

IN THE SUPREME COURT OF OHIO

Case No. 11-1050

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

MOTION OF APPELLEE/CROSS-APPELLANT LISA VACHA FOR RECONSIDERATION
OF DECISION NOT TO ACCEPT CROSS-APPEAL

JOHN P. HILDEBRAND, SR. (0025124)
 John P. Hildebrand Co., L.P.A.
 21430 Lorain Road
 Fairview Park, OH 44126
 (440) 333-3100
 (440) 333-8992-FAX
 Email: legaljack@aol.com
*Counsel for Plaintiff-Appellee/Cross-Appellant
 Lisa Vacha*

JOHN T. McLANDRICH (0021494)
 JAMES A. CLIMER (0001532)
 FRANK H. SCIALDONE (0075179)
 Mazanec, Raskin, Ryder & Keller Co., L.P.A
 100 Franklin's Row
 34305 Solon Road
 Cleveland, OH 44139
*Counsel for Defendant -Appellant/Cross-
 Appellee, City of North Ridgeville*

CHARLES RALSTON, A543443
 Grafton Correctional Institution
 2500 South Avon Belden Road
 Grafton, Ohio 44044
INMATE MAIL
Defendant, Pro Se

<p>FILED</p> <p>OCT 17 2011</p> <p>CLERK OF COURT SUPREME COURT OF OHIO</p>
--

**MOTION OF APPELLEE/CROSS-APPELLANT LISA VACHA FOR
RECONSIDERATION OF DECISION NOT TO ACCEPT CROSS-APPEAL**

Comes Now Appellee/Cross-Appellant Lisa Vacha, and moves this Honorable Court to reconsider its decision, rendered 4 to 3, not to allow the cross-appeal in this case. The two propositions of law at issue are:

Proposition of Law II:

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.

Proposition of Law III:

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).

This case arises from Plaintiff Lisa Vacha's civil action against the City of North Ridgeville. Ms. Vacha, a North Ridgeville employee, sued the City for intentional, reckless and negligent tort liability attendant to Ms. Vacha's having been raped by Charles Ralston, a co-employee who was hired by the City despite a significant history of criminal behavior. The Ninth District Court of Appeals held that the City was not immune from intentional tort liability on the basis of sovereign immunity. However, the Ninth District held that the City was immune from liability for reckless and negligent hiring practices on the basis of Worker's Compensation immunity.

This Court has already accepted Proposition of Law I, which is the City's appeal of the decision not to grant the City sovereign immunity for the intentional tort claim. The Court

ordered that briefing on Proposition of Law I be stayed pending the determination of *Sampson v. Cuyahoga County Metropolitan Housing Authority*, Case No. 2010-1561.

Over the dissent of three Justices (Pfeifer, Lundberg Stratton, and O'Donnell, JJ.), this Court declined to accept Propositions of Law II and III, which are Ms. Vacha's propositions on cross-appeal regarding the decision to grant the City immunity by virtue of Worker's Compensation from the alleged torts of reckless and negligent hiring. The three dissenting justices all opined that the cross-appeal should be accepted and the case held pending *Sampson*.

This Court is asked to reconsider and, consistent with the dissenting justices, accept the cross-appeal and hold briefing of the cross-appeal until *Sampson* is decided.

Collectively, Propositions of Law II and III are about the rights of every employee not to be limited to Worker's Compensation recovery when victimized by a sexual assault in the workplace that could have been avoided had the employer not been reckless or negligent in its hiring practices. (Here, the assailant's criminal history was known by the Mayor of North Ridgeville because Ralston had fathered children with the Mayor's daughter and had previously assaulted the Mayor's daughter).

At the same time, this is also a case about establishing a rule of law which ensures that irresponsible employers cannot hide behind Worker's Compensation immunity as a means of evading accountability for reckless and negligent hiring decisions that cause employees to be sexually assaulted. The Worker's Compensation Act was designed to shield employers from lawsuits for ordinary torts. *Blankenship v. Cincinnati Milactron Chemicals, Inc.* (1982), 69 Ohio St. 608, 614. When the Worker's Compensation fund is taxed for the type of malfeasance alleged

in this case, everyone suffers – particularly the responsible employers who contribute to Worker’s Compensation and will never draw on the fund for the kind of misconduct alleged herein. Worker’s Compensation is being twisted when it becomes the exclusive remedy in these types of circumstances.

Nor is this a situation, as the City of North Ridgeville suggests, where employees such as Ms. Vacha will receive a windfall. There are provisions under Chapter 4123, the Worker’s Compensation laws, whereby the Worker’s Compensation fund will receive reimbursement from Ms. Vacha should she prevail on her recklessness and negligence claims against the City, and the Worker’s Compensation fund has continuing jurisdiction in this regard. R.C. 4123.52. This makes sense – and once again helps keep the Worker’s Compensation fund solvent and operating consistently with the law’s purpose.

Proposition of Law II – that sexual assault is not a workplace injury -- is one that has divided lower courts during the past several years. 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. Relying upon 82 American Jurisprudence 2d (2008), Workers’ Compensation Section 238, *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. While *Prewitt* was also decided on other grounds, this disparity in the rule of law between the instant case and *Prewitt* creates uncertainty and inconsistency and is appropriately resolved in this

Court. See generally, *Whitelock v. Gilbane Building Company*, 66 Ohio St.3d 594, 1993-Ohio-223.

Moreover, the rule of law of the Ninth District in the instant case is at odds with a recent case of the Tenth District. In *Weimerskirch v. Coakely*, Franklin App. No. 07AP-952, 2008-Ohio-1681, par. 15, a physical assault case, the Tenth District indicated that its jurisprudence recognizing the right of an employee to sue for negligent hiring of a co-worker could be undermined if “injury” were expanded beyond that which is “in the course of or arising out of” employment.

CONCLUSION

Wherefore, this Court should accept jurisdiction over the cross-appeal, and stay briefing on Proposition of Law I until this Court decides *Sampson v. Cuyahoga County Metropolitan Housing Authority*, Case No. 2010-1561.

Respectfully submitted,

John P. Hildebrand, Sr. by JPM
JOHN P. HILDEBRAND, SR. (0025124)
Attorney for Plaintiff Lisa Vacha
21430 Lorain Road
Fairview Park, Ohio 44126
(440) 333-3100 phone; (440) 333-8992 facsimile
legal jack@aol.com

CERTIFICATE OF SERVICE

A true copy of the foregoing Motion for Reconsideration has been sent via U. S. mail on
this 17th day of October, 2011, to:

John T. McClandrich, Esq.
James A. Climer, Esq.
John D. Pinzone, Esq.
Mazanec, Raskin & Ryder, Co., LPA
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
Attorneys for Defendant-Appellant/Cross-Appellee City of North Ridgeville

Mr. Charles Ralston, A543443
Grafton Correctional Institution
2500 South Avon Belden Road
Grafton, Ohio 44044
INMATE MAIL
Defendant, Pro Se


JOHN P. HILDEBRAND, SR. (0025124)
Attorney for Plaintiff, Lisa Vacha