

**IN THE SUPREME COURT OF OHIO**

**LISA VACHA**

**Plaintiff - Appellee,**

**v.**

**THE CITY OF NORTH RIDGEVILLE,  
OHIO, et al.**

**Defendants – Appellants.**

: **Case No. 2011-1050**  
: **Case No. 2011-1327**  
: **On Appeal from the**  
: **Ninth District Court of Appeals**  
: **Lorain County, Ohio**  
:  
: **Court of Appeals**  
: **Case No. 10CA009750**  
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:  
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**BRIEF OF *AMICUS CURIAE***  
**THE OHIO MUNICIPAL LEAGUE**  
**IN SUPPORT OF DEFENDANTS-APPELLANTS**  
**CITY OF NORTH RIDGEVILLE, OHIO, et al.**

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**STEPHEN L. BYRON (#0055657) (COUNSEL OF RECORD)**

**Ice Miller LLP**  
**4230 State Route 306, Suite 240**  
**Willoughby, Ohio 44094**  
**Phone: (440) 951-2303**  
**Fax: (216) 621-5341**  
**E-mail: Stephen.Byron@icemiller.com**

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**JOHN GOTHERMAN (#0000504)**  
**Ohio Municipal League**  
**175 S. Third Street, #510**  
**Columbus, Ohio 43215-7100**  
**Phone: (614) 221-4349**  
**Fax: (614) 221-4390**  
**E-mail: jgotherman@columbus.rr.com**

**STEPHEN J. SMITH (#0001344)**  
**CHRIS W. MICHAEL (#0086879)**  
**Ice Miller LLP**  
**250 West Street**  
**Columbus, Ohio 43215**  
**Phone: (614) 462-2700**  
**Fax: (614) 462-5135**  
**E-mail: Stephen.Smith@icemiller.com**  
**E-mail: Chris.Michael@icemiller.com**

**COUNSEL FOR *AMICUS CURIAE***  
**THE OHIO MUNICIPAL LEAGUE**

**JOHN T. MCLANDRICH (#0021494)**

**JAMES A. CLIMER (#0001532)**

**FRANK H. SCIALDONE (#0075179)**

**Mazanec, Raskin & Ryder Co., L.P.A.**

**100 Franklin's Row**

**34305 Solon Road**

**Cleveland, Ohio 44139**

**Phone: (440) 248-7906**

**Fax: (440) 248-8861**

**E-mail: [jmclandrich@mrrlaw.com](mailto:jmclandrich@mrrlaw.com)**

**E-mail: [jclimer@mrrlaw.com](mailto:jclimer@mrrlaw.com)**

**E-mail: [fscialdone@mrrlaw.com](mailto:fscialdone@mrrlaw.com)**

**COUNSEL FOR DEFENDANT/APPELLANT  
THE CITY OF NORTH RIDGEVILLE,  
OHIO**

**JOHN HILDEBRAND, SR. (#0025124)**

**John P. Hildebrand Co., L.P.A.**

**21430 Lorain Road**

**Fairview Park, Ohio 44126**

**Phone: (440) 333-3100**

**Fax: (440) 333-8992**

**E-mail: [legaljack@aol.com](mailto:legaljack@aol.com)**

**COUNSEL FOR PLAINTIFF/APPELLEE  
LISA VACHA**

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## INTRODUCTION

The Ohio Municipal League (“League”), as amicus curiae on behalf of the City of North Ridgeville (“City”), urges this Court to reverse the decision of the Ninth District Court of Appeals (“Ninth District”) in *Vacha v. N. Ridgeville*, 2011-Ohio-2446. The Ninth District erroneously held that the City was not entitled to summary judgment because Plaintiff’s claim that her employer committed an intentional tort “may constitute a claim within the scope of R.C. 2744.09(B).” Under R.C. §2744.09(B), if a claim against a political subdivision arises out of an “employment relationship,” the immunities provided under R.C. Chapter 2744 are not applicable. The Ninth District arrived at this conclusion notwithstanding the fact that there was no causal connection or relationship between the Plaintiff’s claims for relief alleged in her complaint and her employment relationship with the City.

This Court is respectfully requested to clarify the application of R.C. Chapter 2744, the Political Subdivision Tort Liability Act, when a political subdivision is sued for an alleged intentional tort by an employee. This Court has repeatedly determined that R.C. Chapter 2744 is the appropriate statute that is to be applied when determining whether a political subdivision is liable in tort. Courts have often struggled with the issue of tort liability when an intentional tort is alleged to have been committed by an employer, and the law on this point is in need of further development.

Recently, this Court determined that an intentional tort alleged by an employee to have been committed by the employing political subdivision may “(arise) out of the employment relationship,” within the meaning of R.C. 2744.09(B), if there is a causal connection or causal relationship between the claims raised by the employee and the employment relationship. *Sampson v. Cuyahoga Metropolitan Housing Auth.*, 131 Ohio St.3d 418, 2012-Ohio-570, 966

N.E.2d 247. The issue raised in this case is whether R.C. 2744.09(B) creates an exception to the statutory immunity that R.C. 2744.01(A)(1) otherwise confers on the political subdivision when an employee of a City is the subject of an intentional act (i.e. sexual assault) by another employee during a work shift. The League suggests that the question to be asked in such cases is, necessarily: is there a causal connection or relationship between the alleged sexual assault and the employment relationship in this case?

The Ninth District's decision in *Vacha*, if it is allowed to stand, will strip local governments of an express grant of immunity conferred upon them by R.C. Chapter 2744, and subject local governments to myriad claims for alleged intentional torts that would otherwise be disposed of at summary judgment. The League asserts that this is contrary to the language and established intent of the statute. The purpose behind the legislature's enactment of R.C. Chapter 2744 was to preserve the fiscal integrity of political subdivisions in response to the judiciary's abrogation of common law sovereign immunity. See *Estate of Graves v. Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, 922 N.E.2d 201, ¶ 12. Even if political subdivisions have insurance, the broadening of exposure to intentional tort claims will have an adverse impact on the finances of political subdivisions as premiums rise to cover the increased risks of liability. Responding to claims also exacts a cost in work hours which are lost in the defense of claims, which outcome is also contrary to the purpose of R.C. Chapter 2744.

The League respectfully requests this Court to reverse the decision of the Ninth District and hold that an alleged sexual assault on a public employee committed by another public employee does not arise out of the employment relationship with a public employer, and as a result the City is entitled to immunity under R.C. Chapter 2744.

## STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of Ohio cities and villages. The League was incorporated as an Ohio non-profit corporation in 1952 by city and village officials who saw the need for a statewide association to serve the interests of Ohio municipal government. The League provides educational opportunities for municipal officials and advocates on behalf of Ohio's municipal corporations.

The League and its members have an interest in ensuring the proper application of R.C. Chapter 2744 in order to preserve the fiscal integrity of political subdivisions and avoid unwarranted and unnecessary litigation, liability and costs that arise out of the improper application of Ohio's Political Subdivision Tort Immunity Act.

## STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Brief of Appellant, City of North Ridgeville, Ohio.

## ARGUMENT

**Proposition of Law No. 1: R.C. 2744.09(B) does not create an exception to political subdivision immunity for an intentional tort claim alleged by a public employee against the employing political subdivision when the alleged tortious act occurs outside of the employment relationship.**

### Political Subdivision Tort Immunity

The Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744, is the governing statute in Ohio that determines the tort liability of political subdivisions. *See* R.C. 2744.02(A)(2) ("The defenses and immunities conferred under this chapter apply in connection with *all* governmental and proprietary functions performed by a political subdivision and its employees, \*\*\*") (emphasis added). R.C. Chapter 2744 was enacted to provide Ohio's political

subdivisions with immunity from tort liability with few enumerated exceptions, which are to be construed narrowly. See *Terry v. Ottawa Cty. Bd. of Mental Retardation & Developmental Disabilities*, 151 Ohio App.3d 234, 2002-Ohio-7299, 783 N.E.2d 959, ¶ 10 (6th Dist.); *Doe v. Dayton City School Dist. Bd. of Edu.*, 137 Ohio App.3d 166, 738 N.E.2d 390 (1999). The manifest purpose of the Political Subdivision Tort Liability Act is the preservation of the fiscal integrity of political subdivisions. *Estate of Graves, supra*, at ¶ 12.

Determining whether a political subdivision is immune from tort liability involves a three-tiered analysis under the Political Subdivision Tort Liability Act. *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716. The first-tier is the general rule that political subdivisions are immune from tort liability incurred in connection with the performance of a governmental or proprietary function. R.C. 2744.02(A)(1). The second-tier requires a court to determine whether any of the five statutory exceptions provided in R.C. 2744.02(B) apply to remove the general grant of immunity. *Hortman* at ¶ 12. Finally, under the third-tier of analysis, immunity can be reinstated if the political subdivision can successfully argue that any of the defenses contained in R.C. 2744.03 applies. *Id.*

In the case at bar, there is no question that the City, which owns and operates the French Creek Wastewater Treatment Plant, is a political subdivision. Accordingly, the City is generally immune from tort liability pursuant to R.C. 2744.02(A)(1) unless an exception applies to remove this general grant. If no exception applies, then the analysis ends at this point and the City is entitled to immunity.

It is undisputed that none of the express exceptions provided in R.C. 2744.02(B) are applicable in the case at bar. This Court has previously held that an intentional tort is not an exception to a City's immunity under R.C. 2744.02. See *Wilson v. Stark Cty. Dept. of Human*

*Serv.*, 70 Ohio St.3d 450, 639 N.E.2d 105 (1994). Thus, if R.C. Chapter 2744 were to be determined to be applicable to this case, the City would be entitled to judgment on Plaintiff's claim.

The Plaintiff, however, asserts that R.C. 2744.09(B) precludes the application of R.C. Chapter 2744 because the Plaintiff is an employee of the City. R.C. 2744.09(B) provides that R.C. Chapter 2744 does not apply to "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." Thus, if R.C. 2744.09(B) is applicable, the Plaintiff's claim against the City may proceed; conversely, if R.C. 2744.09(B) is not applicable, judgment must be entered on behalf of the City.

#### **No Causal Connection**

While this appeal was pending, this Court issued its decision in *Sampson v. Cuyahoga Metropolitan Housing Auth.*, 131 Ohio St.3d 418, 2012-Ohio-570, 966 N.E.2d 247, holding that the phrase "relative to any matter that arises out of the employment relationship," under R.C. 2744.09(B) requires "only a causal connection between the subject matter of the civil action and the employment relationship." *Id.*, at ¶16. After making this determination, the Court concluded that, based on the pertinent facts, reasonable minds could find that the Plaintiff's claim for intentional infliction of emotional distress against his employer-political subdivision arose out of the employment relationship. *Id.*, at ¶¶ 20-22. Specifically, the Court noted that the alleged tort arose from an accusation by the employer that the employee had engaged in misconduct in his duties as a plumber; the investigation into this misconduct was conducted entirely by the employer's police based on documents in the employers possession; the employee was arrested at a mandatory employee meeting; and that after the employee grieved through the local union,

he was reinstated to his former position. *Id.* at ¶¶20-21. Under these facts, the Court determined that sufficient facts had been alleged such that a causal connection could be found by a trier of fact.

This Court, sub silento, reached a similar conclusion in *Buck v. Reminderville*, 132 Ohio St.3d 24, 2012-Ohio-1580, 967 N.E.2d 1218, in which it affirmed a decision by the Ninth District under the authority of *Sampson*. Like *Sampson*, *Buck* involved an alleged intentional tort by a village chief of police against his employing political subdivision for alleged false and defamatory remarks made by a village police sergeant about the chief's performance. *See Buck v. Reminderville*, 9th Dist. No. 25272, 2010-Ohio-6497, ¶1. After *Sampson* was released, this Court summarily upheld the Ninth District's decision that the chief's accusations were related to his employment for purposes of political subdivision immunity. *See Buck v. Reminderville*, 132 Ohio St.3d 24, *supra*. In doing so, this Court determined that a causal connection or relationship existed between the chief's claims and his employment with the village.

Similarly, the Second District Court of Appeals recently construed the *Sampson* decision in *Steinbrink v. Greenon Local School Dist.*, 2d Dist. No. 11CA0050, 2012-Ohio-1438. In *Steinbrink*, an assistant football coach brought an action against his employing school district alleging various intentional torts and defamation arising out of an investigation and report that was leaked to the local newspaper. *Id.* at ¶ 1-6. Construing *Sampson*, the Second District concluded that from the face of the pleadings there was a causal relationship between the claims for relief in the plaintiff's complaint and his employment relationship with the school district, thereby upholding the trial court's denial of the school district's motion for judgment on the pleadings. *Id.* at ¶ 25.

While the foregoing line of cases each found that a causal connection existed between the plaintiff's claims and the employment relationship with the political subdivision, the case at bar presents a stark contrast from the facts presented in those cases. In *Sampson*, the alleged tort arose out of accusations and an investigation made entirely by the employer that directly related to the employee's work performance or alleged malfeasance. Similarly, in *Buck and Steinbrink*, the plaintiffs' claims for defamation arose out of comments made and information leaked by the employer regarding the employees' work performance. The facts of the present case, however, have nothing to do with the employee's work performance or duties associated with her position at the wastewater treatment plant. Rather, Plaintiff's injuries were caused by the actions of a third party, another employee, who was not engaged in any employment-related activity when the alleged sexual assault occurred. Further unlike the foregoing cases, the City in this case did not accuse or investigate Plaintiff for any alleged wrongdoing, or take any affirmative action to cause the harm to the Plaintiff. Thus, the Plaintiff's employment relationship with the City was in no way causally related to the injuries she sustained as the result of any sexual assault committed by a third party. If a causal relationship is needed between the actions of the employer and the harm suffered by the employee, such a relationship is manifestly absent in this case. Thus, R.C. 2744.09(B) ought not be applied to preclude immunity for the City.

#### **No Vicarious Liability**

The application of the state statute in this case is entirely consistent with the common law tradition of this state relative to the doctrine of respondeat superior. It is well established that in order for an employer to be liable under the doctrine of respondeat superior, "the tort of the employee *must be committed within the scope of employment.*" *Jackson v. Saturn of Chapel Hill*,

*Inc.*, 5th Dist. No. 2005 CA 00067, 2005-Ohio-5302, ¶ 26 (emphasis added), quoting *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991). Moreover, “where the tort is intentional, the behavior giving rise to the tort *must be calculated to facilitate or promote the business for which the servant was employed.*” *Id.* (emphasis added).

Under these principles, the Fifth District Court of Appeals in *Jackson v. Saturn of Chapel Hill*, *supra*, concluded that the alleged sexual harassment of one employee by another did not in any way facilitate or promote the employer’s main enterprise, which was selling and servicing automobiles. *Jackson* at ¶ 27. As a result, the employer could not be held liable for the acts of its employee that allegedly harassed the plaintiff. *Id.*

It is significant that the trial court granted summary judgment for the City on the issue of vicarious liability in this case, the principles established in the foregoing cases are applicable in the case of the intentional tort claim against the City. An alleged sexual assault by a City employee on another is analogous to the sexual harassment allegations at issue in *Jackson*. That alleged sexual assault in no way facilitates or promotes the business of the City’s wastewater treatment facility. The act occurred outside of the tortfeasor’s scope of employment, and as such does not “arise out of the employment relationship” between the Plaintiff and the City. There is no causal connection between the actions that injured the Plaintiff and Plaintiff’s employment with the City; therefore, there is no exception to immunity. To hold the City liable for Plaintiff’s injuries in this case would thus create liability upon the City from which an ordinary private employer would otherwise be shielded. This is manifestly contrary to the common law of this state and purposes behind the Political Subdivision Tort Liability Act.

### No Common Law Employer Intentional Tort

In addition to the statutory immunity, the City is also entitled to summary judgment in this matter because there is no evidence that the City committed an intentional tort as the employer.

To state a common law action for an intentional tort against an employer, an employee must demonstrate each of the following: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employer to that dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under these circumstances, and with that knowledge, did act to require the employee to continue to perform the dangerous task. *Fyffe v. Jenos Inc.*, 59 Ohio St.3d 115, 849 N.E.2d 77 (1991), syllabus. This requires proof beyond that required to prove negligence and beyond that to prove recklessness. *Id.* Mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent. *Id.*

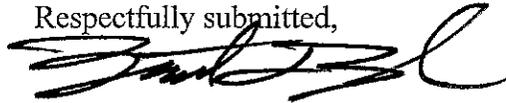
Applying this standard, the Eighth District Court of Appeals in *Maynard v. H.A.M. Landscaping, Inc.*, 166 Ohio App.3d 76, 2006-Ohio-1724, 849 N.E.2d 77, ruled that summary judgment on an intentional tort claim in favor of the employer was proper when an employee sustained injury after he suffered a diabetic seizure while his supervisor left him unattended in the work vehicle during lunch. The Eighth District concluded that there was no evidence of an existing danger within the employer's business operation, nor was there evidence that the employee was subjected to such a danger by his employment. *Id.* at ¶ 32. Further, there was no evidence that the employer knew that if the employee was subjected by his employment to such a danger, that harm to the employee would be a substantial certainty. *Id.* at ¶ 33.

Applying the facts of the present case to the common law elements for employer intentional tort, it becomes clear that no employer intentional tort exists. First, there is no evidence that the City had knowledge of a dangerous, process, procedure, instrumentality, or condition within its business premises. Neither did the City know that harm was substantially certain to occur to the Plaintiff in this instance. Finally, without said knowledge, the third element of *Fyffe* fails as well. Accordingly, the City is entitled to summary judgment because there is no evidence that even tends to establish that the City committed an intentional tort to the Plaintiff.

### CONCLUSION

Based upon the foregoing, the League respectfully requests that this Court reverse the decision of the Ninth District Court of Appeals and enter judgment on behalf of the City of North Ridgeville.

Respectfully submitted,



Stephen J. Smith (#0001344)

ssmith@szd.com

ICE MILLER LLP

250 West Street

Columbus, Ohio 43215

Phone: (614) 462-2700

Fax: (614) 462-5135

*Counsel for Amicus Curiae*

*The Ohio Municipal League*

**CERTIFICATE OF SERVICE**

A copy of the foregoing *Brief of Amicus Curiae the Ohio Municipal League in Support of Defendant-Appellant City of North Ridgeville, Ohio*, has been sent via regular U.S. mail, postage pre-paid this \_\_\_\_ day of July, 2012 to:

John T. McClandrich  
James A. Climer  
Frank H. Scialdone  
Mazanec, Raskin & Ryder Co., L.P.A.  
100 Franklin's Row  
34305 Solon Road  
Cleveland, Ohio 44139

John Hidebrand, Sr.  
John P. Hildebrand Co., L.P.A.  
21430 Lorain Road  
Fairview Park, Ohio 44126



Stephen J. Smith (#0001344)