

IN THE SUPREME COURT OF OHIO

Case No. 11-1050

LISA VACHA,	:	
	:	
Plaintiff-Appellee/Cross-Appellant	:	
vs.	:	Cross-Appeal from Lorain
	:	County App. No. 10CA009750,
	:	Ninth Judicial District of Ohio
CITY OF NORTH RIDGEVILLE, et al.,	:	
	:	
Defendants-Appellants/Cross-Appellees	:	

MEMORANDUM OF APPELLEE/CROSS-APPELLANT LISA VACHA IN RESPONSE TO
 APPELLANT'S MEMORANDUM OF JURISDICTION AND IN SUPPORT OF
 JURISDICTION OF THE CROSS-APPEAL

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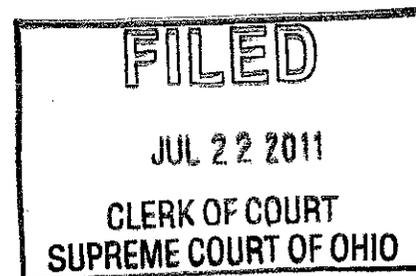


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This case is about the fundamental responsibility of every employer, in either the public or private sector, to take reasonable steps to ensure that the workplace is free from the presence of those who are prone to commit crimes of violence against fellow employees. This case will decide whether any employer can shield itself from this responsibility via Workers' Compensation immunity. It will also determine whether public sector employers can use the shield of sovereign immunity to insulate themselves from even intentional-tort claims made by their own employees who have been victimized in the workplace. This is an important case.

Appellee/Cross-Appellant Lisa Vacha was raped by a fellow employee while working at the City of North Ridgeville's water treatment plant. Her assailant, Charles Ralston, was a fellow employee, hired by the City despite having seven prior convictions for crimes of violence. He liked to hit women. Ralston's past was not a secret to the Mayor of North Ridgeville, who oversaw the hiring of Ralston – Ralston was the unwed father of two of the Mayor's grandchildren and four of Ralston's prior crimes of violence were against the Mayor's daughter.

When Lisa Vacha brought a lawsuit seeking recovery of damages resulting from the City's negligent, reckless, and intentional conduct, the City's response included a two-fold argument. On one hand, the City argued that her negligent and reckless tort claims were within the course and scope of her employment and that the City was thus immune by virtue of the Worker's Compensation laws. On the other hand, the City argued that the intentional tort claim

arose from outside the course and scope of Ms. Vacha's employment and that the City should avoid liability by virtue of the sovereign immunity conferred by Chapter 2744 of the Revised Code.

The Ninth District agreed with the City with respect to Workers' Compensation. It is from this aspect of the decision that Ms. Vacha has taken her cross-appeal and presents Propositions of Law II and III. Conversely, the Ninth District agreed with Ms. Vacha regarding the issue of sovereign immunity and held that the City could not avail itself of sovereign immunity to shield itself Ms. Vacha's intentional tort claim. It is from this aspect of the decision that the City previously filed its appeal and has presented a single proposition that is referenced herein as Proposition of Law I.

The Significance of the City's Appeal: Propositions of Law I (proposed by the City)

The City correctly notes that its single proposition of law has already been accepted by this Court in *Sampson v. Cuyahoga County Metropolitan Housing Authority*, Case No. 2010-1561, which is scheduled to be argued on September 20, 2011. If Sampson prevails, then this Court will have rejected Proposition of Law I in the instant case as well.

However, even if the Cuyahoga County Metropolitan Housing Authority prevails, this Court cannot reverse the Ninth District outright. The City cannot avail itself of sovereign immunity for at least one additional reason in the instant case – the operation of a wastewater treatment plant is a “proprietary” function and, as such, sovereign immunity is unavailable. This argument was presented in the Ninth District, which did not reach it in light of the Ninth

District's holding that there was no sovereign immunity available for an intentional tort as a blanket matter.

Accordingly, in the event *Sampson* determines that sovereign immunity is available for intentional torts, this Court would still have to remand the instant case to the Ninth District for further determination of unresolved alternative arguments.

The Significance of Ms. Vacha's Cross-Appeal: Propositions of Law II and III.

Propositions of Law II and III will determine whether Worker's Compensation is the only means of recovery against employers for employees who have been sexually assaulted or otherwise victimized by a another employee's violent criminal acts.

The more significant of these two propositions is Proposition of Law II, which addresses the question of whether a sexual assault that occurs at the workplace is an injury that occurs "in the course of or arising out of employment." The Ninth District decision in the Opinion Below holds that the rape of Ms. Vacha is a workplace injury under this statutory definition.

In reaching this conclusion, the Ninth District, at footnote 1 of the Opinion Below, explicitly rejected the reasoning of the Twelfth District Court of Appeals in *Prewitt v. Alexson Serv., Inc.*, Butler App. No. CA2007-09-218, 2008-Ohio-4306, at par. 21. *Prewitt* held that being raped by another employee was not an accident that is part of the "natural and probable consequences of the nature of employment," and rejected the conclusion that Workers' Compensation was the raped employee's exclusive means of recovery. *Id.*, citing 82 American Jurisprudence 2d (2008), Workers' Compensation Section 238.¹

¹ A motion to certify conflict on this issue was filed by Ms. Vacha in the Ninth District and remains pending.

This Court should accept Proposition of Law II in order to resolve the disparity between the Ninth and Twelfth Districts on this critical issue. Workers' Compensation was intended to shield an employer from excessive damages for the types of injuries that an employee recognizes are part and parcel of coming to work. Simply put, the reasonable employee does not, and should not be expected to, believe that reporting for his or her shift carries with it, *as part of the job*, that he or she will be violently assaulted, much less raped, by another employee. This is not to say that employers will always be liable for the criminal acts of their employees – but liability should not be determined by virtue of immunity under Workers' Compensation.

Proposition of Law III concerns the definition of "injury" that was in place at the time Ms. Vacha was raped. While the term "injury" has been modified since that time, the interpretation of the prior definition of "injury" still arises in Workers' Compensation litigation where employees' injuries occurred prior to October 11, 2006 (the effective date of the amendment of the term "injury."), and thus remains worthy of this Court's consideration.

For these reasons, this Court should accept the instant case.

STATEMENT OF THE CASE

On or about March 10, 2008, Charles A. Ralston was convicted for the rape of the Plaintiff Lisa Vacha. The rape occurred on June 2, 2006, on the premises of the North Ridgeville French Creek Wastewater Treatment Plant, a facility owned and operated by the Defendant City of North Ridgeville. Both Ms. Vacha and Ralston were employees of the Treatment Plant.

Ms. Vacha sued Ralston and North Ridgeville for the following:

Count I alleged that North Ridgeville is liable for the rape of Plaintiff because the rape occurred during the course and scope of Ralston's employment with North Ridgeville.

Count II alleged that North Ridgeville is liable for the rape of the Plaintiff because it failed to provide a safe working environment due to the negligent hiring supervision and employment of Ralston.

Count III alleged that North Ridgeville is vicariously liable for the actions of Ralston because the rape occurred while he was acting in his capacity as an employee of the North Ridgeville.

Count IV alleged that North Ridgeville was reckless in hiring and supervising Ralston which resulted in the failure to provide a safe work environment for the Plaintiff.

Count V alleged that North Ridgeville acted intentionally with willful wanton disregard for the safety of the Plaintiff in hiring, supervising or otherwise controlling Ralston.

The trial court granted summary judgment as to Counts I and III and denied summary judgment as to the remaining counts. Pursuant to R.C. 2744.02(C), the City noted an interlocutory appeal limited to the issue of whether it was immune from judgment.

STATEMENT OF THE FACTS

Lisa Vacha was hired by the Defendant City of North Ridgeville to work at its French Creek Wastewater Treatment Plant in 1999. At some point during her employment she became an unlicensed operator, responsible for plant maintenance, meter reading and high flows if the plant was flooding.

Ralston was hired by North Ridgeville in March of 2004 to work at the same Treatment Plant. Ralston is the father of two of North Ridgeville Mayor G. David Gillock's grandchildren. The grandchildren are the result of a four to five year relationship Ralston had with the Mayor's daughter. Ralston had known Mayor Gillock personally for approximately a decade preceding his hiring. Ralston saw Mayor Gillock every weekend when he picked up his children for

visitation. On occasion they would sit and talk. At the time he was hired by North Ridgeville, Ralston owed over four thousand dollars in back child support for the Mayor's grandchildren.

Prior to being hired by the City, Ralston had been convicted of domestic violence six times and of assault on one occasion. The victim in at least four of the domestic violence cases was Mayor Gillock's daughter. According to Ralston, he did not hide his criminal past or his domestic violence convictions from Mayor Gillock. Mayor Gillock testified in a deposition that he was aware that on two occasions his daughter called the police regarding claims of domestic violence by Ralston. However, Mayor Gillock denied knowing the results of those cases or Ralston's criminal history. Mayor Gillock admitted that he had a good relationship with his daughter.

Despite knowing that Ralston had been involved on at least two occasions with the police for domestic-violence-related issues, Mayor Gillock oversaw the hiring of Ralston for a Helper position at the Treatment Plant. As Mayor for the City of North Ridgeville, Mayor Gillock involved himself in the hiring process of city employees by conferring with department heads regarding open positions. On approximately March 3, 2004, the job opening for a Helper D position was posted at the Treatment Plant. The job opening was not posted in a public avenue, such as a newspaper or the internet. Mayor Gillock contacted Ralston to inform him about the job with the Treatment Plant. Mayor Gillock told Ralston to go to the Plant and fill out an application. Mayor Gillock also told Ralston that he would request that the plant supervisor give Ralston an interview.

Mayor Gillock then contacted Donald Daley ("Daley"), plant superintendent or department head, and told him about Ralston and requested that he be given an interview. In this instance, Daley was responsible for interviewing Ralston. Mayor Gillock testified at a deposition that he did not tell Daley about Ralston's involvement with his daughter or his criminal history. Daley then gave Dennis Johnson ("Johnson"), Safety Service Director, the "heads up" on Mayor Gillock's request to interview Ralston and recommended that he be hired. Johnson approved the hiring of Ralston. Johnson's decision to hire Ralston was done with oversight from Mayor Gillock.

Ralston admits that he went to the Treatment Plant to fill out an application. Despite discovery requests no application has ever been produced by the City. A copy of Ralston's resume, however, was produced. Daley does not recall seeing Ralston's application. On the same day Ralston allegedly filled out an application, he spoke with Daley. During that half hour discussion, Daley never questioned Ralston about his previous employers or previous employment. Nor did Mayor Gillock contact or have any discussions with Ralston's previous employers. In fact, during the interview, Daley admitted he only talked to Ralston about how much he needed the job and what type of work he would be doing.

Despite the sketchy existence of his application and the failure to check his past employment record, Ralston was not questioned about his criminal background either. Similarly, no criminal background check was conducted. Johnson indicated that North Ridgeville required a criminal background check for only those in a position which requires security. Further, Johnson admitted that it was possible to hire a person in an entry level position who had a history

of violence and/or multiple convictions of domestic violence if they lied on their application. Since Daley assumed that City Hall previously vetted Ralston, Daley just “put him to work”. No other applicants interviewed for the Helper position.

Ralston had problems with his employment from the outset. Within the first month of his employment, Ralston was fired by Daley for “missing time”. Ralston was subsequently rehired by Johnson while Daley was on vacation. Daley was told by Johnson that Ralston was being given a second chance.

During his second chance, Ralston was involved in a verbal argument with Lisa Vacha which started at the filter building. Ralston then followed Vacha to the administration building. The verbal argument escalated and Ralston started slamming doors and kicking trash cans. Vacha testified that she was afraid of Ralston. Vacha immediately reported the incident to assistant superintendent, Mark Francis. Vacha further reported the incident to Daley. Ralston recalled being talked to by Daley about the incident. Despite having these conversations, Daley did not recall having any problems with Ralston.

On the evening of June 2, 2006, Ms. Vacha and Ralston were on shift together. They were required to do rounds to check the operation and security of the Plant three times per shift. During that shift, Ralston physically assaulted and raped Ms. Vacha. Subsequently, Ms. Vacha filed a worker’s compensation claim as a result of the physical assault and rape.

ARGUMENT

In Opposition to Proposition of Law I (as formulated by Defendant/Appellant/Cross-Appellee City of North Ridgeville):

R.C. 2744.09(B) DOES NOT CREATE AN EXCEPTION TO POLITICAL SUBDIVISION IMMUNITY FOR INTENTIONAL TORT CLAIMS ALLEGED BY A PUBLIC EMPLOYEE.

The City argues that it is immune from the intentional tort claim by virtue of Chapter 2744 of the Ohio Revised Code, which provides limited sovereign immunity. The City's argument should be rejected.

R.C. 2744.09 denies the City immunity and protects the viability of Vacha's lawsuit.

R.C. 2744.09 specifically excludes from Chapter 2744's immunity provisions:

(B) Civil actions by an employee . . . against his political subdivision relative to any matter that arises out of the employee relationship between the employee and the political subdivision.

R.C. 2744.09.

The State attempts to evade subsection (B)'s blanket provision by arguing that the civil action brought by Ms. Vacha does not involve a matter "that arises out of the employee relationship." The Ninth District correctly rejected this argument. See also, e.g., *Buck v. Reminderville*, 9th Dist. No. 25272, 2010-Ohio-6497.

R.C. 2744.02(A) immunity is unavailable

Assuming, arguendo, that the blanket exception to Chapter 2744 found in R.C. 2744.09 does not apply, the City is still not immune. The City argues that its immunity under Chapter 2744 derives from R.C. 2744.02(A). However, there is an exception to subsection (A) for those

causes of action that involve negligent performance of proprietary functions. R.C. 2744.02(B)(2).

A “proprietary function” includes:

(c) The establishment, maintenance, and adoption of a utility, including but not limited to, a light , gas power, or heat plant, a railroad, a bus line or other transit company, an airport, and a municipal corporation water supply system; and

(d) The maintenance, destruction, operation, and upkeep of a sewer system.

R.C. 2744.02(G)(2)

Here, the Treatment Plant is not a solid waste facility. It is a sewer plant. The operation of the Treatment Plant relates to the water and sewer systems as defined in the R.C. sections 2744.02(B)(2)(c) and (d). The maintenance and operation of the Treatment Plant is not a governmental function but a proprietary function. Moreover, because it would be irrational to hold that the negligence in proprietary functions is actionable while intentional torts associated with proprietary functions is not actionable, it follows that the intentional tort claims must also survive by virtue of R.C. 2744.02(B)’s “proprietary function” provision. Otherwise, the statute would violate the Equal Protection Clause of the United States Constitution.

Sovereign Immunity Would Render Chapter 2744 Unconstitutional

Finally, should this Court accept the City’s argument and hold that some or all of her claims are precluded by Chapter 2744, then it will have interpreted the Chapter so as to cause Chapter 2744 to be unconstitutional by denying Ms. Vacha the right to trial by jury and the right to a remedy, as guaranteed her by Article I, Sections 5 and 16, of the Ohio Constitution. See, *Kammeyer v. City of Sharonville* (S.D. Ohio 2003), 311 F.Supp.2d 653. In this regard, it should

be noted that, under Ohio law, the State of Ohio is sovereign but individual political subdivisions are not.

In Support of Proposition of Law II (Proposed by Plaintiff/Appellee/Cross-Appellant Vacha):

BECAUSE SEXUAL ASSAULT BY A CO-WORKER DOES NOT ARISE AS A NATURAL AND PROBABLE CONSEQUENCE OF EMPLOYMENT, AN EMPLOYER DOES NOT ENJOY IMMUNITY FROM LIABILITY UNDER THE WORKERS' COMPENSATION PROVISIONS OF THE REVISED CODE.

The trial court correctly denied the City immunity under Chapter 4123. The City's immunity argument is premised upon R.C. 4123.74, which provides in pertinent part that:

Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law . . . for any *injury* . . . received . . . by any employee *in the course of or arising out of employment* . . . occurring during the period covered by such premium so paid into the state insurance fund.

Id. (emphasis added). R.C. 4123.74 is part of the constitutional and statutory workers' compensation scheme whereby employers pay into a worker's compensation fund that (1) allows employees a streamlined means of recovering for workplace injuries, and (2) shields employers from excess liability by limiting an employee's ability to recover beyond the parameters of Worker's Compensation.²

However, not all claims by employees against employers are limited to the remedies available via Workers' Compensation. As R.C. 4123.74 explicitly provides, for Workers'

² This Court's recent decision in *Kaminski v. Metal & Wire Prods., Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, does not affect this Court's analysis of the instant case. *Kaminski* addresses the constitutionality of R.C. 2745.01's provision regarding employer liability for an intentional tort. It is not an immunity case and this interlocutory appeal can only address immunity issues.

Compensation to be the exclusive remedy for the employee there are, inter alia, two criteria that must be met:

The employee must have received an “injury.”

The “injury” must have been received “in the course of or arising out of employment.”

Neither of these criteria has been met in the instant case. This Proposition of Law II addresses the second of these two criteria – whether rape arises “in the course of or arising out of employment.” Proposition of Law III, post, addresses whether the psychological injury arising from rape is an injury at all.

The rape of Ms. Vacha did not occur “in the course of or arising out of employment” as that term is used in R.C. 4123.74.

In the instant case, the rape did not occur “in the course of or arising out of employment,” as that term is used in R.C. 4123.74.

“For an accident to ‘arise out of the employment’ as required under Workers’ Compensation Act, it is necessary that the conditions or obligations of the employment put the employee in the position or at the place where the accident occurs; the accident need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.” 82 American Jurisprudence 2d (2008), Workers’ Compensation Section 238. “The controlling test of whether an injury arises out of the employment is whether the injury is a natural and probable consequence of the nature of the employment.” Id. at Section 243.

Prewitt v. Alexson Serv. , Inc. , Butler App. No. CA2007-09-218, 2008-Ohio-4306, at par. 21.

This is consistent with R.C. 4123.95’s admonition that Chapter 4123 be interpreted liberally in favor of the employee.

Accordingly, the Ninth District Court of Appeals erred in the Opinion Below when it reversed the decision of the trial court that had previously denied the City summary judgment with respect to the issue of Workers' Compensation immunity.

In Support of Proposition of Law III (Proposed by Plaintiff/Appellee/Cross-Appellant Vacha):

**PSYCHOLOGICAL DAMAGES ARISING FROM SEXUAL ASSAULT
DO NOT FALL UNDER THE RUBRIC OF "INJURY" AS THAT TERM
WAS DEFINED UNDER R.C. 4123.01(C) (pre-Oct. 11, 2006).**

The Complaint alleges a course of conduct by Defendant City that resulted in Ms. Vacha being raped on June 2, 2006. During the relevant time period, R.C. 4123.01(C) defined "injury"³ and provided in pertinent part that injury did not include "psychiatric conditions except where the conditions have arisen from an injury or occupational disease."

In *Kerans v. Porter Paint Company* (1991), 61 Ohio St.3d 486, this Court, addressing the same definition of "injury" set forth above, held that the psychological and psychiatric damages attendant to a sexual assault in the workplace did not constitute an "injury" as defined in the then-existing version of R.C. 4123.01(C).

³ Since the date of the rape alleged the Complaint, the definition of "injury" has been expanded to include "psychiatric conditions [that] have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate." R.C. 4123.01(C) (as amended, SB 7, 126th General Assembly, effective October 11, 2006). However, the more expansive definition of "injury" found in the amended version of R.C. 4123.01(C) is not applicable to this case. See, *Prewitt v. Alexson Serv., Inc.*, Butler App. No. CA2007-09-218, 2008-Ohio-4306, at par. 16 (using definition of "injury" that was codified "[a]t the time of the assault"); see generally, R.C. 1.48 (laws are presumed to be prospective in nature); Article II, Sec. 28 (prohibition on retroactive laws).

Examining the policy and purpose underlying workers' compensation, *Kerans* recognized

that:

If the workers' compensation scheme were adjudged to be the exclusive remedy for claims based upon sexual harassment in the workplace, as appellee urges, victims of sexual harassment would often be left without a remedy. Generally, injured employees receive coverage only for economic losses resulting from their accidents – medical bills, lost wages and diminished earning capacity. However, aside from expenses which may incur for psychiatric care, victims of sexual harassment generally do not suffer economic loss. Their injuries are much less tangible and often are not susceptible to a neat compensatory formula. Thus, even if this court were to hold that psychiatric conditions resulting solely from emotional stress in the workplace are compensable under the workers' compensation scheme, most victims would not obtain appropriate or sufficient relief.

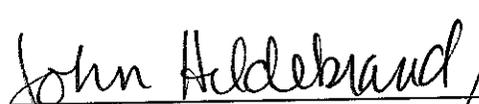
Kerans, 61 Ohio St.3d at 489. Accord, *Prewitt*.

Accordingly, the Ninth District Court of Appeals erred in the Opinion Below when it reversed the decision of the trial court that had previously denied the City summary judgment with respect to the issue of Workers' Compensation immunity.

CONCLUSION

Wherefore, this Court should accept jurisdiction over the instant case, and order immediate briefing of Propositions of Law II and III, while staying any briefing on Proposition of Law I until this Court decides *Sampson v. Cuyahoga County Metropolitan Housing Authority*, Case No. 2010-1561.

Respectfully submitted,


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CERTIFICATE OF SERVICE

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