unambiguous. *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, Slip Opinion No. 2011-Ohio-1603 at ¶24.

As this Court stated in *Zumwalde*:

The language of R.C. 2744.09(B) is clear and unambiguous on its face and requires no interpretation. Subsection (B) clearly states that immunity is removed only with respect to political subdivisions. Had the General Assembly intended also to remove immunity from the employees of political subdivisions, it could have easily done so by including the word “employee” in R.C. 2744.09(B) as it did in R.C. 2744.09(A). To find otherwise would require this court to insert ‘employee’ into Subsection (B). But [a] court should give effect to the words actually employed in a statute, and should not delete words used, or insert words not used, in the guise of interpreting the statute.”

Zumwalde, 2011-Ohio-1603, at ¶24 (quoting *State v. Taniguchi* (1995), 74 Ohio St.3d 154, 156).

Appellant, however, wants to do exactly what is prohibited. Like Ms. Zumwalde, CMHA is attempting to persuade the Court that R.C. 2744.09(B) should be interpreted as if it contains additional verbiage. *Id.* at ¶20. Section 2744.09(B) does *not* contain the words “except intentional torts,” and the statute must be construed as written, not as Appellant wishes it were written.

Section 2744.09 begins with the direction that “this chapter *shall not be construed to apply to*, the following: ... (B) Civil 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.” R.C. 2744.09(B) (emphasis added.) The plain and natural meaning of “arises out of the employment relationship” is that the claim must be causally connected to the public employee’s employment with the political subdivision. See *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, at ¶41; *Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, at ¶20.

In *Nagel v. Horner*, the court was “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 characterization of the tort – negligent or intentional – is immaterial in deciding whether R.C. 2744.09(B) applies to remove immunity from a political subdivision. *Id.* at ¶1. Instead, the relevant inquiry is whether the claims are causally related to the plaintiff’s employment with the political subdivision. *Id.*; See, also, *Gessner v. Union*, 159 Ohio App.3d 43, 2004-Ohio-5770, at ¶¶31, 35 (finding that regardless of appellant’s argument that his dismissal for age discrimination was an intentional tort, “discharge is clearly a matter that stems from an employment relationship. Consequently, because R.C. 2744.09 allows suit against political subdivisions for matters arising out of an employment relationship, actions for wrongful discharge would be permitted. The case law on this issue is sparse, but that is not surprising in view of such an obvious point.”)

This case law demonstrates that courts do and should read the plain meaning of R.C. 2744.09(B) without consulting other case law or statutes – including the workers’ compensation statutory scheme. Had the general assembly intended to exclude all intentional torts from the

operation of R.C. 2744.09(B), it certainly knew how to do so. It chose not to. *Carter v. King Wrecking Co.*, 1st Dist. No. C-090208, 2009-Ohio-6802, at ¶9. As it did excepting the immunities of R.C. 3314.07 and 3746.24 from the 2744.02(B) list of exceptions to immunity, the legislature could have excepted the provisions of R.C. 4123.01 *et seq.* from R.C. 2744.09(B). See R.C. 2744.02(B)(2).

The analysis of this proposition of law could easily end with the application of the clearly established rules of statutory construction. See *Zumwalde* at ¶26 (“our conclusion that R.C. 2744.09(B) is unambiguous prevents us from entertaining [Appellee’s] public-policy arguments.”) That is to say, CMHA is not entitled to Chapter 2744 immunity, if under the plain and unambiguous language of R.C. 2744.09(B), Mr. Sampson’s claims fall into the category of “any matter that arises out of the employment relationship.” Mr. Sampson’s claims against CMHA easily fit within this category because in the circumstances in which they arose, they were causally related to and uniquely within his employment relationship with CMHA. However, CMHA’s unfounded persistence in arguing entitlement to immunity fails for other reasons as well.

B. Because The Language Of R.C. 2744.09(B) Is Clear, It Is Not Necessary To Resort To Outside Case Law To Interpret The Statute.

CMHA relies extensively on, and takes out of context excerpts from, *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624 and its predecessors and progeny in an attempt to support its assertion that R.C. 2744.09(B) fails to lift public employer immunity for suits by their public employee whether the employer’s tort is intentional or negligent. (Appellant’s Merit Brief at 13.) *Brady v. Safety-Kleen Corp.* continued the reasoning of *Blankenship v. Cincinnati Milacron Chemical, Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572 that employees are not barred from prosecuting actions at law against their employer for the employer’s intentional torts not

preempted by the immunity granted to employers under the Ohio Constitution or the statutory workers' compensation scheme. *Brady*, 61 Ohio St.3d at 635. Appellant cannot logically use cases that *provided* private employees a right to sue their employers in the Workers Compensation context to form a basis for *taking away* the clear statutory rights of public employees to bring suit for non-workers' compensation-related intentional tort claims in the context of R.C. 2744.09(B).

In *Brady*, while discussing the policy reasons behind the scope and purpose of the Workers' Compensation Act, in order to provide an additional avenue of recovery to employees in certain instances, this Court stated that, "[w]hen an employer intentionally harms his employee, that act effects a complete breach of the employment relationship." *Brady*, 61 Ohio St.3d at 634 quoting *Blankenship v. Cincinnati Milacron Chemical, Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572. Appellant argues that this completely out of context sound bite operates to remove non-workers' compensation intentional torts from the broad language of R.C. 2744.09(B) and therefore any intentional tort alleged by Mr. Sampson cannot, by the definition in *Brady*, arise out of his employment relationship.

Appellant's reliance on those words is misguided and misplaced, conveniently ignoring that the *Brady* Court itself explicitly limited them to the Workers' Compensation context and used them to rationalize the ability of employees to sue their employers in certain instances for torts covered by Workers' Compensation:

... [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 a cause of action contemplates redress of tortious conduct that occurs during the course of employment, an intentional tort alleged in this context necessarily occurs outside the employment relationship.

Brady, at 635 (emphasis added).

Brady did not make sweeping declarations about whether an intentional tort can ever arise out of the employment relationship and the Eighth District *en banc* opinion applied the correct law – namely, that “*Brady* was a workers’ compensation case and never dealt with sovereign immunity or R.C. 2744.09(B)...Further, we conclude 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.” (8th District *en banc* opinion at 12.)

By relying on this Court’s decision in *Brady*, Appellant and its Amicus are choosing to ignore this Court’s subsequent clarification in *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90, and then *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373. The *Penn Traffic* Court stated:

[I]n *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90 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...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... ‘[A]rise out of or in the course of employment’ merely means that the injury is causally related to one’s employment.

Penn Traffic Co., at ¶¶39-41 (emphasis added). *Penn Traffic* puts *Brady* and its progeny in their appropriate workers’ compensation context, holding that intentional torts do “arise from the employment relationship” but can be placed outside of the workers’ compensation scheme to give employees remedies not provided under the Workers’ Compensation Act. *Id.* at ¶¶38-40.

See, also, *Fleming v. Ashtabula Area City Sch. Bd. Of Educ.*, 11th Dist. No. 2006-A-0030, 2008-Ohio-1892 (discussed *infra*).

Appellant admits in its Merit Brief that “R.C. 2744.09(B) “was merely intended to ensure that public employees enjoyed the same ability as private employees to enforce the rights arising from the existence of an ‘employment relationship’”. (Appellant’s Merit Brief at 17.) As CMHA admits, private employees maintain the right to sue their employer for intentional torts not related to the Workers’ Compensation scheme and also, pursuant to *Blankenship, et sec*, for intentional torts otherwise covered by Workers Compensation. Public employees should (and do, pursuant to R.C. 2744.09(B)) enjoy at least the right to sue because of torts not covered by Workers Compensation.

C. A Political Subdivision Is Liable In Tort – Whether Negligent Or Intentional – If That Tort Arises Out Of The Employment Relationship.

This Court has never held that intentional torts cannot arise out of the employment relationship in the context of R.C. 2744.09(B). (See *Sampson v. CMHA*, 8th Dist. en banc Opinion at 12.) But the Court has held that in order for a claim to arise out of employment, there must be a causal relationship between the employment and the claim. *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, at ¶41. It is not necessary to establish a direct causal connection – an indirect connection will do. *Keith v. Chrysler, L.L.C.*, 6th Dist. No. L-09-1126, 2009-Ohio-6974, at ¶16, citing to *Merz v. Indus. Comm. of Ohio* (1938), 134 Ohio St. 36.

The Eighth District’s opinions in *Sampson* are far from the first (and not the only) to allow employees to sue their political subdivision employers for intentional torts pursuant to R.C. 2744.09(B). As set forth below, the 2nd, 4th, 6th, 8th, 9th, 10th, and 11th Districts have all allowed public employees to bring intentional tort (as well as negligence) claims when the facts show that the claims “arise out of the employment relationship.”

1. The Second District Has Held That Employees May Sue Their Political Subdivision Employers For Intentional Torts Pursuant To R.C. 2744.09(B).

The Second District addressed the issue in *Gessner v. City of Union*, 159 Ohio App.3d 43, 2004-Ohio-5770. Officer Gessner alleged that the City Manager “badgered” him into retirement. The trial court denied the city’s motion for judgment on the pleadings and the city’s immunity. *Id.* at ¶22. The Second District affirmed, stating: “[D]ischarge is clearly a matter that stems from an employment relationship.” *Id.* at ¶31. The court explained that because R.C. 2744.09(B) allows an employee to bring suit for matters arising out of an employment relationship. Actions for wrongful discharge [are] permitted. *Id.*

2. The Fourth District Has Held That Employees May Sue Their Political Subdivision Employers For Intentional Torts Pursuant To R.C. 2744.09(B).

Citing to *Gessner* the Fourth District in *Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, held that political subdivisions do not have *per se* immunity from intentional tort claims pursuant to R.C. 2744.09(B). Nagel sued the City, its police department and another defendant, for retaliation and hostile work environment. *Id.* at ¶14. Despite the city’s argument that Nagel’s claims were intentional torts for which political subdivisions retain their immunity, the Fourth District said.

In *Gessner v. Union* [citation omitted] the Second District held that age discrimination and wrongful discharge claims arose out of the employment relationship, despite the defendant’s claim that age discrimination is an intentional tort. In reaching its decision, the court noted that ‘[t]he case law on this issue is sparse, but that is not surprising in view of such an obvious point.’ [*Gessner*, at ¶31.]

* * *

Like our colleagues in *Gessner*, 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.

* * *

We continue to believe claims 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'.

Nagel, at ¶¶17-19.

3. The Sixth District Has Held That Employees May Sue Their Political Subdivision Employers For Intentional Torts Pursuant To R.C. 2744.09(B).

In *Patrolman "X" v. City of Toledo*, 132 Ohio App.3d 374, (6th App. Dist., Lucas County, February 26, 1999), the Sixth District held that political subdivisions were not immune from intentional tort liability pursuant to R.C. 2744.09(B) *Patrolman X* sued the City of Toledo and his captain for several claims including invasion of privacy. *Id.* at 396. *Patrolman X* alleged that the city and the police improperly exposed past sexual assault allegations to the police academy as part of his background investigation and as a result he was exposed to ridicule and harassment. *Id.* at 383-84. The trial court granted summary judgment. *Id.* at 293-94. The city argued that because R.C. 2744.09(B) does not expressly permit an employee to bring a claim of intentional tort against the political subdivision, their immunity should remain intact. *Id.* at 396. The Sixth District disagreed, holding although the claim should fail for other reasons, because the invasion of privacy claim arose out of the patrolman's employment with the city, the city was not immune. *Id.* at 397.

4. In Addition To Sampson v. CMHA, The Eighth District Has Held Twice That Employees May Sue Their Political Subdivision Employers For Intentional Torts Pursuant To R.C. 2744.09(B).

In *Davis v. Cleveland*, the Eighth District held that the city did not have immunity from claims brought by a police officer against the city and two supervisors for defamation and invasion of privacy. *Davis v. Cleveland*, 8th Dist. No. 83665, 2004-Ohio-6621, at ¶34. The police officer alleged that after being called out by name and improperly reprimanded during role call in front of the rest of the department, she became emotionally upset and physically ill such that she had to seek medical treatment. *Id.* at ¶17. The court found that the officer's intentional tort claims arose out of her employment with the city pursuant to R.C. 2744.09(B). *Id.* at ¶34.

In *Jopek v. City of Cleveland*, 2010-Ohio-2356, at ¶43-44, the Eighth District again applied the analysis now followed by a majority of other Ohio appellate courts to determine whether, based on the specific facts of the case, the torts alleged arose out of the employment relationship. Officer Jopek shot and killed a fleeing suspect. The Cleveland Police "shoot team," Homicide, and Internal Affairs found the shooting justified. *Id.* at ¶2. Subsequently the prosecutor conducted an investigation, finding the shooting not justified. *Id.* at ¶¶3-5. Holding that intentional torts can arise out of the employment relationship, the Eighth District found that Jopek's claims arose out of an investigation subsequent to the police inquiry. *Id.* at ¶44.

5. The Ninth District Has Held that Employees May Sue Their Political Subdivision Employers For Intentional Torts Pursuant to R.C. 2744.09(B).

In *Buck v. Village of Reminderville*, 2010-Ohio-6497², at ¶1, the Ninth District affirmed the trial court's denial of the Village's motion for judgment on the pleadings on Mr. Buck's defamation claim. The court concluded that:

[A] claim by the employee of a political subdivision against the political subdivision for its intentionally tortuous 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)).

Id. at ¶10. The court observed that "just because Sections 2744.09(B) and 4123.74 [the workers' compensation statute] contain similar language, does not mean they have the same meaning, especially in light of their different legislative purposes." *Id.* at ¶14.

6. The Tenth District Has Held That Employees May Sue Their Political Subdivision Employers For Intentional Torts Pursuant To R.C. 2744.09(B).

In *Marcum v. Rice*, the Tenth District similarly found that a claim for defamation arose out of the plaintiffs' employment under R.C. 2744.09(B). *Marcum v. Rice*, 10th Dist. No. 98AP-717, 98AP-721, 98AP-718, 98AP-719, 1999 WL 513813. This case stemmed from a mayoral investigation into allegations of misconduct by the Columbus police chief. *Id.* at *1. The committee that investigated also looked into misconduct by the chief's subordinates, including plaintiffs. *Id.* The committee presented their findings to the mayor, who accepted the report without question or further investigation, and released it to the public. *Id.* The report included some untruths. As a result, the plaintiffs filed suit, including a claim for defamation. The trial court denied the City's motion to dismiss, stating that the claims "arose out of the plaintiffs'

² Application for Jurisdiction was filed by the Village of Reminderville on February 14, 2011.

employment” under R.C. 2744.09(B) because the plaintiffs would not have been subject to the investigation had they not been employed by the city and because the claims arose out of plaintiffs’ employment, the city did not have statutory immunity under 2744. *Id.* at *5. On appeal, the Tenth District agreed. *Id.* at *7. In response to the City’s argument that R.C. 2744.09(B) should apply only to wage and labor disputes, the court found that the City’s construction of 2744.09(B) would effectively read the words “any matter” out of the section and substitute the words “any labor matter” and that the statements giving rise to the plaintiffs’ claims “arose out of the employment relationship” because they related to allegations of nonfeasance and malfeasance by plaintiffs in carrying out their official duties. *Id.*

7. The Eleventh District Has Held That Employees May Sue Their Political Subdivision Employers For Intentional Torts Pursuant To R.C. 2744.09(B).

The Eleventh District has also held that public employees may maintain intentional tort claims against their public employers. See *Poppy v. Willoughby Hills City Council*, 11th Dist. No. 2004-L-015, 2005-Ohio-2071, at ¶29 (holding that R.C.2744.09(B) permitted a claim for an intentional tort) and *Fleming v. Ashtabula Area City Sch. Bd. Of Educ.*, 11th Dist. No. 2006-A-0030, 2008-Ohio-1892.

In *Fleming v. Ashtabula Area City Sch. Bd. Of Educ.*, the trial court denied summary judgment. *Id.* at ¶43. Determining whether the claims arose out of the employment relationship,” the 11th District posed two questions: (1) was Fleming an employee for purposes of 2744.09(B), and (2) did the torts alleged arise out of the employment relationship between Fleming and the School Board. *Id.* at ¶36. The court found that *Brady* was not a per se bar to any intentional tort claim by a political subdivision employee against his or her employer. “If the conduct forming the basis of the intentional tort arose out of the employment relationship, the

employer does not have the benefit of immunity pursuant to the plain language of R.C. 2744.09(B).” *Id.* at ¶41.

8. The Cases Above, When Read Together, Demonstrate The Proper Steps To The R.C. 2744.09(B) Analysis – First Read The Plain Meaning Into The Statute, Then Ask Whether The Facts Giving Rise To The Tortious Behavior Are Causally Related To The Employee’s Employment.

This ample case law shows that the determination whether an employer’s tort “arises out of the employment relationship” in the context of R.C. 2744.09(B) does not involve the question whether it was intentional. The cases presented above start with the plain language of the statute: “This chapter shall not apply to, and shall not be construed to apply to . . . Civil actions by an employee . . . relative to any matter that arises out of the employment relationship.” R.C. 2744.09(B). That plain meaning, as determined by this Court, is that a matter arises out of the employment relationship when there is a causal relationship between the employment and the claim. *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, at ¶41.

After applying the plain meaning to the words, the Courts above examine the facts and circumstances which gave rise to the torts alleged to see if, in fact, they are causally related to the employment. An appropriate inquiry would be, “would the employee have been subject to the tortious conduct were it not for the employee’s job with the political subdivision?” See, *Marcum v. Rice*, 1999 WL 513813, at *5. The answer in Mr. Sampson’s case is a resounding *no*, he would not and could not have been subject to the tortious conduct but for his job.

D. Sampson’s Claims Arise Uniquely Out Of The Employment Relationship Within The Plain Meaning Of The Statute.

In its opinion in *Sampson v. CMHA*, the Eighth District held that an employer’s conduct can create an intentional tort that arises out of the employment relationship by way of R.C. 2744.09(B), excepting the claim from R.C. 2744 statutory immunity. (Eighth District *en banc*

Opinion at 12.) A finding that torts whether negligent or intentional *can* arise from within the employment relationship with respect to R.C. 2744.09(B) is not tantamount to a finding that intentional torts by employers against their employees must per se fall within the employment relationship. As the Eighth District held, having determined “that intentional torts can arise out of the employment relationship with respect to R.C. 2744.09(B), we must now look to the totality of the circumstances and determine if Sampson’s claims did arise out of the employment relationship.” (Eighth District *en banc* Opinion at 12-13.) Eight members of the court found *en banc* that the particular facts of *Sampson* involved tortious conduct which “clearly arose out of his employment relationship, thus barring CMHA from asserting immunity pursuant to R.C. 2744.09(B).” (Eighth District *en banc* Opinion at 8.)

The Eighth District’s decision was not novel as the decisions cited to above demonstrate. Appellee does not assert, as Appellant maintains, that a claim arises out of the employment relationship merely because the alleged tort occurred at the workplace or was committed by the employer. (See Appellant’s Merit Brief at 14.) Rather, Mr. Sampson argues that intentional torts *can* be asserted against a political subdivision through R.C. 2744.09(B) if the circumstances giving rise to the tortious conduct are, in fact, causally related to the employment relationship. The circumstances that gave rise to Mr. Sampson’s lawsuit arose uniquely out of the actions of CMHA which manipulated them to construct a teaching moment for its employees and publicity for its claimed “crack down” on crime..

Appellant argues that Appellee’s claims do not arise out of its employment relationship with Mr. Sampson because he and CMHA are not employer and employee but, in the words of *Brady v. Safety-Kleen*, ‘intentional tortfeasor and victim.’ (Appellant’s Merit Brief at 15, citing to *Brady*, 61 Ohio St.3d at 634.) CMHA and Mr. Sampson are tortfeasor and victim and they are

also employer and employee. The *Brady* Court chose its description of the relation of the parties where there is intentional physical injury by the employer “for purposes of the legal remedy for such an injury.” The Court’s words were never intended to be turned inside out to deprive injured employees of a remedy.

CMHA argues that Mr. Sampson’s allegations arise out of a violation of “purely personal rights” not “created by or dependent upon” the “existence of an employment relationship” between the parties. (Appellant’s Merit Brief at 16.) In support, CMHA cites to *Fuller v. Cuyahoga Metropolitan Housing Auth.* (C.A.6 2009), 334 Fed.Appx. 732, 2009 WL 1546372, at *4-5; *Lentz v. City of Cleveland* (N.D. Ohio 2006), 410 F.Supp.2d 673, 697.); and *Nungester v. City Cincinnati*, 100 Ohio App.3d 561 (1st App. Dist., Hamilton County, January 31, 1995). Appellant’s characterization of *Fuller* to establish a blanket rule for whether R.C. 2744.09(B) permits claims arising out of the arrest of an employee is an off base red herring.

Except that there was an arrest, and that Fuller worked for CMHA, the facts of *Fuller v. CMHA* have no similarity to the facts in this case. After Fuller’s shift for the day was over, he stopped to use the restroom in a vacant CMHA residential unit that was used as an employee break room. *Id.* Two CMHA security officers who were nearby observed Fuller enter the unit, and did not realize he was a CMHA employee. *Id.* When he came out of the unit, the two officers ran toward him with their guns drawn. “The officers began questioning Fuller and then grabbed him, punched him, pulled him to the ground, sprayed him with pepper spray, and handcuffed him.” *Id.* He was fired from his job, and then acquitted on the criminal charges. *Id.*

The *Fuller* court concluded that R.C. 2744.09(B) did not allow Fuller’s intentional infliction of emotional distress claim because his claims were not causally connected to his employment relationship. *Id.* at 736. This is not at all surprising in light of the fact that the court

found that the officers did not realize that they were arresting a CMHA employee, nor was Fuller acting in his capacity as boilermaker when he engaged in the events giving rise to his arrest. The court held that the underlying facts – a law enforcement response to an anonymous suspected trespasser on CMHA property – did not arise from Fuller’s position as a boilermaker for CMHA, and therefore his claims did not arise out of his employment. *Id.*

CMHA’s reliance on *Lentz v. City of Cleveland* (N.D. Ohio 2006), 410 F.Supp.2d 673, and *Nungester v. City Cincinnati*, 100 Ohio App.3d 561 (1st App. Dist., Hamilton County, January 31, 1995) are equally unhelpful. Officer Lentz ordered a car to stop, jumped on the roof and shot through injuring the driver. *Id.* at 681. After investigation he was charged with a misdemeanor and disciplined. *Id.* at 682. He sued alleging a variety of torts. *Id.* at 683. The District Court found that some of the intentional torts alleged arose out of his employment relationship and some did not. Mr. Sampson could have just as easily cited to *Lentz* in support of his own argument. Judge Manos, the author of the opinion, followed the lead of several Ohio appellate courts in supporting the proposition that intentional torts can arise out of the employment relationship, and when they do, a public employee can bring a claim against his political subdivision employer through R.C. 2744.09(B). *Lentz*, 410 F.Supp.2d at 698 (following precedent and holding that “all four Ohio courts that have addressed this issue agree that R.C. 2744.09(B) protects an employee’s right to sue his political subdivision for invasion of privacy”).

In *Nungester*, a police officer was unjustly identified as buying lumber without paying full price. As the First District found in denying immunity, his “undeniable status as a police officer” was of no legal significance. At the time, he was acting not in furtherance of his official duties but “solely to carry out a personal transaction.” *Id.* at 7.

E. Appellant's Case Law Citations Are A Disingenuous Mirage.

1. Cases That Fail to Support Appellants' Position Because They are Classic Workers' Compensation Cases that Involve a Physical Injury Plus an Intentional Tort

Appellants begin their citation to authority with a line of immunity cases that cite to *Brady v. Safety-Kleen, supra*, to support the concept that intentional torts arise outside the employment relationship, and therefore, are excluded from the application of R.C. 2744.09(B). (See Appellants' Merit Brief at 12.) These cases are inapposite to the issue in the present case because each of these cases is a classic workers' compensation intentional tort case in which a physical injury at the workplace was followed by a statutory recovery and then a suit for intentional tort. See *Chase v. Brooklyn City School Dist.* (2001), 141 Ohio App.3d 9; *Ventura v. City of Independence* (May 7, 1998), 8th Dist. No. 72526, 1998 WL 230429; *Williams v. McFarland Properties, LLC*, 177 Ohio App.3d 490; *Terry v. Ottawa Cty. Bd. of Mental Retardation and Developmental Disabilities*, 151 Ohio App.3d 234, 2002-Ohio-7299; *Schmitz v. Xenia Bd. of Edn.*, 2003-Ohio-213; *Sabulsky v. Trumbull Cty.*, 2002-Ohio-7275; *Engelman v. Cincinnati Bd. of Edn.* (June 22, 2001), 1st Dist. No. C-000597, 2001 WL 705575; *Ellithorp v. Barberton City Sch. Dist.* (July 9, 1997), 9th Dist. No. 18029, 1997 WL 416333; *Fabian v. City of Steubenville*, 2001-Ohio-3522.

These cases do not apply in support of Appellants' position in this case which is not a workers' compensation intentional tort case.

2. Cases That Fail to Support Appellants' Position Because Even Though There is No Physical Injury, Ohio Courts Have Decided That Intentional Torts Are Not Permitted Under R.C. 2744.09(B) Solely Based on a Confused Reliance on the Language of the Workers' Compensation Cases.

Like the category of irrelevant cases above, the following cases are likewise off point. Even though the plaintiffs in these cases did not suffer a physical injury, the courts' analyses consistently rely exclusively on workers' compensation cases to support the conclusion that intentional torts are not permitted under R.C. 2744.09(B). This is an inappropriate analysis in the context of R.C. 2744.09, and therefore, the following cases do not apply as authority for the issue at hand. *Neilsen-Mayer v. CMHA* (Sept. 2, 1999), 8th Dist. No. 75969, 1999 WL 685635; *Zieber v. Heffelfinger*, 2009-Ohio-1227; *Coats v. City of Columbus*, 2007-Ohio-761; *Stanley v. City of Miamisburg* (Jan. 28, 2000), 2nd Dist. No. 17912, 2000 WL 84645; *Abdalla v. Olexia* (Oct. 6, 1999), 7th Dist. No. 97-JE-43, 1999 WL 803592; *Hale v. Village of Madison* (N.D. Ohio 2006), No. 1:04-CV-1646, 2006 WL 4590879; *Kohler v. City of Wapakoneta* (N.D. Ohio 2005), 381 F.Supp.2d 692.

3. Appellants' Concede That Ohio Courts Have Permitted Civil Rights Claims Under R.C. 2744.09(B), Even if Categorized As Intentional Torts, Because Those Claims So Obviously Arise Out of The Employment Relationship.

Ohio Courts have allowed civil rights claims under R.C. 2744.09(B). *Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm'n* (1995), 74 Ohio St.3d 120; *Gessner v. City of Union*, 159 Ohio App.3d 43, 2004-Ohio-5770; *Carney v. Cleveland Hts.-University Hts. Sch. Dist.* (May 29, 2001), 143 Ohio App.3d 415. Just as there is no language in R.C. 2744.09(B) disallowing intentional torts, there is also no language stating that "intentional torts are not permitted, with the exception of civil rights claims." Therefore, Ohio courts allowing civil rights intentional torts have rightly decided the issue based on the clear language (or absence of language) in R.C. 2744.09(B).

4. Appellants' Cases That Do Not Support Their Argument Because The Facts Giving Rise to the Tortious Behavior Clearly Do Not Arise Out of the Employment Relationship

Mr. Sampson argues that there is no *per se* rule that bars intentional torts from the application of R.C. 2744.09(B). Appellants continue to cite to cases in support of their position that Appellants agree were rightly decided. See *Fuller v. Cuyahoga Metropolitan Housing Auth.* (C.A.6, 2009), 334 Fed.Appx. 732; *Nungester v. Cincinnati* (1995), 100 Ohio App.3d 561. Everyone agrees that the intentional torts alleged in these two cases were rightly disallowed under R.C. 2744.09(B) because the torts were completely unrelated to the employment relationship.

5. Appellants' Cases That Do Not Support Their Argument Because There is No R.C. 2744.09(B) Analysis

Finally, the remainder of the cases cited to by Appellant are completely irrelevant as authority for the concept that R.C. 2744.09(B) does not permit intentional tort actions, as these cases are decided on grounds either completely outside the immunity context or on a different subsection within Chapter 2744. See *Franklin County Law Enforcement Assn. v. Fraternal Order of Police, Captial City Lodge No. 9* (1991), 59 Ohio St.3d 167; *Bringheli v. Parma City Sch. Dist.*, 2009-Ohio-3077; *Scott v. City of Cleveland* (N.D. Ohio 2008), 555 F.Supp.2d 890; *Rhoades v. Cleveland Metropolitan Housing Auth.*, 2005-Ohio-505; *Barstow v. Waller*, 2004-Ohio-5746; *Inghram v. City of Sheffield Lake* (Mar. 7, 1996), 8th Dist. No. 69302, 1996 WL 100843.

IV. CONCLUSION

The record reflects, and CMHA does not deny the operative facts necessary to establish that Mr. Sampson's claims are "relative to any matter that arises out of" his employment relationship with CMHA. (Appellant's Merit Brief at 4.) While working as a plumber in CMHA's maintenance department, he was investigated by CMHA as a result of CMHA's decision to include all plumbers in its investigation of a tip that one plumber was misusing a

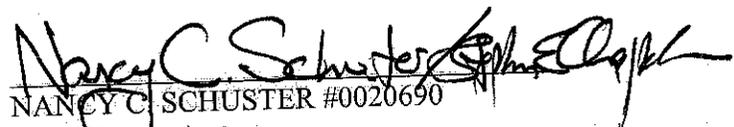
CMHA gas card. (*Id.*) The investigation was perfunctory and based entirely on CMHA documents, resulted in his identification by CMHA as a felon for alleged theft in office by misuse of CMHA gas cards and a CMHA PIN while on duty with CMHA. (*Id.* at 3-6.) Performed entirely by CMHA, the investigation ended in the planned public arrest by CMHA of Mr. Sampson at a work related meeting, publicized by CMHA, conducted by CMHA at the CMHA warehouse, and attended by Mr. Sampson and over 200 other maintenance employees on the orders of CMHA, as part of their work day with CMHA. (*Id.* at 4-5.)

Mr. Sampson was terminated by CMHA, grieved the termination through CMHA/Union arbitration, and was reinstated to a position with CMHA.

It begs reason to claim as CMHA now does that these events do not "arise[] out of the employment relationship between the employee and the political subdivision". R.C. 2744.09(B).

For the reason that his claims against Appellant CMHA clearly arise out of his employment relationship with CMHA under R.C. 2744.09(B), Appellee Darrell Sampson respectfully asks the Court to affirm the judgment of the Eighth District Court of Appeals affirming the denial of summary judgment to Appellant. Appellee asks the Court to remand this case to the trial court.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Appellee Darrell Sampson was sent by ordinary

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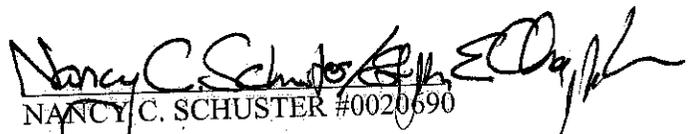
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