

IN THE SUPREME COURT OF OHIO

ANDREA RIFFLE, et al.

Plaintiff-Appellees

v.

**PHYSICIANS AND SURGEONS
AMBULANCE SERVICE AND CITY OF
AKRON**

Defendant-Appellant

:
: Case No. 2012-0205
:
:
: On Appeal from the Summit County Court
: of Appeals, Ninth Appellate District
:
: Court of Appeals
: Case No. 25829
:
:

**MEMORANDUM IN RESPONSE TO
DEFENDANT/APPELLANT, CITY OF AKRON, OHIO'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

Ann Ruley Combs – No. 0004810
Rebecca Cull – No. 0083542
Kohnen & Patton, LLP
PNC Center, Suite 800
201 East Fifth Street
Cincinnati, OH 45202
(513) 381-0656 Fax: (513) 381-5823
acombs@kplaw.com
rcull@kplaw.com
Attorneys for Plaintiff-Appellees

Cheri B. Cunningham – No. 0009433
John Christopher Reece – No. 0042573
Michael J. Defibaugh – No. 0072683
161 S. High Street, Suite 202
Akron, OH 44308
(330) 375-2030 Fax: (330) 375-2041
JReece@akronohio.gov
MDefibaugh@akronohio.gov
*Attorneys for Defendant-Appellant City of
Akron*

Stephen L. Byron – No. 0055657
Ice Miller LLP
4230 State Route 306, Suite 240
Willoughby, Ohio 44094
(440) 951-2303 Fax: (216) 621-5341
Stephen.Byron@icemiller.com

Stephen J. Smith – No. 0001344
Chris W. Michael – No. 0086879
Ice Miller LLP
250 West Street
Columbus, Ohio 43215
(614) 462-2700 Fax: (614) 462-5135
Stephen.Smith@icemiller.com
Chris.Michael@icemiller.com

John Gotherman – No. 0000504
Ohio Municipal League
175 S. Third Street, #510
Columbus, Ohio 43215-7100
(614) 221-4349 Fax: (614) 221-4390
jgotherman@columbus.rr.com

*Attorneys for Amicus Curiae
The Ohio Municipal League*

RECEIVED
FEB 29 2012
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
FEB 29 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
I. EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST	1
II. STATEMENT OF THE CASE AND FACTS.....	4
A. Statement of the Facts	4
B. Proceedings Before the Trial Court	4
C. Proceedings Before the Ninth District Court of Appeals	5
III. ARGUMENT IN OPPOSITION TO AKRON'S PROPOSITION OF LAW	6
A. R.C. 4765.49 Expressly Imposes Liability on a Political Subdivision Within the Meaning of R.C. 2744.02(B)(5).....	6
B. An Irreconcilable Conflict Exists Between R.C. 4765.49 and R.C. 2744.02, and R.C. 4765.49, as the More Specific Statute Controls.....	8
IV. CONCLUSION.....	10
CERTIFICATE OF SERVICE	11

I. EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This case can, should, and has been determined on the narrow facts involved. The trial court Order and the Ninth District Court of Appeals' Decision address only the application of Ohio's sovereign immunity laws to the provision of emergency medical services, when the medical services provided present such a deviation from the standard of care as to rise to the level of willful or wanton misconduct. As set forth below, R.C. 4765.49 applies only to the provision of medical services under these circumstances. There is no dispute among the courts of appeal as to the proper application of this statute; to date, each of the Ohio courts to address the application of R.C. 4765.49 under similar circumstances has found that this more specific statute controls. Moreover, the statutes advanced by Appellant City of Akron ("Akron") as related or comparable are, in fact, not comparable to R.C. 4765.49, and the Ninth District's interpretation of that statute will not open the flood gates of litigation against municipalities across the state.

In the context of a political subdivision, R.C. 4765.49(B) imposes liability only where the misconduct alleged rises to the level of willful or wanton misconduct. In all other circumstances, R.C. 4765.49(B) can be read and applied in harmony with Ohio's sovereign immunity statute, R.C. 2744.02, and the judicial framework adopted for applying that statute, *Cater v. Cleveland*, 83 Ohio St.3d 24 (1998).

The language of R.C. 4765.49 spells out its limited scope:

A political subdivision ... is not liable in a civil action for injury, death, or loss to person or property arising out of any actions taken by a first responder, EMT-basic, EMT-I, or paramedic working under the officer's or employee's jurisdiction, or for injury, death, or loss to person or property arising out of any actions of licensed medical personnel advising or assisting the first responder,

EMT-basic, EMT-I or paramedic, **unless the services are provided in a manner that constitutes willful or wanton misconduct.**

R.C. 4765.49(B) (emphasis added). Thus, where an action against a political subdivision is based on negligent conduct, either R.C. 2744.02 or R.C. 4765.49 or both provide immunity to the political subdivision. The conflict between these two statutes arises only when the conduct alleged rises to the level of willful or wanton misconduct by the political subdivision. The narrow scope of this conflict prevents this matter from being of public or great general interest.

Akron argues that the Ninth District's reasoning must be corrected because it deviates from the reasoning of other courts of appeals who have considered the proper application of R.C. 4765.49 under similar circumstances, but Akron neglects to mention that the Ohio courts of appeals that have considered the relationship between these statutes have ultimately reached the same conclusion: under this specific factual scenario – allegations of willful or wanton misconduct in the provision of emergency medical services by a political subdivision – R.C. 4765.49 defeats a political subdivision's immunity. *Riffle v. Physicians & Surgeons Ambulance Serv.*, 9th Dist. No. 25829, 2011-Ohio-6595; *Blair v. Columbus Division of Fire*, 10th Dist. No. 10AP-575, 2011-Ohio-3648 (July 26, 2011); *Johnson v. City of Cleveland*, 8th Dist. No. 95688, 2011-Ohio-2152 (May 5, 2011); and *Fuson v. City of Cincinnati*, 91 Ohio App.3d 734 (1st Dist. 1991). The Ninth District's decision does not conflict with prior authority and therefore cannot rightfully be construed as "opening up" new liability for a political subdivision. For this reason too, this case does not present an issue of public or great concern.

Akron and Amicus Curiae attempt to paint a bleak picture of uncertainty for political subdivisions if the Ninth District's opinion stands, arguing that the interpretation and application of numerous other statutes are now unsettled. In reality, however, the particular facts of this case and the limited scope of R.C. 4765.49 prevent such an effect. As set forth in the Riffles'

Memorandum in Opposition to Motion to Certify a Conflict, the Ninth District's ruling on this matter will not likely affect other courts' interpretation of other statutes because of the unique and limited applicability of R.C. 4765.49. In addressing its proposition of law, Akron attempts to argue that the defenses set forth in R.C. 2744.03 are "analogous defenses" and that Ohio's Recreational User immunity statute is comparable to R.C. 4765.49. Simply, they are not. Again, it may be true that the underlying purpose of all of these statutes is indeed the same: to limit taxpayer exposure, as Akron says. However, the means by which these distinct statutes achieve that purpose and the extent to which they achieve that purpose are every different. Tellingly, neither the defenses in R.C. 2744.03 nor Ohio's Recreational User statute, R.C. 1533.181 are impinged by application of the Cater analysis. Those statutes provide immunity coterminous with the immunity provided by R.C. 2744.02, but as demonstrated herein, R.C. 4765.49(B) does not. The specific, limited purpose and scope of R.C. 4765.49 prevents its broad application to the interpretation of other statutes and further prevents this case from becoming a matter of public or great general concern.

Finally, Akron asserts at the very outset of its Memorandum in Support of Jurisdiction that this case presents a substantial constitutional question but fails to identify that constitutional question. Indeed, there is not a substantial constitutional question at issue in the present case; this case turns on the interpretation of a single statute and its application to the specific facts at hand. Because this case does not present a substantial constitutional question or a matter of public or great general concern, Appellees, Andrea Riffle and Dan Riffle, individually and as the Co-Administrators of the Estate of Tenley Jayne Riffle ("the Riffles") respectfully request that this Court deny Akron's discretionary appeal and remand this case to the trial court.

II. STATEMENT OF THE CASE AND FACTS

A. Statement of the Facts

Again, this case arises from the willful and wanton misconduct of the city of Akron's employees in providing emergency medical services to Andrea Riffle ("Mrs. Riffle") and Tenley Jayne Riffle on December 26, 2008. On that night, Akron's emergency dispatch told its EMS crew that they were responding to a patient in her third trimester of pregnancy with a pregnancy related problem. Specifically, the dispatcher relayed complaints of "SERIOUS bleeding" to the EMS crew, and yet, the EMS crew completely failed to assess the condition of Tenley Jayne Riffle. Then, rather than directly transporting Mrs. Riffle and her baby to a hospital, Akron delayed and contacted a private ambulance company to transport them. Because of this delay in transportation, Tenley Jayne's delivery was likewise delayed. After she was born, it was determined that she suffered fetal bradycardia, and after struggling to survive for three days, Tenley Jane died on December 29, 2008. According to the Affidavit of Merit submitted with the Complaint in this matter, as measured against the medical standard of care, the misconduct which occurred here demonstrates such a conscious disregard for the health and well-being of both mother and child that it rises to the level of willful or wanton misconduct.

B. Proceedings Before the Trial Court

On November 24, 2009, Andrea Riffle and Dan Riffle ("the Riffles") filed a Complaint with the Summit County Court of Common Pleas, along with an Affidavit of Merit from Michael Olinger, M.D. supporting their allegations. This Complaint sets forth claims arising from the medical malpractice described above – medical malpractice, which according to Dr. Olinger, fell so far below the standard of care that it constituted a conscious disregard for the health and

safety of Mrs. Riffle and the Riffles' baby, Tenley Jayne. The defendants named in the Complaint include, among others, the city of Akron.

Akron answered, asserting that it was immune from suit. After answering, Akron filed a Motion for Judgment on the Pleadings, which the Riffles opposed. The trial court considered Akron's motion and issued a well-reasoned decision denying Akron's motion and finding that Akron was not entitled to sovereign immunity under the facts of this case, pursuant to R.C. 4765.49. (Order, January 24, 2011). The trial court reached this conclusion by reasoning that the interpretation of the relevant statutes advocated by Akron (that R.C. 4765.49(B) serves only as an additional, restorative defense, applicable through R.C. 2744.03) ignores R.C. 4765.49(B)'s imposition of liability for willful or wanton misconduct in providing emergency medical treatment. (*Id.*) Therefore, the trial court determined that the interpretation of these two statutes that would give full effect to both was to construe R.C. 4765.49(B), in accord with its plain language, as expressly imposing liability upon political subdivisions under these limited factual circumstances. (*Id.*) Akron timely appealed that Order.

C. Proceedings Before the Ninth District Court of Appeals

After the appeal was fully briefed and argued, the Ninth District Court of Appeals issued a Decision affirming the trial court's Order, although relying on slightly different reasoning to reach the same conclusion. The Ninth District began by applying the same *Cater* analysis conducted by the trial court and advocated by Akron and found itself faced with the same dilemma: rote application of R.C. 2744.02 and *Cater* resulted in nullification of the plain language of R.C. 4765.49(B). (Decision, Dec. 21, 2011). But, instead of construing R.C. 4765.49(B) as expressly imposing liability upon a political subdivision as the trial court had, the Ninth District found that the two statutes – R.C. 2744.02 and R.C. 4765.49 could not be applied

together. (*Id.*) The Ninth District, following sound Ohio precedent, applied the more specific statute, R.C. 4765.49(B) and ruled that Akron is not entitled to sovereign immunity under the facts of this case. (*Id.*) Akron timely appealed this Decision.

III. ARGUMENT IN OPPOSITION TO AKRON'S PROPOSITION OF LAW

The reasoning of the trial court and the Ninth District differ, but both courts reached the correct result in this case. Either by construing R.C. 4765.49 as an express imposition of liability, as the trial court did, or by applying the more specific statute in response to an irreconcilable conflict as the Ninth District did, the outcome of both decisions was consistent with Ohio's rules of statutory interpretation and prior Ohio case law on this subject. Both lines of reasoning are supported by the law and the facts of this case, and both lines of reasoning reach the appropriate result. In order to give effect to the plain language of R.C. 4765.49(B) with respect to political subdivisions, one of these lines of reasoning must be applied. Either R.C. 4765.49(B) represents an express imposition of liability within the meaning of R.C. 2744.02(B)(5), or an irreconcilable conflict exists between the two statutes, resulting in the application of R.C. 4765.49(B) to the specific factual scenario at issue here. Any other application of this statute fails to give full effect to its plain language.

A. R.C. 4765.49 Expressly Imposes Liability on a Political Subdivision Within the Meaning of R.C. 2744.02(B)(5).

If a court applies R.C. 2744.02 in a typical *Cater* analysis and offers R.C. 4765.49(B) to a political subdivision as an additional defense in the third step of the analysis, as Akron suggests it should, the end result is that a political subdivision remains immune for any misconduct, regardless of degree fault. Using the specific facts of the present case, that analysis begins by acknowledging that, pursuant to R.C. 2744.02(A), Akron is a political subdivision, and the provision of emergency medical services is a governmental function (R.C. 2744.01(C)(2)(a)) and

thus, Akron is entitled to sovereign immunity. The second step of the *Cater* analysis asks whether any of the exceptions to immunity enumerated in R.C. 2744.02(B)(1)-(5) applies. Of those, only R.C. 2744.02(B)(5) potentially applies here, but according to Akron's argument, R.C. 4765.49(B) does not represent an express imposition of liability on a political subdivision, even in cases alleging willful or wanton misconduct. As such, the *Cater* analysis ends at the second step, and R.C. 4765.49(B) cannot be applied, despite the fact that its plain language dictates a different outcome when a plaintiff has alleged willful and wanton misconduct by the political subdivision.

As the trial court pointed out, the City's argument that R.C. 4765.49 operates like the defenses enumerated in R.C. 2744.03 and actually provides more immunity "would render R.C. 4765.49 a nullity. If R.C. 4765.49 does not provide an exception to that immunity, it has no meaning whatsoever." (Order, p.3). R.C. 4765.49 clearly provides that it applies to political subdivisions, and it imposes liability for willful and wanton misconduct. By contrast, the blanket immunity of R.C. 2744.02(A) does not explicitly recognize an exception for willful or wanton misconduct. Thus, if R.C. 4765.49 is not interpreted as expressly imposing liability for willful or wanton misconduct as an exception to the general immunity otherwise provided to political subdivisions, then the statute has no effect.

Failing to give a statute its plain meaning is equally as dangerous as "stretching" the meaning of a statute. "The presumption always is, that every word in a statute is designed to have *some* effect, and hence the rule that, 'in putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to *every part of it*'" (Emphasis in original.) *Ford Motor Co. v. Administrator, Ohio Bureau of Employment Serv's.* (1991), 59 Ohio St.3d 188, 190, quoting *Turley v. Turley* (1860), 11 Ohio St.

173, 179. Failure to recognize that R.C. 4765.49 expressly imposes liability on a political subdivision for its willful and wanton misconduct is a failure to give effect to the entire statute.

Again, the second tier of the *Cater* analysis considers whether any of the exceptions to immunity set forth in R.C. 2744.02(B)(1)-(5) apply. *Cater*, 83 Ohio St.3d at 30. R.C. 2744.02(B)(5) provides that “a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code ...” As the trial court recognized, R.C. 4765.49 expressly imposes liability, and the facts of the present case fall squarely within the circumstances contemplated by R.C. 4765.49. As such, Akron is not immune to the Riffles’ claims.

B. An Irreconcilable Conflict Exists Between R.C. 4765.49 and R.C. 2744.02, and R.C. 4765.49, as the More Specific Statute Controls.

If, however, a court does not interpret R.C. 4765.49(B) as an express imposition of liability, it must be acknowledged that a conflict exists between R.C. 2744.02 and R.C. 4765.49 under the facts of this case: “[R.C. 2744.02] appears to provide immunity to governmental entities that provide emergency medical services for all claims related to those services and [R.C. 4765.49] appears to provide immunity only to negligence claims related to those services.” (Decision, p.5). Both of these statutes cannot be applied fully and contemporaneously. It is clear that R.C. 4765.49 and R.C. 2744.02 are in conflict.

As application of the *Cater* analysis bears out and as the Ninth District correctly concluded, there is an irreconcilable conflict between these two statutes under the present set of facts. On its face, R.C. 4765.49(B) expressly provides that a political subdivision may be held liable in damages in a civil action for its willful or wanton misconduct in providing emergency medical services, but R.C. 2744.02 cloaks a political subdivision with immunity for that same conduct. Pursuant to R.C. 1.51, “[i]f the conflict between the provisions is irreconcilable, the

special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevails.” *State ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 2004-Ohio-4354 at ¶14.

The Ohio Legislature has kept R.C. 4765.49 intact through two amendments since 2003; if the Legislature had intended to give political subdivisions blanket immunity for their misconduct of any character, it could have removed political subdivisions from the purview of this statute. As it is written and as it has been interpreted by Ohio courts, R.C. 4765.49 operates to pull back a small portion of the blanket immunity provided to cities by R.C. 2744.02(A) and thereby expressly imposes liability for the City’s willful or wanton misconduct. *Fuson*, 91 Ohio App.3d at 738; *Bostic v. City of Cleveland*, 8th Dist. No. 79336, 2002-Ohio-333.

Here, the special provision is R.C. 4765.49, and although R.C. 2744.02 is the later adoption, both statutes were amended in 2003 and again in 2007 and the apparently conflicting language was allowed to remain. (2001 Ohio S.B. 106 and 2001 Ohio S.B. 115; 2005 Ohio HB 401 and 2007 Ohio HB 119, respectively). As such, the Ninth District correctly applied the more specific statute: R.C. 4765.49(B), and found that a political subdivision can held liable for its willful or wanton misconduct in providing emergency medical services.

Either of these interpretations of R.C. 4765.49 result in application of that statute to its full extent in accord with its plain language. Both interpretations reach the same result: a political subdivision may be held liable for the willful or wanton misconduct in providing emergency medical services. And, both interpretations are based in sound Ohio precedent. For these reasons, the Ninth District’s opinion should stand.

IV. CONCLUSION

The Ninth District Court of Appeals' decision in this matter is in accord with the decisions of the other Ohio Courts of Appeals to address this precise issue. Moreover, the decision was limited to the narrow factual scenario of this case. There is no indication that prior Ohio decisions similarly interpreting R.C. 4765.49(B) have opened the floodgates of litigation against municipalities, and there is no reason to believe that this decision will either. This case simply does not present an issue of public or great general concern. Finally, even though the trial court and the Ninth District employed different reasoning, both courts reached the correct result, which is application of R.C. 4765.49(B) to its full extent as written. Ohio law plainly provides that a political subdivision may be liable in a civil action for damages for its willful or wanton misconduct, and here, Akron can be and should be held liable for its hand in causing the wrongful death of Tenley Jayne Riffle. For these reasons, the Riffles respectfully request that this Court decline jurisdiction and remand this case to the trial court for further proceedings consistent with the decision of the Ninth District Court of Appeals.

Respectfully submitted,

KOHNEN & PATTON, LLP



Ann Ruley Combs (0004810)
Rebecca Louise Cull (0083542)
800 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Tele: (513) 381-0656
Fax: (513) 381-5823
Email: acombs@kplaw.com
Email: rcull@kplaw.com
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 20 day of February, 2012, via regular U.S. Mail, postage prepaid, upon the following:

John Christopher Reese
Michael J. Defibaugh
Assistant Directors Of Law
City Of Akron, Department of Law
202 Ocasek Government Office Building
161 South High Street
Akron, Oh 44308-1655

Stephen L. Byron
Ice Miller LLP
4230 State Route 306, Suite 240
Willoughby, Ohio 44094

John Gotherman
Ohio Municipal League
175 S. Third Streert, #510
Columbus, Ohio 43215-7100

Stephen J. Smith
Chris W. Michael
Ice Miller LLP
250 West Street
Columbus, Ohio 43215



Rebecca L. Cull