

IN THE SUPREME COURT OF OHIO

DARRELL SAMPSON,)	CASE NO. 2010-1561
)	
Plaintiff-Appellee,)	On Appeal from the Cuyahoga County
)	Court of Appeals, Eighth Appellate
v.)	District, Case No. 09-093441
)	
CUYAHOGA METROPOLITAN)	
HOUSING AUTHORITY, et al.)	
)	
Defendants-Appellants.)	

APPELLANTS' REPLY BRIEF

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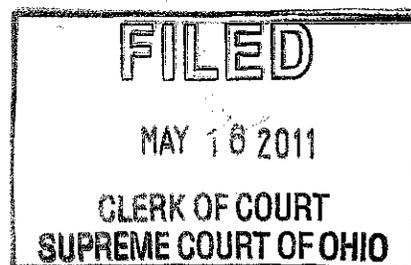
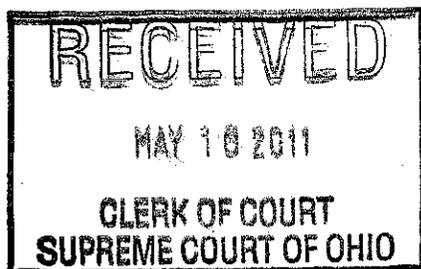


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REPLY TO APPELLEE'S ARGUMENTS

I. SAMPSON HAS FAILED TO ESTABLISH THAT THE GENERAL ASSEMBLY INTENDED TO CREATE A STATUTORY EXCEPTION FOR INTENTIONAL TORTS WHEN IT ADOPTED R.C. 2744.09(B).

In his Merit Brief, Appellee Darrell Sampson (“Sampson”) does not dispute that R.C. 2744.09(B) is limited only to a claim that “arises out of the employment relationship.” The legal question presented by this appeal, therefore, turns on the meaning of this phrase -- “arises out of the employment relationship” -- and whether it was intended by the General Assembly to subject political subdivisions to liability for intentional tort claims when it was inserted by the legislature into R.C. 2744.09(B). The answer to this question is clearly “no.” When the General Assembly enacted Ohio’s Political Subdivision Tort Liability Act in 1985, the phrase -- “arises out of the employment relationship” -- had a generally accepted legal meaning that had been construed by the courts to exclude intentional torts. *See Blankenship v. Cincinnati Milacron Chemicals* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572, 23 O.O. 504 (“an employer’s intentional conduct does not arise out of employment”). Thus, when the General Assembly used the words, “arises out of the employment relationship,” in R.C. 2744.09(B), it should be presumed to have known of this existing common law definition when it inserted this same language into the statute. *See Graves v. City of Circleville*, 179 Ohio App.3d 479, 2008-Ohio-6052, 902 N.E.2d 535, at ¶ 23 (“The General Assembly is presumed to know the common law when enacting legislation”).

Notwithstanding this fact, Sampson argues in his Merit Brief that CMHA somehow is violating the applicable rules of statutory construction by arguing that the statute should be construed in accordance with this well-established common law definition. (Sampson Merit Brief, pg. 10). In making this argument, however, Sampson fails to appreciate that the phrase -- “arises out of the employment relationship” -- did not originate with the General Assembly.

Rather, when it was included in R.C. 2744.09(B), it was a phrase that already had a specific legal meaning and had been construed by the Ohio Supreme Court to exclude intentional tort claims. In *Blankenship*, in fact, this Court expressly stated that “an employer’s intentional conduct does not *arise out of* employment,” and that “[a]n intentional tort, then, is clearly not an ‘injury’ *arising out of* the course of employment.” *Id.*, 69 Ohio St.2d at 613 & fn. 8. Thus, when the General Assembly used this same language – “arises out of the employment relationship,” it would have known of this common law definition and should be presumed to have intended that the phrase should be given the same legal meaning in R.C. 2744.09(B).

Indeed, as this Court held in *Thompson v. Community Mental Health Centers of Warren County, Inc.*, 71 Ohio St.3d 194, 1994-Ohio-223, 642 N.E.2d 1102, “[i]t is well-established that where a statute uses a word which has a definite meaning at common law, it will be presumed to be used in that sense and not in the loose popular sense.” *Id.* at 195. In *Thompson*, for example, the Court considered the question of whether the term, “malpractice,” in R.C. 2305.11(A) should be defined based upon the common law definition of malpractice or should be construed more broadly to encompass other types of professional negligence. Upon review, this Court held that “malpractice” should be limited solely to its common-law definition and should not be extended to other types of professional negligence. In this regard, former Chief Justice Thomas Moyer, writing for the Court, “reasoned that the General Assembly was aware of the common-law definition and until the statute is amended to specifically include other professions, the common law definition limits the scope of the statute.” *Id.*¹

¹ This well-established rule of statutory construction has long been followed by the courts and merely calls upon this Court to construe the plain language of the statute in accordance with its commonly-accepted legal meaning. *See State ex rel. Schneider v. Gullatt Cleaning & Laundry Co.* (1934), 32 Ohio N.P. (N.S.) 121, 1934 WL 1926, at *12 (“The legislature must be presumed to have known of this judicial definition of ‘unfair competition’ when it enacted [the bill]”).

The same reasoning applies equally here. By inserting the phrase – “arises out of the employment relationship” – into R.C. 2744.09, the General Assembly is presumed to have known of the relevant case law, which established that “an employer’s intentional conduct does not arise out employment.” *Blankenship*, 69 Ohio St.2d at 613. Given this fact, therefore, the Court should conclude that the General Assembly did not intend to subject political subdivisions to liability for intentional tort claims when it adopted the statutory exception in R.C. 2744.09(B).

Contrary to Sampson’s suggestions, CMHA is not attempting to interpose “additional verbiage” into R.C. 2744.09(B). CMHA is merely asking the Court to construe the phrase – “arise out of the employment relationship” – in a manner that is consistent with commonly-accepted understanding and meaning of this phrase. By contrast, it is Sampson who is wrongfully requesting that the Court abandon this common law definition and ignore the vast majority of the appellate courts that have agreed that R.C. 2744.09(B) does not apply to intentional tort claims. *See Zieber v. Heffelfinger* (Mar. 17, 2009), Fifth Dist. No. 08CA0042, 2009-Ohio-1227, at ¶ 29 (citing the majority of appellate courts that “have determined that an employer intentional tort is not excepted under R.C. 2744.09(B) from the statutory grant of immunity to political subdivisions”); *Williams v. McFarland Properties, LLC*, 177 Ohio App.3d 490, 2008-Ohio-3594, 895 N.E.2d 208, at ¶ 19 (“R.C. 2744.09(B) does not except an employer-intentional-tort claim from the general grant of immunity granted to a political subdivision under R.C. Chapter 2744”) (citing cases); *Terry v. Ottawa County Board of Mental Retardation & Developmental Disabilities*, 151 Ohio App.3d 234, 2002-Ohio-7299, 783 N.E.2d 959, at ¶ 21 (citing long list of other appellate court decisions that have held that “an employer’s intentional tort against an employee does not arise out of the employment relationship”).

In his Merit Brief, Sampson argues that “[h]ad the general assembly intended to exclude all intentional torts from the operation of R.C. 2744.09(B),” it should have expressly stated that claims that “arise out of the employment relationship” do not include “intentional torts.” (Sampson Merit Brief, pp. 13-14). This is a backwards argument that ignores how the immunity statute actually operates under Ohio law. As this Court has held, the immunity statute begins with the “general rule that political subdivisions are not liable in damages” unless one of the statutory exceptions expressly applies. *Moore v. Lorain Metropolitan Housing Authority*, 121 Ohio St.3d 455, 457, 2009-Ohio-1250, 905 N.E.2d 606. Thus, unless Sampson can establish that the General Assembly adopted a statutory exception that expressly permitted public employees to sue for “intentional torts,” the general rule of immunity would control. *See Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450, 452, 1994-Ohio-394, 639 N.E.2d 105 (holding that political subdivisions are not liable for intentional torts [including fraud and intentional infliction of emotional distress] because the General Assembly did not include “intentional torts” as one of the statutory exceptions to immunity).

Here, the fact that the General Assembly created an exception for claims that “arise out of the employment relationship” does not mean that the General Assembly intended to permit public employees to sue political subdivisions for intentional torts. If the General Assembly had intended to abandon the common law definition and subject political subdivisions to liability for intentional tort claims, then it could and should have adopted a more specific statutory exception for intentional tort claims. It did not do so. Accordingly, the Court should conclude that the General Assembly did not intend to create any exception for intentional tort claims, which under the common law definition that had been established before R.C. 2744.09 was adopted, do not “arise out of the employment relationship.” *Zieber*, 2009-Ohio-1227, at ¶ 29 (citing cases).

II. THIS COURT'S OPINION IN *PENN TRAFFIC* IS DISTINGUISHABLE AND DOES NOT OVERRULE THE COMMON LAW DEFINITION OF INTENTIONAL TORTS IN *BRADY*.

In his Merit Brief, Sampson argues that this Court has “modified” the common law definition of intentional torts in *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, 790 N.E.2d 1199, and that this modified definition supersedes the holding in *Blankenship* and *Brady v. Safety Kleen Corp.* (1991), 61 Ohio St.3d 624, 634. (Sampson Merit Brief, pg. 16). This is not true. In *Penn Traffic*, this Court re-affirmed the holding in *Blankenship* that “an employer’s intentional tort occurs outside the employment relationship,” and did not reach any conclusions that would suggest that the General Assembly intended to subject political subdivisions to liability for intentional tort claims. *Penn Traffic*, 2003-Ohio-3373 at ¶ 39-40. Indeed, the Court’s holding in *Penn Traffic* was expressly limited to the issue of insurance coverage and did not change the common law understanding of intentional tort claims in *Brady*. To the contrary, this Court re-affirmed that “an employer intentional tort occurs outside the employment relationship for purposes of recognizing a common-law cause of action for intentional tort” and made clear that its holding in *Penn Traffic* was “[f]or purposes of the employer’s insurance coverage” only. *Id.* at ¶ 40-41. Thus, the Court did not alter the common law definition of intentional torts in *Blankenship*, which was the governing legal definition when the General Assembly adopted R.C. 2744.09(B) in 1985. *See Williams*, 177 Ohio App.3d at ¶ 18 (holding that *Penn Traffic* did not change the common law definition that intentional torts arise outside the employment relationship under Ohio law).

In this regard, Sampson cites a recent 2-1 decision by the Ninth District Court of Appeals that relied upon *Penn Traffic* decision to overrule other Ninth District precedent, which had long held that R.C. 2744.09(B) did not apply to intentional torts. *See Buck v. Village of Reminderville*

(Dec. 30, 2010), Summit App. No. 25272, 2010-Ohio-6497, *appeal accepted*, Case No. 2011-0258 (May 4, 2011). The reasoning of *Buck* is flawed, however, because it misconstrues the *Penn Traffic* opinion and conflicts with the vast majority of the appellate courts, including two opinions of the Ninth District, which have long held that R.C. 2744.09(B) does not apply to intentional torts. *See, e.g., Dolis v. City of Tallmadge* (Aug. 25, 2004), 9th Dist. No. 21803, 2004-Ohio-4454; *Ellithorp v. Barberton City School District Board of Education* (July 9, 1997), 9th Dist. No. 18029, 1997 WL 416333. Accordingly, the Court should reject the holding of *Buck* and re-affirm the bright-line rule that has long protected political subdivisions from intentional tort claims.²

In this regard, this Court should reject the holding in *Buck* because it misconstrues this Court's holding in *Penn Traffic*. As several other courts have explained, this Court "took care to specifically limit its holding in *Penn Traffic* to situations involving the applicability of recovery under a private insurance policy." *Williams*, 177 Ohio App.3d 490, 2008-Ohio-3594, at ¶ 18; *Thayer v. West Carrollton Bd. Of Edn.*, Montgomery App. No. 20063, 2004-Ohio-3921, 2004 WL 1662198, at ¶ 17; *see also Kohler v. City of Wapakoneta* (N.D. Ohio 2005), 381 F. Supp.2d 692, 702. Indeed, as previously discussed, *Penn Traffic* did not overrule *Brady*, which re-affirmed that "intentional tortious conduct will always take place outside the [employment] relationship." *Brady*, 61 Ohio St.3d at 634. Thus, as the 2nd and 12th appellate districts have explained, "*Brady* remains good law." *Williams*, 2008-Ohio-3594, at ¶ 18; *Thayer*, 2004-Ohio-3921, at ¶ 17.

² We note that this Court has accepted jurisdiction to review the *Buck* decision and has ordered that briefing be stayed pending a decision in this case. *See Buck v. Village of Reminderville*, No. 2011-0258 (May 4, 2011).

Second, the reasoning of *Buck* should be rejected because it improperly holds that the grant of immunity for intentional tort claims is “tantamount to encouraging” public employers to engage in “[intentionally tortious] conduct.” *Buck*, 2010-Ohio-6497, at ¶ 11. This argument ignores the fact, however, that the primary purpose of the immunity statute “is the preservation of the financial soundness of its political subdivisions – not the promotion of the efficient operation of those governmental units.” *Terry*, 151 Ohio App.3d 234, 2002-Ohio-7299, at ¶ 28; *Kohler*, 381 F. Supp.2d at 702. Thus, the fact that the General Assembly granted political subdivision immunity for intentional torts is not “tantamount to encouraging such [intentionally tortious] conduct,” as the *Buck* opinion found. Rather, it merely means that the General Assembly is seeking to advance “the public policy underlying the enactment of R.C. Chapter 2744, [which] is the preservation of financial soundness of [Ohio’s] political subdivisions.” *Kohler*, 381 F. Supp.2d at 702 (citing *Terry*, 783 N.E.2d at 965).

In its amicus brief, the Fraternal Order of Police, *et al.* (“FOP Amicus Parties”) argue that it would constitute an “absurd result” if R.C. 2744.09(B) were construed to apply to “almost every type of employment-related dispute” except for those intentional torts “involving the most serious and injurious acts by unscrupulous public employers.” (FOP Amicus Brief, pg. 20). In so doing, the FOP Amicus Brief cites the *Buck* opinion to argue that, if R.C. 2744.09(B) were construed to “exclude intentional torts,” this would be “tantamount to encouraging such intentionally tortious conduct.” (FOP Amicus Brief, pg. 19) (citing *Buck*). Again, this argument ignores the underlying purpose of the immunity statute, which is designed to protect the financial soundness of political subdivisions. Thus, it advances the purpose of the statute for the General Assembly to protect political subdivisions from liability for “intentional torts,” which generally

are not covered by liability insurance and would expose political subdivisions to significant financial liability if not subject to immunity.

In making this public policy argument, both Sampson and the FOP Amicus Brief incorrectly presume that employees of political subdivisions would have no legal recourse for alleged intentional tort injuries if they could not sue their public employers. This is simply not true. Even in the case of an intentional tort claim, a plaintiff may be able to bring a claim against the individual defendant who allegedly committed the intentional tort, if he/she can establish under R.C. 2744.03(A)(6) that “[t]he employee’s acts or omissions were manifestly outside the scope of the employee’s employment or official responsibilities,” or that “[t]he employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton and reckless manner.” *Id.* Under such circumstances, in fact, the General Assembly clearly intended that the intentional tort liability should be personally borne by the individual defendant (not the political subdivision) because R.C. 2744.07(A) does not permit a political subdivision to defend or indemnify an employee for individual tort liability unless the “employee was acting in good faith and not manifestly outside the scope of employment or official responsibilities.” *Id.* (copy attached). Accordingly, this Court should reject Sampson’s public policy arguments and re-affirm the long-standing majority rule that intentional tort claims, by definition, “do not arise out of the employment relationship.” *Zieber*, 2009-Ohio-1227, at ¶ 29; *Williams*, 2008-Ohio-3594, at ¶ 19; *Terry*, 2002-Ohio-7299, at ¶ 21 (citing cases).

III. CMHA’S INTERPRETATION OF R.C. 2744.09(B) WOULD NOT RENDER R.C. 2744.09(C) SUPERFLUOUS OR MEANINGLESS.

In its Amicus Brief, the FOP also argues that CMHA’s interpretation of R.C. 2744.09(B) would render R.C. 2744.09(C) “meaningless” because all of the “employment-related claims” covered by R.C. 2744.09(B) are also covered by R.C. 2744.09(C), which creates an exception for

“civil actions by an employee . . . relative to wages, hours, conditions, and other terms of employment.” (FOP Amicus Brief, pp. 11-13). This is a meritless argument that ignores the judicial decisions that have interpreted the meaning of R.C. 2744.09(C). As was explained by the Seventh District in *Fabian v. Steubenville* (Sept. 28, 2001), Jefferson App. No. 00 JE 3, 2011 WL 1199061, the language of R.C. 2744.09(C) tracks the language in the Ohio Public Employees Collective Bargaining Act, R.C. Chapter 4117, which covers all subjects that “affect wages, hours, terms and conditions of employment.” *Id.* at *4. Accordingly, the Seventh District has held that “[b]oth the language of [R.C. 2744.09(C)] and [prior] court decisions make clear that the term ‘conditions of employment’ refer to the conditions that an employee must meet to maintain employment, not to the conditions an employee works within.” *Id.* at *4.

Other appellate courts have agreed with *Fabian* and have concluded that R.C. 2744.09(C) does not create an exception for intentional tort claims under R.C. Chapter 2744. *See Williams*, 177 Ohio App.3d 490, 2008-Ohio-3594, at ¶ 21 (“We find the reasoning in *Fabian* persuasive and hold that R.C. 2744.09(C) does not except an employer-intentional-tort claim from the general grant of immunity granted to a political subdivision under R.C. 2744) (citing cases); *Terry*, 151 Ohio App.3d 234, 2002-Ohio-7299, at ¶ 25 (same). Thus, while R.C. 2744.09(B) and R.C. 2744.09(C) may be inter-related and may have claims that fall within the scope of each section, they are not superfluous and should not be construed as creating an exception for intentional tort claims, which, by definition, “do not arise out of the employment relationship” as a matter of law.

The FOP amicus brief completely ignores this case law and argues, without any legal basis, that the language of R.C. 2744.09(C) was intended to cover employment discrimination claims, and that R.C. 2744.09(B) was intended to cover intentional tort claims. (FOP Amicus

Brief, pp. 11-13). There is absolutely no legal basis for this argument. Both R.C. 2744.09(B) and R.C. 2744.09(C) work in tandem to permit certain types of employment-related claims by a public employee against a public employer, but neither statute should be construed as applying to intentional tort claims. Indeed, in the cases where employment discrimination claims have been permitted against public employers, the courts generally have relied upon R.C. 2744.09(B) as the statutory basis for this immunity exception. *See, e.g., Gessner v. City of Union*, 159 Ohio App.3d 43, 2004-Ohio-5770, 823 N.E.2d 1, at ¶ 47-49 (holding that age-discrimination and other employment discrimination claims by public employees are permitted under R.C. 2744.09(B) because they are not classified as “employer intentional torts” under Ohio law).

In this regard, no court has ever held that the two sections are superfluous, even if an employment-related claim falls within the scope of both sections. *See, e.g., City of Whitehall ex. rel. Wolfe v. Ohio Civil Comm.*, 74 Ohio St.3d 120, 123, 1995-Ohio-302, 656 N.E.2d 684 (citing both R.C. 2744.09(B) and (C) to permit an unlawful discrimination claim against municipal employer). Thus, while R.C. 2744.09(B) and R.C. 2744.09(C) may be inter-related and may be applicable in some situations to the same type of employment-related claims, this does not mean that the two sections are completely “redundant” or should be construed as creating a statutory exception for intentional torts. Rather, consistent with the majority of the appellate courts that have decided this issue, this Court should conclude that both R.C. 2744.09(B) and (C) do not apply to intentional tort claims.

IV. THE COURT SHOULD REJECT SAMPSON’S SUGGESTION TO DISTINGUISH THIS CASE FROM “CLASSIC WORKERS COMPENSATION CASES” THAT INVOLVE A PHYSICAL INJURY.

In his Merit Brief, Sampson also argues that many of CMHA’s cases are distinguishable because they involve a “classic workers’ compensation intentional tort case” arising from a

physical injury at the workplace. (Sampson Merit Brief, pg. 27). In making this argument, however, Sampson fails to explain why the existence of a physical injury should be dispositive of whether a claim arises out of the employment relationship under R.C. 2744.09(B). Indeed, this argument makes no sense. This Court's holding in *Blankenship* and *Brady* was not based upon the existence of a physical injury. Rather, both opinions were based upon the existence of "intentionally tortious conduct," which this Court held "will always take place outside the [employment] relationship," even if committed by the employer at the workplace. *Brady*, 61 Ohio St.3d at 634. In such circumstances, the "injuries resulting from the employer's intentional torts, even though committed at the workplace, * * * are totally unrelated to the fact of employment." *Id.* Thus, with respect to intentional tort claims, this Court held that the parties are not "employer and employee," but "intentional tortfeasor and victim" under Ohio law. *Id.*

This is significant because it explains why the Eighth District's opinion should be reversed. In its *en banc* opinion, the Eighth District openly acknowledged that R.C. 2744.09(B) did not apply to intentional tort claims arising from workplace physical injuries. (*En Banc* Opinion, pp. 11-12) (Appendix to Appellants' Brief, pp. 13-14). In so doing, however, the Eighth District never explained why the language of R.C. 2744.09 should be construed to make a distinction between intentional torts that cause physical injury and intentional torts that cause other types of compensable tort injuries. In fact, as Sampson's Merit Brief acknowledges, a majority of the appellate courts have agreed that R.C. 2744.09(B) does not apply to *any* intentional tort claims, including claims for intentional infliction of emotional distress. *Fuller v. Cuyahoga Metropolitan Housing Auth.*, 334 Fed.Appx. 732, 2009 WL 1546372, at **4-5 (6th Cir. June 3, 2009); *Zieber*, 2009-Ohio-1227, 2009 WL 695533, at ¶ 29; *Coats v. City of Columbus* (Feb. 22, 2007), 10th Dist. App. No. 06AP-681, 2007-Ohio-761, 2007 WL 549462, at

¶ 14-15; *Hale v. Village of Madison* (N.D. Ohio May 23, 2006), No. 1:04-CV-1646, 2006 WL 4590879, at *17-18; *Kohler v. City of Wapakoneta* (N.D. Ohio 2005), 381 F. Supp.2d 692, 699-702; *Abdalla v. Olexia* (Oct. 6, 1999), 7th Dist. No. 97-JE-43, 1999 WL 803592, at *1, 11. Accordingly, the Court should reject Sampson’s argument and hold that R.C. 2744.09(B) does not apply to his alleged intentional tort claims, which, by definition, do not arise out of the employment relationship. *Zieber*, 2009-Ohio-1227, 2009 WL 695533, at ¶ 29.

V. THE COURT SHOULD REJECT SAMPSON’S OVERLY BROAD INTERPRETATION OF WHETHER A CLAIM “ARISES OUT OF THE EMPLOYMENT RELATIONSHIP” UNDER R.C. 2744.09(B).

In his Merit Brief, Sampson argues that the Court should adopt an extraordinarily broad definition of whether a claim “arises out of the employment relationship,” suggesting that the “appropriate inquiry” should be: “would the employee have been subject to tortious conduct were it not for the employee’s job with the political subdivision?” (Sampson Brief, pg. 23). This is an overly broad definition that, if adopted, would completely eviscerate the common law definition and open the door to virtually all types of tort claims because it would subject political subdivisions to potential tort liability whenever public employees allege that they would not have been subject to the alleged tortious conduct if they had never been employed by the political subdivision, which would almost always be the case. Sampson’s overly broad interpretation of R.C. 2744.09(B), therefore, should be rejected by this Court.

Indeed, if adopted, Sampson’s interpretation of R.C. 2744.09(B) would open the door not only to liability for intentional tort claims, but for many other types of tort claims that do not “arise out” of the employment relationship. As the FOP Amicus Brief points out, “arise out of” generally means to “*originate* from a source.” (FOP Amicus Brief, pg. 10) (emphasis added). This does not mean, however, that a tort claim “arises out of the employment relationship” if the

if the alleged tortious conduct was committed at the workplace and would not have occurred if the public employee had never been employed by the political subdivision. Rather, as previously discussed in Appellant's Merit Brief, the question should focus on the source of the alleged claim, *i.e.*, the source of the legal right being enforced, and should turn on whether the claim or right "originated" or "arises out of" the employment relationship, or whether it arises from "purely personal rights" that are not "created by or dependent upon" the "existence of an employment relationship" between the parties. See *Fuller v. Cuyahoga Metropolitan Housing Auth.*, 334 Fed.Appx. 732, 2009 WL 1546372, at **4-5 (6th Cir. June 3, 2009); *Lentz v. City of Cleveland*, 410 F.Supp.2d 673, 697 (N.D. Ohio 2006); *Nungester v. Cincinnati* (1995), 100 Ohio App. 3d 561, 566, 654 N.E.2d 423.

Here, Sampson's claims for intentional infliction of emotional distress, abuse of process, and negligent misidentification all seek to enforce "purely personal rights" arising from CMHA's performance of law enforcement powers in investigating and arresting Sampson for alleged criminal conduct. None of his claims seek to enforce any employment-based rights that are created by and arise from Sampson's employment relationship with CMHA. Indeed, in investigating and arresting the 13 CMHA employees for alleged criminal conduct, CMHA was acting in its capacity as a law enforcement agency. Thus, the alleged tort claims did not seek to enforce any rights that were created by or dependent upon the employment relationship, but were seeking to enforce "purely personal rights" that would be applicable to any citizen who suffers a legally-compensable tort injury as the result of a law enforcement investigation and arrest.

This point is critical because it explains why the Eighth District's opinion should be reversed as a matter of law. In its *en banc* opinion, a majority of the Eighth District Court of Appeals found that Sampson's claims "clearly arose out of his employment relationship" because

“he was arrested during the workday in front of his fellow coworkers, rather than being arrested at home.” (*En Banc* Opinion, pg. 14) (Appendix to Appellant’s Merit Brief, pg. A16). The location of the alleged tort, however, should not be determinative of whether the claim (*i.e.* the right being enforced) “arises out of the employment relationship” under R.C. 2744.09(B). Rather, the focus should be on the source of the common law right being enforced, and whether it originated from the existence of an employment relationship, or whether it arises from “purely personal rights” that are not dependent upon the existence of an employment relationship.

Indeed, to the extent that Sampson truly was seeking to enforce rights that originated from and arise out of the employment relationship, then he would have been required to prosecute his claims through the grievance process under the CMHA’s Collective Bargaining Agreement. (Appellant’s Merit Brief, pp. 18-19). In his Merit Brief, in fact, Sampson does not dispute that he filed a grievance in order to enforce the employment-based rights arising out of his employment relationship with CMHA. Yet, notwithstanding this fact, he wants to have the additional right to file a separate common law tort claim in order to enforce other, purely personal rights that were not created by, or dependent upon, his employment relationship with CMHA. He should not be permitted to have it both ways. R.C. 2744.09(B) was intended only to protect the employment-based rights arising out of the employment relationship, and was not intended to permit public employees to sue for other purely personal tort injuries, like false arrest and “negligent misidentification,” which do not arise from the employment relationship. Accordingly, the Court should reverse the Court of Appeals’ decision and hold that none of Sampson’s claims “arise out of the employment relationship” under R.C. 2744.09(B).

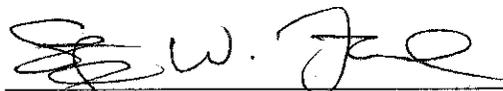
In his Brief, Sampson argues that CMHA’s reliance upon *Fuller*, *Lentz*, and *Nungester* is an “off base red herring” because each case is distinguishable on their facts. CMHA did not cite

this case law, however, based only on their facts. Rather, CMHA cited these cases because of their well-reasoned discussion and analysis of the above-referenced *legal standard*. Indeed, in attempting to distinguish CMHA's case law, Sampson completely fails to address CMHA's legal arguments relating to what it actually means for a claim to "arise out of" the employment relationship. Rather, it vainly hopes that this Court will eviscerate the bright-line rule that has long protected political subdivisions from common law intentional tort claims and hold that R.C. 2744.09(B) applies to virtually *any* tort claim that may be filed by a public employee against his or her public employer. Accordingly, the Court should reject Sampson's argument and hold that R.C. 2744.09(B) does not apply to Sampson's claims.

CONCLUSION

For these reasons, therefore, the Court should reverse the court of appeals' judgment and hold that R.C. 2744.09(B) does not apply to any of Sampson's common law tort claims. Moreover, the Court should conclude that CMHA is entitled to political subdivision immunity and remand with instructions to enter final judgment in CMHA's favor on all claims.

Respectfully submitted,



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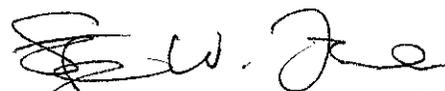
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APPENDIX

2744.07 Defending and indemnifying employees.

(A)(1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee in connection with a governmental or proprietary function. The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance. The duty to provide for the defense of an employee specified in this division does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision.

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

(B)(1) A political subdivision may enter into a consent judgment or settlement and may secure releases from liability for itself or an employee, with respect to any claim for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function.

(2) No action or appeal of any kind shall be brought by any person, including any employee or a taxpayer, with respect to the decision of a political subdivision pursuant to division (B)(1) of this section whether to enter into a consent judgment or settlement or to secure releases, or concerning the amount and circumstances of a consent judgment or settlement. Amounts expended for any settlement shall be from funds appropriated for this purpose.

(C) If a political subdivision refuses to provide an employee with a defense in a civil action or proceeding as described in division (A)(1) of this section, upon the motion of the political subdivision, the court shall conduct a hearing regarding the political subdivision's duty to defend the employee in that civil action. The political subdivision shall file the motion within thirty days of the close of discovery in the action. After the motion is filed, the employee shall have not less than thirty days to respond to the motion.

At the request of the political subdivision or the employee, the court shall order the motion to be heard at an oral hearing. At the hearing on the motion, the court shall consider all evidence and arguments submitted by the parties. In determining whether a political subdivision has a duty to defend the employee in the action, the court shall determine whether the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. The pleadings shall not be determinative of whether the employee acted in good faith or was manifestly outside the scope of employment or official responsibilities.

If the court determines that the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities, the court shall order the political subdivision to defend the employee in the action.

Effective Date: 04-09-2003