
IN THE SUPREME COURT OF OHIO
CASE NOS.: 2011-1050 and 2011-1327

Appeal from the Court of Appeals
Ninth Appellate District
Lorain County, Ohio
Case No. 10CA009750

LISA VACHA,

Plaintiff-Appellee

v.

CITY OF NORTH RIDGEVILLE, et al.,

Defendant-Appellant

MERITS BRIEF OF DEFENDANT/APPELLANT CITY OF NORTH RIDGEVILLE

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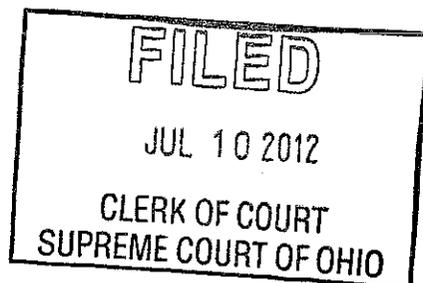
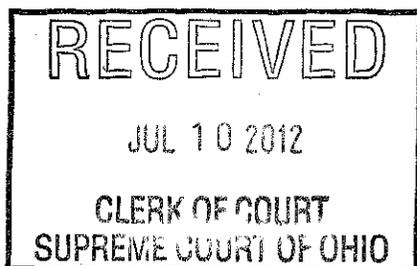


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I. INTRODUCTION

Ohio's Political Subdivision Tort Liability Act provides almost absolute immunity to political subdivisions from intentional tort claims. The immunity in this case turns on whether the exemption to the Act for a “matter that arises out of the employment relationship” under R.C. 2744.09(B) applies. In *Sampson v. CMHA*, this Court held that a “matter that arises out of the employment relationship” requires “a causal connection between the subject matter of the civil action and the employment relationship.” *Sampson v. CMHA*, 131 Ohio St.3d 418, 966 N.E.2d 247, 2012-Ohio-570 at ¶ 16.

This case arises out of Lisa Vacha's rape at the hands of her coworker Charles Ralston. Vacha sued her employer, the City of North Ridgeville, for an employer intentional tort. A legitimate connection cannot exist between Lisa Vacha's rape, her claims, and her employment with the City. Vacha's claims arise out of Ralston's criminal conduct in raping her. They arise out of Vacha's relationship with Ralston, who was criminally convicted and imprisoned for his violent attack. Ralston's rape of Vacha presents an unequivocal contrast to anything employment related in any occupation.

The Legislature never intended for a coworker's violent rape of another co-worker to divest a political subdivision of immunity under the Tort Liability Act. It is difficult to conceive of an act that is more *unconnected* to any employment. Under the Tort Liability Act and *Sampson v. CMHA*, the City cannot be held liable. The Tort Liability Act applies. The City is immune without exception to Vacha's employer intentional tort claim under R.C. 2744.02(A). This Court must reverse the Ninth District's decision and grant summary judgment in favor of the City.

II. STATEMENT OF THE CASE AND FACTS

A. Factual Background

1. Vacha and Ralston Worked at the City's Wastewater Treatment Plant

The City owns the French Creek Wastewater Treatment Plant. On March 3, 2000, the City hired Lisa Vacha as a “helper” at the Treatment Plant and later promoted her to an “unlicensed operator.” (Dep. of Vacha at 34, 46.) Vacha's job duties included plant maintenance and logging meter readings. (*Id.* at 43, 47.)

Charles Ralston is the father of North Ridgeville Mayor Gillock’s grandchildren through a previous relationship with Kristin Gillock. (Dep. of Ralston at 6-8.) On two occasions, Mayor Gillock’s daughter informed him that she had contacted the police as a result of verbal arguments with Ralston. (Dep. of Mayor Gillock at 6-8.) Mayor Gillock testified that there was no indication that Ralston was physically violent with his daughter. (*Id.*)

Mayor Gillock knew Ralston to be a hard worker who was then married with four children, and in need of employment. (*Id.* at 8.) As a result, in March 2004, Mayor Gillock told Ralston about a job posting for an entry level “helper” position at the treatment plant. (*Id.*; Dep. of Ralston at 6-8.) In response, Ralston filled out an application for the “helper” position. (Dep. of Ralston at 35-37.) On the application, Ralston truthfully stated he had no prior felony convictions. (*Id.*) Thereafter, the City interviewed and hired Ralston as a “helper” at the treatment plant. (*Id.*) Ralston did not inform North Ridgeville of any criminal history. (*Id.* at pp. 79-81.)

2. Vacha and Ralston Become Work and Social Acquaintances

Ralston and Vacha worked together at the plant for almost two years before the incident. (Dep. of Vacha at 62.) During Ralston’s employment, treatment plant supervisors did not know

of any potential propensity for Ralston to engage in sexual assault or physical violence. There simply was no indication or notice to North Ridgeville that Ralston had a propensity for physical violence. (Dep. of Gillock at 6-8; Dep. of Daley at 13; Dep. of Johnson at 6-7.)

Vacha alleged Ralston once yelled at her and slammed a door at the plant. (Dep. of Vacha at 70-71.) Ralston testified Vacha initiated the argument by yelling at him. (Dep. of Ralston at 44-47.) Regardless, Vacha and Ralston testified they resumed a friendly social relationship shortly after the argument. (*Id.*; Dep. of Vacha at 84-85.) Vacha also claims to have overheard Ralston yelling at his wife over the phone at work. (Dep. of Vacha at 105.) But, Vacha did not notify any coworkers or supervisors regarding Ralston's alleged verbal arguments with his wife. (*Id.* at p. 108.)

Ralston and Vacha engaged in multiple social activities together outside of work. (Dep. of Vacha at 84-89; 92-99; Dep. of Ralston at pp 47-53.) Vacha testified that these friendly social interactions included meeting Ralston at her dog breeder's house; having Ralston over to her house to show him her Rottweiler; having Ralston at her fortieth birthday party; and having Ralston and his cousin over to her house for drinks. (Dep. of Vacha at 84-89; 92-99; Dep. of Ralston at 47-53.) Vacha and Ralston also drove to work together on several occasions. (Dep. of Vacha at 103-104; Dep. of Ralston at 55.) Vacha and Ralston's social interactions did not evidence any potential for physical violence. (Dep. of Vacha at 84-89; 92-99; Dep. of Ralston at 47-53.)

3. Vacha Gave Ralston a Ride to Work in Exchange for Beer

On June 2, 2006, Vacha gave Ralston a ride to work. (Dep. of Vacha at 105, 118.) Ralston offered Vacha \$8 for gas. (*Id.* at 120-121.) Vacha explained that she had gas and did not want the money. (*Id.*) Rather than accept the money, Vacha accepted beer as payment for the

ride. (*Id.*) Before arriving at work, Vacha stopped at a gas station and Ralston bought a six pack of her favorite beer, Heineken. (*Id.* at 120-121, 103.) Ralston also bought a six-pack of beer for himself. (*Id.*) Vacha then drove to the treatment plant for their 4 p.m. to 2 a.m. shift. (*Id.* at 124.)

Vacha and Ralston brought their beer into the Treatment Plant and put it in the refrigerator. (Dep. of Vacha at 124-127; Dep. of Ralston at 57-58.) Vacha wanted to bring the beer into the facility to keep it cold to drink on the ride home. (Dep. of Vacha at 125, 143.) Vacha knew that it was against plant rules to bring alcohol to work. (*Id.* at 58, 168-169.) She also knew, as an “unlicensed operator,” it was her responsibility to tell a supervisor about the illicit use of alcohol at the treatment plant. (*Id.*)

4. Vacha Asks Ralston's Help To Catch a Woodchuck

During her shift, Vacha spotted a woodchuck on plant property and asked Ralston to help her capture the animal. (Dep. of Vacha at 132-133; Dep. of Ralston at 58, 66-68.) Vacha captured the woodchuck with Ralston’s assistance. (Dep. of Vacha at 132-133; Dep. of Ralston 58, 66-68.) Vacha and Ralston brought the animal into the treatment plant administration building and placed it in the women’s shower area. (Dep. of Vacha at 139-140; Dep. of Ralston at 58, 66-68.) Vacha placed the woodchuck in the shower so that she could take it home with her after work. (Dep. of Vacha at 139-140; Dep. of Ralston at 58, 66-68.) Vacha knew trapping the woodchuck was not part of her job duties and the City prohibited bringing an animal into the treatment plant. (Dep. of Vacha at 168.)

After Vacha placed the woodchuck in the shower area, Ralston told her that he had drunk all the beer brought into the plant. (*Id.* at 142-145; Dep. of Ralston at 58, 68.) Vacha was upset that Ralston had drunk her beer. Vacha gave her truck keys to Ralston so that he could purchase more beer from the gas station. (Dep. of Vacha at 142-145; Dep. of Ralston at 58, 68.) Ralston

left the plant to buy more beer, while Vacha continued to play with the woodchuck. (Dep. of Vacha at 142-145; Dep. of Ralston at 58, 68.) Vacha knew that playing with and watching the woodchuck were not part of her job duties at the treatment plant. (Dep. of Vacha at 168.)

5. Ralston Overpowers and Rapes Vacha

Ralston returned from the gas station and Vacha continued to play with the woodchuck in the shower area. (Dep. of Vacha at 142-145; Dep. of Ralston at 58, 68.) Vacha claims that as she exited the shower area, Ralston startled her. Ralston then raped her by overpowering her. (Dep. of Vacha at 146-150.) After the rape, Vacha claimed that Ralston told her that she would have to get an abortion if she were pregnant. (*Id.* at 150.) In response, Vacha explained to Ralston that she did not believe in abortion as a form of birth control. (*Id.*) Vacha said an argument ensued and Ralston physically assaulted her. (*Id.* at pp. 150, 152.) Vacha fled the plant and told police that Ralston raped her. (*Id.* at 156-157, 166.)

6. Ralston Was Convicted and Imprisoned for Raping Vacha

Ralston's last day of work at the treatment plant was June 2, 2006, the day of the rape. (Dep. of Ralston at 12.) The Sheffield Lake Police Department investigated Ralston, who the State charged and ultimately convicted for raping Vacha. (*Id.* at 12.) The trial court sentenced him to four years in prison on a rape charge and a concurrent year for one count of gross sexual imposition. Ralston was incarcerated in the Grafton Correctional Institute. (*Id.* at 5.)

B. Procedural Background

1. The Trial Court Denied Immunity to the City Without Explanation

Based on these facts, Vacha sued the City of North Ridgeville¹ for vicarious liability, negligent hiring/supervision, reckless hiring/supervision, and intentionally willful and wanton

¹ Vacha also sued Ralston, who is not a party to this appeal.

hiring/supervision. (Am. Comp.) After completing discovery, the City asked the trial court to grant summary judgment on the merits and the immunities contained in R.C. Chapter 2744 and R.C. Chapter 4123. The Lorain County Court of Common Pleas denied, in part, the City's request. (J. Entry of Dec. 8, 2009; Apx. 1-3.) While properly dismissing Vacha's claims of vicarious liability, the trial court found "genuine issues of material fact in dispute" regarding negligent hiring/supervision, reckless hiring/supervision, and intentional, willful and wanton hiring/supervision. (*Id.*) While stating the black-letter law in its opinion, the trial court did not provide any explanation of what facts were in dispute or why judgment as a matter of law was – or was not – appropriate. (*Id.*) The trial court also did not apply the Ninth District's then-binding law that an intentional tort against a public employer could not constitute an exception to immunity. *See generally Buck v. Reminderville*, 9th Dist. No. 25272, 2010-Ohio-6497, 2010 WL 5551003 (Dec. 30, 2010) reconsidering Ninth District precedent and overruling *Ellithorp v. Barberton City School District Board of Education*, 9th Dist. No. 18028, 1997 WL 416333 (July 9, 1997) and *Dolis v. City of Tallmadge*, 9th Dist. No. 21803, 2004 WL 1885348, 2004-Ohio-4454 (Aug. 25, 2004).

2. Two Ninth District Judges Mistakenly Conclude that Ralston's Rape Could Arise Out of Vacha's Employment Relationship

After oral argument in the present case, the Ninth District in *Buck v. Reminderville* overruled its precedent and held for the first time that political subdivision immunity may not bar a claim by the employee of a political subdivision against the political subdivision for its allegedly intentionally tortious conduct. *Id.*

Although not explaining how Ralston's rape of Vacha may "arise out of the employment relationship," the majority panel held that Vacha's claim "may constitute a claim within the

scope of R.C. 2744.09(B).” (Op. at ¶ 23; Apx 12.) Ultimately, the majority affirmed the trial court's decision with regard to Vacha's intentional tort claim.²

3. This Court Accepts Review

At the time the Ninth District rendered its decision in the present case, this Court had accepted review of *Sampson v. CMHA* on the proposition of law: “R.C. 2744.09(B) does not create an exception to political subdivision immunity for intentional tort claims alleged by a public employee.” 127 Ohio St.3d 1460, 938 N.E.2d 362, 2010-Ohio-6008. Subsequently, this Court accepted the present case on that same issue, *sua sponte* ordered that this cause be held for a decision in *Sampson*, and stayed the briefing schedule. *Vacha v. N. Ridgeville*, 129 Ohio St.3d 1487, 954 N.E.2d 661, 2011-Ohio-5129. The Court also consolidated the present case with the City's appeal of the same proposition before the Court on a certified conflict. *Id.* After rendering its decision in *Sampson*, this Court lifted the stay to adjudicate this controversy. *Vacha v. N. Ridgeville*, 131 Ohio St.3d 1537, 966 N.E.2d 892, 2012-Ohio-2025. This case is now before this Court for resolution.

III. LAW AND ARGUMENT

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

Certified Conflict Question: DOES R.C. 2744.09 CREATE AN EXCEPTION TO POLITICAL SUBDIVISION IMMUNITY FOR INTENTIONAL TORT CLAIMS ALLEGED BY A PUBLIC EMPLOYEE?

A. The City is immune without exception under R.C. 2744.02(A).

² While not before this Court, the Ninth District unanimously reversed the trial court, in part, and held that workers compensation immunity barred Vacha's negligent/reckless hiring/supervision claims.

Vacha's intentional tort claim is barred as a matter of law, unless the exemption contained in R.C. 2744.09(B) applies. This Court has expressly held that an intentional tort is not an exception to a City's immunity under R.C. 2744.02(A). *Wilson v. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450, 2002-Ohio-6718, 639 N.E.2d 105 at ¶8(no exceptions to immunity for intentional torts as a matter of law).

1. The R.C. 2744.09(B) exemption does not apply.

Ohio Rev. Code 2744.09(B) states that the Tort Liability Act 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. [Emphasis added.]” The parties agree that Vacha's employer intentional tort is a “civil action.” Likewise, the parties agree that the City is a “political subdivision.”

a. Ralston's rape was not “relative to any matter that arises out of the employment relationship” between Vacha and the City.

This Court held that in the tort immunity context, the phrase “any matter that arises out of the employment relationship” under R.C. 2744.09(B) means there must be “a causal connection or a causal relationship between the claims raised by the employee and the employment relationship.” *Sampson*, syllabus at 2. The Court explained that there must be “a causal connection between the subject matter of the civil action and the employment relationship.” *Id.* at ¶ 16.

b. For there to be a causal connection under *Sampson*, the co-worker/assailant's assault must be “calculated to facilitate or promote the business” of the City in some way.

Ralston's rape of Vacha had no conceivable connection to the employment relationship or facilitating the City's interests.

To determine a public employer's entitlement to immunity from intentional tort claims by its employee or whether a "causal relationship" exists under R.C. 2744.09(B), this Court should apply common-law principles. These principles are in accord with the function of the Tort Liability Act, the purpose of the Act, and the *Sampson v. CMHA* decision.

To demonstrate a "causal relationship" under *Sampson*, the behavior giving rise to the tort must be "calculated to facilitate or promote the business for which the servant was employed" See *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991) (applying respondeat superior principles to determine whether an employee's intentional tort can give rise to liability of an employer), citing *Little Miami RR. Co. v. Wetmore*, 19 Ohio St. 110, 132 (1869). A "causal relationship" will not exist when an employee, as in the present case, commits an intentional, personally motivated attack that does not benefit the employer's interests. "[A]n intentional and willful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person, is a clear departure from his employment and his principal or employer is not responsible therefor." *Byrd, supra* at 59, citing *Vrabel v. Acri*, 156 Ohio St. 467, 474, 103 N.E.2d 564, 568 (1952).

Ohio's Political Subdivision Tort Liability Act is the legal mechanism to determine whether a political subdivision could be liable for the acts of its employees. Similarly, common-law vicarious liability is the mechanism to determine whether a private employer could be held liable for non-governmental employees. This Court's precedent on vicarious liability provides an established, consistent way to interpret and apply *Sampson's* causation requirement about whether political subdivisions could be held liable for the intentional torts of their employees.

The Legislature expressly designed the Tort Liability Act to limit liability, not expand the liabilities and the duties of political subdivisions. *Summerville v. Forest Park*, 128 Ohio St.3d

221, 943 N.E.2d 522, 2010-Ohio-6280 at ¶ 38. The Act does not provide a plaintiff who sues a political subdivision with additional rights that did not exist at common law. In light of the Tort Liability Act's unequivocal purpose to limit liability, the Legislature did not intend for a political subdivision be subjected to liability under the Act when a private employer could not be held liable for the same conduct. This would be a dissonant and absurd result because a political subdivision that has the benefit of immunity could be liable for a claim in which a private employer could not under the same circumstances. Under *Byrd, supra*, and its progeny, an employer would not be liable for an employee's intentional tort unless the employee's act was "calculated to facilitate or promote the business for which the servant was employed" Based on the purpose of the Tort Liability Act, it is impossible to believe that the Legislature intended that immunity would not apply to a claim that could not impose liability on a private employer who does not have the protections of the Act.

The analogous case law regarding vicarious liability embraces the case-by-case determination that intermediate appellate courts must now make under *Sampson*. This Court in *Sampson v. CMHA* refused to set forth a bright-line rule that an employer intentional tort could never arise out of the employment relationship, as it did under workers' compensation cases. *Sampson* at ¶ 16 (declining to apply workers' compensation principles to interpret the R.C. 2744.09(B) exemption because of the differing purposes of R.C. 4123.74 and Chapter 2744). In contrast to the absolute rule in the workers' compensation context, this Court made clear that determinations of whether a tort claim arises out of the employment relationship would be determined on a case-by-case basis in the context of R.C. 2744.09(B). That is, the Court determined that there must be a "causal relationship" between the subject matter of the claim and the employment relationship. As demonstrated in *Sampson*, an intentional tort may arise out of

the employment relationship in some circumstances, which do not exist in the present matter. In *Byrd*, this Court similarly recognized that employers may be liable for the intentional torts of their employees in some circumstances. The fairness of these rules -- to both plaintiffs and defendants -- is illustrated in *Byrd* and in other cases, “for example, an employer might be liable for an intentional tort if an employee injures a patron when removing her from the employer's business premises or blocking her entry. The removal of patrons, who may be unruly, underage, or otherwise ineligible to enter, is calculated to facilitate the peaceful and lawful operation of the business. Consequently, an employer might be liable for an injury inflicted by an employee in the course of removal of a patron.” *Byrd* at 57-58. But in a circumstance like the present matter, “the employer would not be liable if an employee physically assaulted a patron without provocation.” *Id.* at 58. Stated succinctly, “an employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business.” *Id.* This is basic common sense, as well as established precedent.

Under the circumstances and construing the facts most favorably to Vacha, Ralston's rape as a matter of law does not arise out of the employment relationship. If the Legislature intended to completely divest political subdivisions of all immunity for cases brought by employees of political subdivisions, it could have easily done so. The exemption contained in R.C. 2744.09(B) would have simply read that Chapter 2744 does not apply to: “Civil Actions brought by an employee against his political subdivision employer.” Rather, the Legislature provided that the Chapter 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.” R.C. 2744.09(B); *cf.* R.C. 2744.09(A) and 09(B) (where the Legislature made blanket exemptions for contract actions against political subdivisions or federal

constitutional claims). Ralston's violent act was uniquely and blatantly unconnected to any conceivable employment. Rather, it was in violation of his employment duties and City policy. The R.C. 2744.09(B) exemption simply does not apply.

2. Ralston's rape of Vacha was not “calculated to facilitate or promote the business” of the City.

Ralston was convicted and sentenced to four years in prison for Vacha's rape. It is impossible to conclude that Ralston's attack “facilitated” or “promoted” the City's business in any way -- in fact, the opposite is true. *Vrabel, supra; Byrd, supra; see Benner v. Dooley*, 9th Dist. No. 99CA007448, 2000 WL 1072462 (Aug. 2, 2000)(sexual assault was not within scope of employment); *see also Stephens v. A-Able Rents Co.*, 101 Ohio App.3d 20, 654 N.E.2d 1315 (8th Dist. 1995)(felonious assault and attempted rape of customer was outside scope of employment); *see generally State v. Ralston*, 9th Dist. No. 08CA009384, 2008-Ohio-6347, 2008 WL 5122127. Ralston's intentional attack on Vacha was a purely personal act of “malevolence against” Vacha and an unequivocal departure from his employment as a helper at the treatment plant.

A non-supervisor employee's rape of a co-worker presents an extreme act that bears no relationship to one's employment as a matter of law. There is no relationship between a violent sexual assault and Vacha's employment with the City. Charles Ralston's rape presented no legitimate connection between Vacha's claims and her employment with the City of North Ridgeville. The City does not promote or advocate violent acts between its employees. Such acts are expressly prohibited. Certainly, the City did not hire Ralston to rape or assault his coworkers or have any indication that this would occur. In fact before the attack occurred, Ralston and Vacha had a social relationship and apparently got along well both inside and outside of the workplace.

3. The *Sampson* facts are dramatically different from the facts here.

While reasonable minds could differ with regard to whether the *Sampson* plaintiff's claims arose out of his employment relationship, it is impossible to conclude that Ralston's rape of Vacha had any relation to Vacha's employment with the City. Unlike the instant case, *Sampson* presented a strong employment connection between the plaintiff's claims and the employment relationship; the *Sampson* employer's conduct was facilitating its interests when it investigated, arrested and terminated the employee.

In *Sampson*, the Cuyahoga Metropolitan Housing Authority (CMHA) employed plaintiff Darrel Sampson in its maintenance department. CMHA conducted an internal investigation regarding several employees' alleged misuse of CMHA gasoline cards. After the investigation, CMHA directed Sampson and others to one of its warehouses during a work day. CMHA police arrested Sampson and several others during a highly publicized employee meeting. CMHA placed Sampson on paid administrative leave. After being charged and indicted by a grand jury for felony theft and misuse of credit cards, Sampson was terminated by CMHA.

The criminal charges were ultimately dismissed against Sampson. Sampson went to arbitration to be reinstated to his position with CMHA. The arbitrator ultimately concluded that there was no evidence supporting allegations of theft and ordered that Sampson be reinstated. CMHA reinstated Sampson. But Sampson contended that upon his return the atmosphere was no longer tolerable, and he resigned.

Sampson sued CMHA raising various intentional tort and negligence claims arising out of his arrest. The Eighth District concluded that the R.C. 2744.09(B) exemption prevented CMHA from raising immunity. Ultimately, in a divided en banc decision, the Eighth District affirmed that finding. This Court affirmed and reasoned that in the tort immunity context, the

phrase “any matter that arises out of the employment relationship” “requires only a causal connection between the subject matter of the civil action and the employment relationship.” (*Id.* at ¶ 16.)

The *Sampson* facts presented an example of a close connection between the subject matter of the claim and that plaintiff's employment relationship with the political subdivision. This Court determined that there were genuine issues of material fact about whether Sampson's claim arose out of his employment relationship. The Court noted that the alleged tort arose from an accusation by the employer that the employee had stolen from the employer by using company credit cards for personal needs. These allegations were in the context of Sampson's duties as a plumber; the investigation was conducted entirely by CMHA police; and the arrest occurred during a CMHA-called mandatory meeting as part of a regular work day. The Court also noted that there was evidence that his arrest was publicized by CMHA through subsequent press releases and press conferences. The Court concluded that based on these facts, among others, reasonable minds could conclude that Sampson's civil action arose from the employment relationship and therefore was excepted from immunity under R.C. 2744.09(B).

The instant facts present a stark contrast to *Sampson*.

Ralston raped Vacha. Ralston's act bears no relationship between Vacha's claims and her employment with the City. Rather, Ralston's conduct was in violation of City policy and law. The present facts are a compelling contrast to the *Sampson* facts in every material way. In *Sampson*, the employer investigated the employee's fraudulent use of a company credit card, which the employee was allegedly using for his own personal vehicle. After its investigation, the *Sampson* employer orchestrated the plaintiff's arrest in front of several hundred co-employees to make a workplace example of what not to do at work. The plaintiff's intentional tort claims arose

directly from the CMHA's arrest, which promoted the employer's interests. Here, Vacha's claim arose directly from Ralston's serious, violent criminal conduct that did not promote the employer's interests in any conceivable way.

In the present case, the City did not know the rape was occurring and certainly did not orchestrate Ralston's violent rape of Vacha. Ralston and Vacha had worked together for almost two years without any remotely similar incident. Ralston did not have any history of violence with anyone at the treatment plant. Here, the City had no idea of Ralston's conduct until after it happened. In *Sampson*, the employer had its own law enforcement that investigated and arrested the plaintiff. The plaintiff-employee apparently did nothing wrong, yet the employer investigated, arrested, and terminated him. In *Sampson*, the plaintiff-employee's legal claims were about what the employer did to him. In the present case, Vacha's claims are instead related to what Ralston did to her. They do not arise out of Vacha's employment with the City; they arise out of her relationship with Ralston, whose violent outburst did not facilitate the City's interests.

4. A physical assault between co-workers does not constitute a claim that “arises out of the employment relationship” under R.C. 2744.09(B).

In *Moya v. DeClemente*, the Eighth District applied the *Sampson* standard in case that is analogous to the present dispute where a plaintiff-employee's claims arose out of the intentional misconduct of a coworker. *Moya v. DeClemente*, 8th Dist. No. 96733, 2011-Ohio-5843, 2011 WL 5506081. In *Moya*, two teachers employed by the school district got into a verbal and physical dispute. Moya, the plaintiff-employee, alleged that her co-worker, DeClemente, entered her classroom and “began to verbally abuse her and to loudly criticize her teaching abilities in front of the students.” Moya responded by telling DeClemente to “go ahead and file his grievance,” at which point he “physically assaulted” her, “striking her on the shoulder and

causing injury.” Based on this incident, Moya asserted that the school district was liable for DeClemente’s misconduct.

After the trial court granted dismissal in favor of the school district on immunity grounds, Moya appealed, challenging the trial court’s application of immunity that she believed did not apply under R.C. 2744.09. Specifically, Moya argued that her “claims are fully excepted from immunity because they are causally connected to her employment and therefore constitute an exception to immunity under R.C. 2744.09(B).” *Id.* at ¶ 15. The Eighth District rejected Moya’s claim. The court reasoned that “Moya’s claims arise out of alleged misconduct of a fellow teacher. There are no factual allegations demonstrating that the school district orchestrated such conduct. Moreover, the allegations of the complaint fail to establish that Moya’s claims arise out of her employment relationship with the school district. Instead, the claims arise out of Moya’s relationship with DeClemente. We therefore do not find R.C. 2744.09(B) or *Sampson* to be controlling.” *Id.* at ¶ 17.

Moya is far less clear cut than this case, but is analogous to the present case. Here, the City did not promote or condone Ralston’s rape of any co-worker. No reasonable person could conclude that the position of helper at the treatment plant contemplated sexual violence or violence of any kind. Likewise, the position of a teacher who educates children does not contemplate violence. In no way did the assailant-teacher’s “intentional and willful attack” “facilitate or promote [the district’s] business.” The Eighth District properly concluded that Moya’s claims as a matter of law did not “arise out of her employment relationship with the school district” but “instead ... arise out of Moya’s relationship with DeClemente.” This Court should hold that the Tort Liability Act applies. *Sampson, supra; Moya, supra; see Zieber v. Heffelfinger*, 5th Dist. No. 08CA0042, 2009-Ohio-1227, 2009 WL 695533 (plaintiff’s injuries

resulting from the co-worker's intentional assault had nothing to do with her job responsibilities and was not subject to R.C. 2744.09(B)); *see also Villa v. Village of Elmore*, 6th Dist. No. L-05-1058, 2005-Ohio-6649, 2005 WL 3440787 (plaintiff's injuries resulting from former public employer's disclosure of records about the employee had nothing to do with job responsibilities); *see also Coats v. Columbus*, 10th Dist. No. 06AP-681, 2007-Ohio-761, 2007 WL 549462 (finding that R.C. 2744.09(B) does not apply and finding that intervening suicide breaks causation).

B. The legislative policy of the Tort Liability Act supports that the R.C. 2744.09(B) exemption does not apply.

The policy of the Tort Liability Act guides the determination of whether an employee's unexpected and violent rape of another employee arises out of the employment relationship.

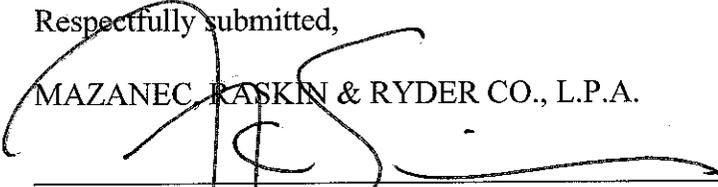
The General Assembly is the final authority on public policy and intended to exclude political subdivisions from intentional tort claims that do not arise out of the employment relationship with the purpose to preserve “ ‘the fiscal integrity of political subdivisions.’ ” *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 23 quoting *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 453, 639 N.E.2d 105. The Ninth District's decision frustrates that policy and common sense by forcing the City to defend a claim that has no legitimate connection to the employment relationship.

The Legislature would not countenance divesting a political subdivision of immunity for the rape of an employee against another employee. Rape is an act that is unrelated to any occupation or relationship to the employer or employment relationship. A rape presents an act that is uniquely unconnected to any conceivable employment relationship. In the present case and construing the facts most favorably to Vacha, the Act applies and the City is immune. Ralston's attack has nothing to do with Vacha's employment relationship with the City.

IV. CONCLUSION

This Court must reverse and should grant judgment as a matter of law in favor of the City of North Ridgeville.

Respectfully submitted,


MAZANEC, RASKIN & RYDER CO., L.P.A.

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CERTIFICATE OF SERVICE

A copy of the foregoing Merits Brief has been sent by regular U.S. Mail, postage prepaid,
on July 9, 2012 to the following:

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APPENDIX

Lorain County Common Pleas Court - December 8, 2009 Journal EntryApx. 1

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Notice of Appeal to the Ohio Supreme Court - June 22, 2011Apx. 15

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FILED
LORAIN COUNTY

2009 DEC -8 P 2:31

**LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO**

CLERK OF COMMON PLEAS
RON NABAKOWSKI

**RON NABAKOWSKI, Clerk
JOURNAL ENTRY
Raymond J Ewers, Judge**

Date 12/8/09 Case No. 08CV156999

LISA VACHA JOHN P HILDEBRAND
 Plaintiff Plaintiff's Attorney (440) 333-3100

VS

NORTH RIDGEVILLE, OHIO (CITY OF), JOHN D PINZONE
ET AL. Defendant's Attorney (440) 248-7906
 Defendant

This matter came on for consideration of Defendant's Motion for Summary Judgment, Plaintiff's Brief in Opposition and Defendant's Reply Brief. This Court grants in part, and denies in part, Defendant's Motion for Summary Judgment.

On June 2, 2008, Plaintiff filed a Complaint against Defendants City of North Ridgeville and Charles Ralston. Plaintiff has obtained a Default Judgment against Defendant Charles Ralston.

In its Complaint against Defendant City of North Ridgeville, Plaintiff has alleged the following causes of action which are also the subject of Defendant's Motion for Summary Judgment:

Counts I and III: Defendant is vicariously liable because the rape occurred during the course and scope of his employment;

Count II: Defendant is liable for negligent hiring, supervision and employment of Charles Ralston;

Count IV: Defendant is liable for the reckless in hiring and supervising of Charles Ralston;

Count V: Defendant acted intentionally with willful, wanton disregard for the safety of others in selecting, supervising or otherwise controlling Charles Ralston.

I. Vicarious Liability

Apx. 1

08CV156999



Whether an employer will be vicariously liable for the torts of its employee depends on whether the tort was committed within the scope of employment. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58. "[C]onduct of an employee is within the 'scope of employment' when: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master." *Akron v. Holland Oil Co.* (2004), 102 Ohio St.3d 1228 citing Restatement of the Law2d, Agency (1957), Section 228.

In reviewing the arguments advanced by counsel and the evidence presented, this Court finds that there are no genuine issues of material fact in dispute that Defendant City of North Ridgeville is not vicariously liable for the actions of its former employee, Charles Ralston. Therefore, Plaintiff's Motion for Summary Judgment as to Counts I and III is granted and those counts are hereby dismissed.

II. Negligent / Reckless Hiring

A claim of negligent hiring requires a showing of "(1) [t]he existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries." *Collins v. Flowers*, 9th Dist. NO. 04CA008594, 2005-Ohio-3797 (citation omitted).

This Court finds that there are genuine issues of material fact in dispute as to Plaintiff's claims for negligent hiring and reckless hiring. Therefore, Defendant's Motion for Summary Judgment as to Counts II and IV are denied.

III. Intentional Tort

To establish an intentional tort, the employee must show "(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 employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." See *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 118.

This Court finds that there are genuine issues of material fact as to whether Defendant committed an intentional tort. Therefore Defendant's Motion for Summary Judgment as to Count V is denied.

Apx. 2



Conclusion

In conclusion, Defendant's Motion for Summary Judgment is granted as to Counts I and III. Counts I and II are hereby dismissed.

Defendant's Motion for Summary Judgment as to Counts II, IV and V is denied and those counts remain pending.

A Status Conference is scheduled for January 11, 2010 at 10:30 a.m.

VOL _____ PAGE _____

RAYMOND J EWERS, JUDGE

cc: Atty Hildebrand
Atty Pinzone
Atty Crites

08CV156999

Apx. 3

COURT OF APPEALS

STATE OF OHIO)
COUNTY OF LORAIN)

LISA VACHA
Appellee

v.

NORTH RIDGEVILLE, OHIO (CITY OF),
et al.
Appellants

FILED
LORAIN COUNTY COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2011 MAY 23 P 12:39

CLERK OF COMMON PLEAS COURT
EDWARD NABAKOWSKI

9th APPELLATE DISTRICT JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CV156999

DECISION AND JOURNAL ENTRY

Dated: May 23, 2011

Per Curiam.

{¶1} Appellant, the city of North Ridgeville, appeals from a judgment of the Lorain County Court of Common Pleas that denied its motion for summary judgment on its defense that it was immune from civil liability to its former employee, Lisa Vacha. This Court affirms in part and reverses in part.

I.

{¶2} On June 2, 2006, Lisa Vacha was raped by a coworker, Charles Ralston, while she was working a shift with him at the French Creek Wastewater Treatment Plant, which is owned and operated by the city of North Ridgeville. Shortly after the incident, Vacha applied for worker's compensation benefits, seeking recovery for the physical and psychological injuries that she sustained in the attack. Although the specific details of her worker's compensation claim are not clear from the record, Vacha's application was approved and she was granted permanent total disability benefits.

{¶3} Vacha later filed this action against the city, alleging that it was liable for her injuries that resulted from the rape, on theories that included vicarious liability, negligent and reckless hiring and supervision of Ralston, and that the city committed an employer intentional tort by employing Ralston. The city eventually moved for summary judgment on all of Vacha's claims. It asserted, among other things, that it was entitled to immunity under R.C. 4123.74 and/or R.C. 2744.02. Although the trial court granted the city summary judgment on Vacha's claims for vicarious liability, it denied the city's motion for summary judgment on her remaining claims. The trial court found that there were genuine issues of material fact on those claims, implicitly rejecting the city's immunity defenses. Pursuant to R.C. 2744.02(C), the city appealed the trial court's denial of its immunity defenses, raising two assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE LOWER COURT ERRED WHEN IT DENIED THE APPELLANT/CITY OF NORTH RIDGEVILLE THE BENEFIT OF IMMUNITY UNDER R.C. CHAPTER 4123."

{¶4} The city's first assignment of error is that the trial court erred in denying its motion for summary judgment on Vacha's remaining claims because it was entitled to immunity under R.C. 4123.74, which provides that worker's compensation is an employee's exclusive remedy against her employer for workplace injuries. For ease of discussion, this Court will address Vacha's claims based on the city's alleged negligence and recklessness separately from her employer intentional tort claim.

Negligent and Reckless Hiring and Supervision

{¶5} The city first argued that it was immune from liability for Vacha's claims for negligent and reckless hiring and supervision of Ralston. R.C. 4123.74 provides that employers

who are in full compliance with their obligation to pay worker's compensation premiums "shall not be liable to respond in damages" for "any injury *** received or contracted by any employee in the course of or arising out of his employment[.]" The statute is a codification of the principle set forth in Section 35, Article II of the Ohio Constitution that worker's compensation benefits will be an employee's exclusive remedy against her employer for workplace injuries and provides, in part:

"Such compensation shall be in lieu of all other rights to *** damages, for such *** injuries *** and any employer who pays the premium or compensation provided by law *** shall not be liable to respond in damages at common law or by statute for such *** injuries[.]"

{¶6} The philosophy behind the exclusivity of the worker's compensation system is to balance the competing interests of employer and employee "whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability." *Bunger v. Lawson Co.* (1988), 82 Ohio St.3d 463, 465, quoting *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 614.

{¶7} At the time Vacha was assaulted by Ralston, R.C. 4123.01(C) defined the term "injury" for purposes of the worker's compensation act to include: "any injury *** received in the course of, and arising out of, the injured employee's employment." It further provided that "[i]njury" does not include ***[p]sychiatric conditions except where the conditions have arisen from an injury or occupational disease[.]" The Ohio Supreme Court has repeatedly construed this provision to mean that a psychiatric condition does not constitute a compensable "injury" under the worker's compensation system unless it accompanies a physical injury. See, e.g., *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, at paragraph one of the syllabus; *Kerans v. Porter Paint Co.* (1991), 61 Ohio St.3d 486.

{¶8} To support its motion for summary judgment under R.C. 4123.74, the city pointed to evidence that it was in full compliance with the payments of its worker's compensation premiums and that Vacha had sustained an "injury" within the meaning of the worker's compensation act because she had applied for worker's compensation benefits and her claim had been approved. It specifically pointed to evidence that the sexual assault had caused Vacha to sustain both physical and psychological injuries, that she applied for worker's compensation benefits for those injuries, that her worker's compensation claim had been approved, and that she was receiving permanent total disability benefits. Vacha admitted in her answers to interrogatories and when deposed by defense counsel that she had sustained physical injuries during the rape that included bruises, muscle soreness, chipped teeth, and an injured right shoulder. She testified that, after the rape, she "was so sore that [she] was bedridden for four days" and that she had her shoulder x-rayed five days after the rape because she thought that Ralston had dislocated it. Vacha further explained that she had been regularly seeing a psychologist and a psychiatrist, who had prescribed an antidepressant and sleep aid, and that all of those expenses are covered by her worker's compensation benefits.

{¶9} In opposition to the city's motion for summary judgment, Vacha did not dispute that the city was in full compliance with the payments of its worker's compensation premiums or that her worker's compensation claim had been approved for her to receive permanent total disability benefits for her injuries. Instead, she made a legal argument that her injury was not an "injury" as that term is defined in R.C. 4123.01(C)(1). She did not argue that her worker's compensation claim had been wrongly decided, however, nor did she cite any legal authority for the underlying premise of her argument that the same injury could fall within this definition for purposes of qualifying for worker's compensation benefits but outside of it for purposes of her

employer's immunity for civil suits. There is but one definition of "injury" in R.C. Chapter 4123; if an employee's "injury" is compensable within the workers' compensation system, the employer is consequently immune from a civil action by the employee for negligently or recklessly causing the injury.

{¶10} Vacha relied primarily on distinguishable case law such as *Kerans*, supra, in which the Court found that R.C. 4123.74 did not bar Kerans' civil claim against her employer because she had sustained a purely psychological injury that did not qualify for workers' compensation benefits. 61 Ohio St.3d at 488-489.¹ The *Kerans* court emphasized that employees who suffer purely psychological injuries caused by their employers' negligence would be left without any remedy if their only recourse were the workers' compensation system for which they do not qualify:

"[I]n order for this court to find that the workers' compensation statute provides the exclusive remedy for appellant's injury, we must find that it is theoretically possible for her to recover under the statute, i.e., that she has suffered the type of injury which is compensable under the statute." (Emphasis sic.) 61 Ohio St.3d at 431, fn.2.

{¶11} Likewise, in *Bunger*, 82 Ohio St.3d at 465, it was critical to the court's decision that *Bunger's* workers' compensation claim for purely psychological injuries had been denied because there had been no physical, compensable "injury" under R.C. 4123.01(C). Because the injuries sustained by *Bunger* and *Kerans* did not satisfy the definition of "injury" under R.C. 4123.01(C)(1), those employees did not qualify for workers' compensation benefits and,

¹ Although Vacha also relied on *Prewitt v. Alexson Servs., Inc.*, 12th Dist. No. 2007-09-218, 2008-Ohio-4306, we are not persuaded by its reasoning, which is at odds with a prior decision of this Court. See *Luo v. Gao*, 9th Dist. No. 23310, 2007-Ohio-959 (rejecting the argument that an "injury" must be accidental to qualify for workers' compensation benefits, the basic premise of the *Prewitt* decision).

therefore, R.C. 4123.74 did not provide their employers with immunity from their civil actions for damages.

{¶12} Those employers were not immune from liability for the employees' injuries because the injuries were not compensable within the workers' compensation system:

"If a psychological injury is not an injury according to the statutory definition of 'injury,' then it is not among the class of injuries from which employers are immune from suit. Any other interpretation is nonsensical, and leads to an untenable position that is unfair to employees." 82 Ohio St.3d at 465.

{¶13} Conversely, if an employee's "injury" does qualify for workers' compensation coverage, that remedy is exclusive and the employer is immune from civil action liability arising out of an allegation that the employer was negligent or reckless in causing the employee's injury. That is the only reasonable interpretation of the language of R.C. 4123.74 and 4123.01(C) and any other interpretation would be unfair to the employer in the overall balance of competing interests in the workers' compensation system.

{¶14} Because it was not disputed that Vacha's injuries qualified for compensation under the workers' compensation system and that she was, in fact, receiving permanent total disability benefits, there was no genuine issue of material fact that the city was immune from Vacha's claims for negligent and reckless hiring and supervision of Ralston. Therefore, the trial court erred in denying the city's motion for summary judgment under R.C. 4123.74 on those claims.

Employer Intentional Tort Claim

{¶15} The city conceded that an employee's claim for an employer intentional tort does not occur in the course of or arise out of employment and, therefore, is not barred by R.C. 4123.74. See, e.g., *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, paragraph one of the syllabus, approving and following *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982),

69 Ohio St.2d 608. It argued in its summary judgment motion, however, that Vacha could not prove that the city committed an employer intentional tort, citing the common law standard set forth in *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115. The trial court found that there were genuine issues of material fact as to whether Vacha could establish a common law employer intentional tort claim against the city.

{¶16} On appeal, the city does not argue that the trial court wrongly determined that there were factual issues under the common law intentional tort standard. Instead, it argues that this Court should apply the more stringent standard for establishing an employer intentional tort set forth in R.C. 2745.01, because, since the trial court ruled on the summary judgment motions, the Ohio Supreme Court held that the statute is constitutional. See *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027.

{¶17} Although the current version of R.C. 2745.01 was in effect at the time of Vacha's injury, and it had not been declared unconstitutional by this appellate court, the city did not mention R.C. 2745.01 in its motion for summary judgment. The trial court had no authority to grant summary judgment on a ground that the city failed to raise in its motion for summary judgment. See *Smith v. Ray Esser & Sons, Inc.*, 9th Dist. No. 10CA009798, 2011-Ohio-1529, at ¶14-17 (fully addressing the impropriety of a defendant raising the statutory standard for the first time in its summary judgment reply brief). Therefore, the city has failed to demonstrate that the trial court erred in denying it summary judgment on Vacha's employer intentional tort claim.

{¶18} The city's first assignment of error is sustained insofar as it challenges the trial court's denial of its motion for summary judgment on Vacha's claims for the negligent and reckless hiring, employment, and supervision of Ralston, as alleged in counts two and four of her amended complaint. To the extent that the city challenges the denial of summary judgment on

Vacha's employer intentional tort claim, as alleged in count five of her complaint, the first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE LOWER COURT ERRED WHEN IT DENIED THE APPELLANT/CITY OF NORTH RIDGEVILLE THE BENEFIT OF IMMUNITY UNDER R.C. CHAPTER 2744."

{¶19} The city also argues that the trial court erred in denying its motion for summary judgment on Vacha's employer intentional tort claim because it was entitled to immunity under R.C. 2744.02. According to the city, it is immune from civil actions seeking to recover damages, except as provided in R.C. 2744.02(B), none of which apply here. Vacha responded in opposition to the summary judgment motion and argued, among other things, that R.C. 2744.09(B) explicitly provides that R.C. Chapter 2744 political subdivision tort immunity does not apply to "[c]ivil 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[.]"

{¶20} The city maintained that, as a matter of law, the "civil actions" that are within the scope of R.C. 2744.09(B) do not include employer intentional torts. It relied on a line of cases including *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), 9th Dist. No. 18029, in which this Court held that an employer intentional tort claim does not fall within R.C. 2744.09(B) because "[a]n employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside of the scope of employment." *Id.*, citing *Brady*, 61 Ohio St.3d at paragraph one of the syllabus.

{¶21} Since *Ellithorp* was decided, the Ohio Supreme Court decided *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, in which it determined that an employer's

intentional torts fall within an exclusion in the employer's commercial general liability insurance policy for injuries to an employee that arise out of or in the course of employment. *Id.* at ¶38 and 42. During its examination of this policy exclusion, the court distinguished its reasoning from *Brady, Blankenship*, and other worker's compensation cases about whether employer intentional torts occur within the scope of the employment relationship and/or arise out of or in the course of employment, emphasizing the significance that those decisions arose within the context of the worker's compensation system. *Id.* at ¶39-40.

{¶22} After the Ohio Supreme Court decided *Penn Traffic*, this Court was asked to reexamine its *Ellithorp* decision. See *Buck v. Reminderville*, 9th Dist. No. 25272, 2010-Ohio-6497. In *Buck*, at ¶16, this Court explicitly overruled *Ellithorp* to the extent that it held that a political subdivision employer's intentional tort can never be subject to the immunity exclusion of R.C. 2744.09(B). This Court concluded "that a claim by the employee of a political subdivision against the political subdivision for its intentionally tortious conduct may constitute a 'civil action[] *** relative to any matter that arises out of the employment relationship between the employee and the political subdivision' under Section 2744.09(B)." *Id.* at ¶10.

{¶23} Because Vacha's employer intentional tort claim may constitute a claim within the scope of R.C. 2744.09(B), the city failed to establish that it was entitled to summary judgment on that claim based on the immunity provisions of R.C. Chapter 2744. Consequently, the trial court did not err in denying it summary judgment on that basis. The city's second assignment of error is overruled.

III.

{¶24} The city's first assignment of error is sustained to the extent it challenges the trial court's denial of its motion for summary judgment on Vacha's claims for negligent and reckless

hiring and supervision of Ralston. The remainder of its first assignment of error, as well as its second assignment of error, are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed in part and reversed in part and the cause is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.


CLAIR E. DICKINSON
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

CARR, J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶25} I respectfully dissent from the majority's conclusion that Vacha's employer intentional tort claim may fall within the scope of R.C. 2744.09(B) and that, therefore, the city was not entitled to summary judgment under the immunity provisions of R.C. Chapter 2744. As I stated in my dissenting opinion in *Buck v. Reminderville*, 9th Dist. No. 25272, 2010-Ohio-6497, at ¶18, I believe that political subdivisions are immune from employer intentional tort claims, as held by this Court in *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), 9th Dist. No. 18029, and *Dolis v. Tallmadge*, 9th Dist. No. 21803, 2004-Ohio-4454, at ¶ 6. For that reason, I would sustain the city's second assignment of error. I concur in the remainder of the majority opinion.

APPEARANCES:

JOHN T. MCCLANDRICH, JAMES A. CLIMER, and FRANK H. SCIALDONE, Attorneys at Law, for Appellant.

ANDREW CRITES, Law Director, for Appellant.

JOHN HILDERBRAND, SR., Attorney at Law, for Appellee.

RECEIVED
 MAY 25 2011
 BY: *JH*

IN THE SUPREME COURT OF OHIO
CASE NO.

11-1050

Appeal from the Court of Appeals
Ninth Appellate District
Lorain County, Ohio
Case No. 10CA009750

LISA VACHA

Plaintiff-Appellee

v.

CITY OF NORTH RIDGEVILLE, et al.,

Defendants-Appellants

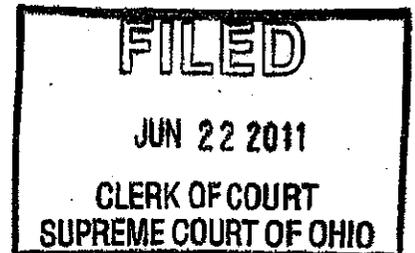
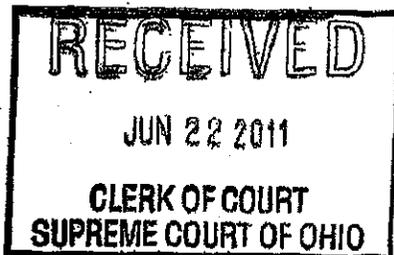
**NOTICE OF APPEAL OF DEFENDANT/APPELLANT
CITY OF NORTH RIDGEVILLE**

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Counsel for Plaintiff/Appellee



Pursuant to Supreme Court Rule II § 2(A)(3), Appellant/Defendant City of North Ridgeville, hereby gives notice of appeal to the Supreme Court of Ohio from the Ninth District Court of Appeals' May 23, 2011 decision and judgment entry. A copy of the court of appeals decision is attached to this Notice. (See Ex. "A.")

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

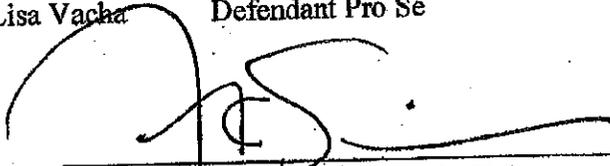
A copy of the foregoing Notice of Appeal was served June 21, 2011 by depositing same in first-class United States mail, postage prepaid, to the following:

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Counsel for Defendant/Appellant City of North Ridgeville

COURT OF APPEALS

STATE OF OHIO)
COUNTY OF LORAIN)

LISA VACHA

Appellee

v.

NORTH RIDGEVILLE, OHIO (CITY OF),
et al.

Appellants

FILED
LORAIN COUNTY COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2011 MAY 23 P 12:39

CLERK OF COMMON PLEAS COURT
FOR HARRISBURG
A009750

9th APPELLATE DISTRICT JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CV156999

DECISION AND JOURNAL ENTRY

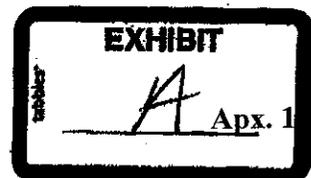
Dated: May 23, 2011

Per Curiam.

{¶1} Appellant, the city of North Ridgeville, appeals from a judgment of the Lorain County Court of Common Pleas that denied its motion for summary judgment on its defense that it was immune from civil liability to its former employee, Lisa Vacha. This Court affirms in part and reverses in part.

I.

{¶2} On June 2, 2006, Lisa Vacha was raped by a coworker, Charles Ralston, while she was working a shift with him at the French Creek Wastewater Treatment Plant, which is owned and operated by the city of North Ridgeville. Shortly after the incident, Vacha applied for worker's compensation benefits, seeking recovery for the physical and psychological injuries that she sustained in the attack. Although the specific details of her worker's compensation claim are not clear from the record, Vacha's application was approved and she was granted permanent total disability benefits.



{¶3} Vacha later filed this action against the city, alleging that it was liable for her injuries that resulted from the rape, on theories that included vicarious liability, negligent and reckless hiring and supervision of Ralston, and that the city committed an employer intentional tort by employing Ralston. The city eventually moved for summary judgment on all of Vacha's claims. It asserted, among other things, that it was entitled to immunity under R.C. 4123.74 and/or R.C. 2744.02. Although the trial court granted the city summary judgment on Vacha's claims for vicarious liability, it denied the city's motion for summary judgment on her remaining claims. The trial court found that there were genuine issues of material fact on those claims, implicitly rejecting the city's immunity defenses. Pursuant to R.C. 2744.02(C), the city appealed the trial court's denial of its immunity defenses, raising two assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE LOWER COURT ERRED WHEN IT DENIED THE APPELLANT/CITY OF NORTH RIDGEVILLE THE BENEFIT OF IMMUNITY UNDER R.C. CHAPTER 4123."

{¶4} The city's first assignment of error is that the trial court erred in denying its motion for summary judgment on Vacha's remaining claims because it was entitled to immunity under R.C. 4123.74, which provides that worker's compensation is an employee's exclusive remedy against her employer for workplace injuries. For ease of discussion, this Court will address Vacha's claims based on the city's alleged negligence and recklessness separately from her employer intentional tort claim.

Negligent and Reckless Hiring and Supervision

{¶5} The city first argued that it was immune from liability for Vacha's claims for negligent and reckless hiring and supervision of Ralston. R.C. 4123.74 provides that employers

who are in full compliance with their obligation to pay worker's compensation premiums "shall not be liable to respond in damages" for "any injury *** received or contracted by any employee in the course of or arising out of his employment[.]" The statute is a codification of the principle set forth in Section 35, Article II of the Ohio Constitution that worker's compensation benefits will be an employee's exclusive remedy against her employer for workplace injuries and provides, in part:

"Such compensation shall be in lieu of all other rights to *** damages, for such *** injuries *** and any employer who pays the premium or compensation provided by law *** shall not be liable to respond in damages at common law or by statute for such *** injuries[.]"

{¶6} The philosophy behind the exclusivity of the worker's compensation system is to balance the competing interests of employer and employee "whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability." *Bunger v. Lawson Co.* (1988), 82 Ohio St.3d 463, 465, quoting *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 614.

{¶7} At the time Vacha was assaulted by Ralston, R.C. 4123.01(C) defined the term "injury" for purposes of the worker's compensation act to include: "any injury *** received in the course of, and arising out of, the injured employee's employment." It further provided that "[i]njury" does not include ***[p]sychiatric conditions except where the conditions have arisen from an injury or occupational disease[.]" The Ohio Supreme Court has repeatedly construed this provision to mean that a psychiatric condition does not constitute a compensable "injury" under the worker's compensation system unless it accompanies a physical injury. See, e.g., *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, at paragraph one of the syllabus; *Kerans v. Porter Paint Co.* (1991), 61 Ohio St.3d 486.

{¶8} To support its motion for summary judgment under R.C. 4123.74, the city pointed to evidence that it was in full compliance with the payments of its worker's compensation premiums and that Vacha had sustained an "injury" within the meaning of the worker's compensation act because she had applied for worker's compensation benefits and her claim had been approved. It specifically pointed to evidence that the sexual assault had caused Vacha to sustain both physical and psychological injuries, that she applied for worker's compensation benefits for those injuries, that her worker's compensation claim had been approved, and that she was receiving permanent total disability benefits. Vacha admitted in her answers to interrogatories and when deposed by defense counsel that she had sustained physical injuries during the rape that included bruises, muscle soreness, chipped teeth, and an injured right shoulder. She testified that, after the rape, she "was so sore that [she] was bedridden for four days" and that she had her shoulder x-rayed five days after the rape because she thought that Ralston had dislocated it. Vacha further explained that she had been regularly seeing a psychologist and a psychiatrist, who had prescribed an antidepressant and sleep aid, and that all of those expenses are covered by her worker's compensation benefits.

{¶9} In opposition to the city's motion for summary judgment, Vacha did not dispute that the city was in full compliance with the payments of its worker's compensation premiums or that her worker's compensation claim had been approved for her to receive permanent total disability benefits for her injuries. Instead, she made a legal argument that her injury was not an "injury" as that term is defined in R.C. 4123.01(C)(1). She did not argue that her worker's compensation claim had been wrongly decided, however, nor did she cite any legal authority for the underlying premise of her argument that the same injury could fall within this definition for purposes of qualifying for worker's compensation benefits but outside of it for purposes of her

employer's immunity for civil suits. There is but one definition of "injury" in R.C. Chapter 4123; if an employee's "injury" is compensable within the workers' compensation system, the employer is consequently immune from a civil action by the employee for negligently or recklessly causing the injury.

{¶10} Vacha relied primarily on distinguishable case law such as *Kerans*, supra, in which the Court found that R.C. 4123.74 did not bar Kerans' civil claim against her employer because she had sustained a purely psychological injury that did not qualify for workers' compensation benefits. 61 Ohio St.3d at 488-489.¹ The *Kerans* court emphasized that employees who suffer purely psychological injuries caused by their employers' negligence would be left without any remedy if their only recourse were the workers' compensation system for which they do not qualify:

"[I]n order for this court to find that the workers' compensation statute provides the exclusive remedy for appellant's injury, we must find that it is theoretically possible for her to recover under the statute, i.e., that she has suffered the type of injury which is compensable under the statute." (Emphasis sic.) 61 Ohio St.3d at 431, fn.2.

{¶11} Likewise, in *Bunger*, 82 Ohio St.3d at 465, it was critical to the court's decision that *Bunger's* workers' compensation claim for purely psychological injuries had been denied because there had been no physical, compensable "injury" under R.C. 4123.01(C). Because the injuries sustained by *Bunger* and *Kerans* did not satisfy the definition of "injury" under R.C. 4123.01(C)(1), those employees did not qualify for workers' compensation benefits and,

¹ Although Vacha also relied on *Prewitt v. Alexson Servs., Inc.*, 12th Dist. No. 2007-09-218, 2008-Ohio-4306, we are not persuaded by its reasoning, which is at odds with a prior decision of this Court. See *Luo v. Gao*, 9th Dist. No. 23310, 2007-Ohio-959 (rejecting the argument that an "injury" must be accidental to qualify for workers' compensation benefits, the basic premise of the *Prewitt* decision).

therefore, R.C. 4123.74 did not provide their employers with immunity from their civil actions for damages.

{¶12} Those employers were not immune from liability for the employees' injuries because the injuries were not compensable within the workers' compensation system:

"If a psychological injury is not an injury according to the statutory definition of 'injury,' then it is not among the class of injuries from which employers are immune from suit. Any other interpretation is nonsensical, and leads to an untenable position that is unfair to employees." 82 Ohio St.3d at 465.

{¶13} Conversely, if an employee's "injury" does qualify for workers' compensation coverage, that remedy is exclusive and the employer is immune from civil action liability arising out of an allegation that the employer was negligent or reckless in causing the employee's injury. That is the only reasonable interpretation of the language of R.C. 4123.74 and 4123.01(C) and any other interpretation would be unfair to the employer in the overall balance of competing interests in the workers' compensation system.

{¶14} Because it was not disputed that Vacha's injuries qualified for compensation under the workers' compensation system and that she was, in fact, receiving permanent total disability benefits, there was no genuine issue of material fact that the city was immune from Vacha's claims for negligent and reckless hiring and supervision of Ralston. Therefore, the trial court erred in denying the city's motion for summary judgment under R.C. 4123.74 on those claims.

Employer Intentional Tort Claim

{¶15} The city conceded that an employee's claim for an employer intentional tort does not occur in the course of or arise out of employment and, therefore, is not barred by R.C. 4123.74. See, e.g., *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, paragraph one of the syllabus, approving and following *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982),

69 Ohio St.2d 608. It argued in its summary judgment motion, however, that Vacha could not prove that the city committed an employer intentional tort, citing the common law standard set forth in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115. The trial court found that there were genuine issues of material fact as to whether Vacha could establish a common law employer intentional tort claim against the city.

{¶16} On appeal, the city does not argue that the trial court wrongly determined that there were factual issues under the common law intentional tort standard. Instead, it argues that this Court should apply the more stringent standard for establishing an employer intentional tort set forth in R.C. 2745.01, because, since the trial court ruled on the summary judgment motions, the Ohio Supreme Court held that the statute is constitutional. See *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027.

{¶17} Although the current version of R.C. 2745.01 was in effect at the time of Vacha's injury, and it had not been declared unconstitutional by this appellate court, the city did not mention R.C. 2745.01 in its motion for summary judgment. The trial court had no authority to grant summary judgment on a ground that the city failed to raise in its motion for summary judgment. See *Smith v. Ray Esser & Sons, Inc.*, 9th Dist. No. 10CA009798, 2011-Ohio-1529, at ¶14-17 (fully addressing the impropriety of a defendant raising the statutory standard for the first time in its summary judgment reply brief). Therefore, the city has failed to demonstrate that the trial court erred in denying it summary judgment on Vacha's employer intentional tort claim.

{¶18} The city's first assignment of error is sustained insofar as it challenges the trial court's denial of its motion for summary judgment on Vacha's claims for the negligent and reckless hiring, employment, and supervision of Raiston, as alleged in counts two and four of her amended complaint. To the extent that the city challenges the denial of summary judgment on

Vacha's employer intentional tort claim, as alleged in count five of her complaint, the first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE LOWER COURT ERRED WHEN IT DENIED THE APPELLANT/CITY OF NORTH RIDGEVILLE THE BENEFIT OF IMMUNITY UNDER R.C. CHAPTER 2744."

{¶19} The city also argues that the trial court erred in denying its motion for summary judgment on Vacha's employer intentional tort claim because it was entitled to immunity under R.C. 2744.02. According to the city, it is immune from civil actions seeking to recover damages, except as provided in R.C. 2744.02(B), none of which apply here. Vacha responded in opposition to the summary judgment motion and argued, among other things, that R.C. 2744.09(B) explicitly provides that R.C. Chapter 2744 political subdivision tort immunity does not apply to "[c]ivil 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[.]"

{¶20} The city maintained that, as a matter of law, the "civil actions" that are within the scope of R.C. 2744.09(B) do not include employer intentional torts. It relied on a line of cases including *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), 9th Dist. No. 18029, in which this Court held that an employer intentional tort claim does not fall within R.C. 2744.09(B) because "[a]n employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside of the scope of employment." *Id.*, citing *Brady*, 61 Ohio St.3d at paragraph one of the syllabus.

{¶21} Since *Ellithorp* was decided, the Ohio Supreme Court decided *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, in which it determined that an employer's

intentional torts fall within an exclusion in the employer's commercial general liability insurance policy for injuries to an employee that arise out of or in the course of employment. *Id.* at ¶38 and 42. During its examination of this policy exclusion, the court distinguished its reasoning from *Brady, Blankenship*, and other worker's compensation cases about whether employer intentional torts occur within the scope of the employment relationship and/or arise out of or in the course of employment, emphasizing the significance that those decisions arose within the context of the worker's compensation system. *Id.* at ¶39-40.

{¶22} After the Ohio Supreme Court decided *Penn Traffic*, this Court was asked to reexamine its *Ellithorp* decision. See *Buck v. Reminderville*, 9th Dist. No. 25272, 2010-Ohio-6497. In *Buck*, at ¶16, this Court explicitly overruled *Ellithorp* to the extent that it held that a political subdivision employer's intentional tort can never be subject to the immunity exclusion of R.C. 2744.09(B). This Court concluded "that a claim by the employee of a political subdivision against the political subdivision for its intentionally tortious conduct may constitute a 'civil action[] *** relative to any matter that arises out of the employment relationship between the employee and the political subdivision' under Section 2744.09(B)." *Id.* at ¶10.

{¶23} Because Vacha's employer intentional tort claim may constitute a claim within the scope of R.C. 2744.09(B), the city failed to establish that it was entitled to summary judgment on that claim based on the immunity provisions of R.C. Chapter 2744. Consequently, the trial court did not err in denying it summary judgment on that basis. The city's second assignment of error is overruled.

III.

{¶24} The city's first assignment of error is sustained to the extent it challenges the trial court's denial of its motion for summary judgment on Vacha's claims for negligent and reckless

hiring and supervision of Ralston. The remainder of its first assignment of error, as well as its second assignment of error, are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed in part and reversed in part and the cause is remanded for further proceedings consistent with this opinion.

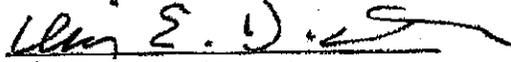
Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.


CLAIR E. DICKINSON
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

CARR, J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶25} I respectfully dissent from the majority's conclusion that Vacha's employer intentional tort claim may fall within the scope of R.C. 2744.09(B) and that, therefore, the city was not entitled to summary judgment under the immunity provisions of R.C. Chapter 2744. As I stated in my dissenting opinion in *Buck v. Reminderville*, 9th Dist. No. 25272, 2010-Ohio-6497, at ¶18, I believe that political subdivisions are immune from employer intentional tort claims, as held by this Court in *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), 9th Dist. No. 18029, and *Dolis v. Tallmadge*, 9th Dist. No. 21803, 2004-Ohio-4454, at ¶ 6. For that reason, I would sustain the city's second assignment of error. I concur in the remainder of the majority opinion.

APPEARANCES:

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ANDREW CRITES, Law Director, for Appellant.

JOHN HILDERBRAND, SR., Attorney at Law, for Appellee.

RECEIVED
 MAY 25 2011
 BY: *JK*

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. **11-1327**

Appeal from the Court of Appeals
Ninth Appellate District
Lorain County, Ohio
Case No. 10CA009750

LISA VACHA

Plaintiff-Appellee

v.

CITY OF NORTH RIDGEVILLE, et al.,

Defendants-Appellants

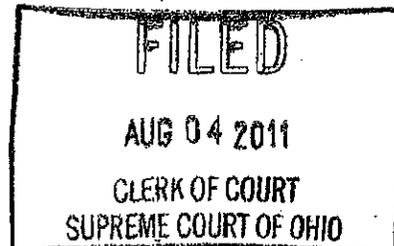
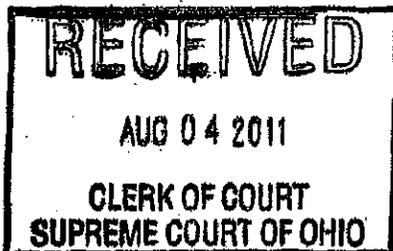
**CITY OF NORTH RIDGEVILLE'S NOTICE THAT THE
NINTH DISTRICT COURT OF APPEALS HAS CERTIFIED A CONFLICT**

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Counsel for Plaintiff/Appellee



Under S. Ct. Prac. R. 4.1, the City of North Ridgeville notifies this Court that the Ninth District certified a conflict over the following proposition of law: Does R.C. 2744.09 create an exception to Political Subdivision Immunity for intentional tort claims alleged by a public employee? A copy of the Court's Journal Entry Certifying a Conflict is attached as Ex. "1."

This Ninth District's merits opinion (Ex. "A") conflicts with several appellate districts, including the twelfth district, tenth district, sixth district, and the fifth district. *Williams v. McFarland Properties, L.L.C.* (12th Dist.), 177 Ohio App.3d 490, 895 N.E.2d 208 (Ex. "B"); *Zieber v. Heffelfinger* (5th Dist.), 2009 Ohio 1227, ¶29 (Ex. "C"); *Coats v. City of Columbus* (10th Dist.), 2007 Ohio 761 (Ex. "D"); and *Villa v. Vill. of Elmore* (6th Dist.), 2005 Ohio 6649, ¶36. (Ex. "E").

Respectfully submitted,

MAZANEC, RASKIN & RYDER CO., L.P.A.

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CERTIFICATE OF SERVICE

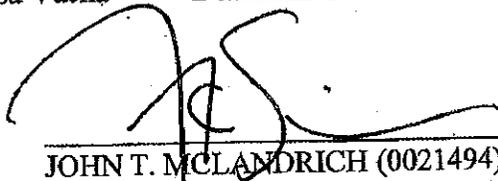
A copy of the foregoing Notice that the Ninth District Has Certified a Conflict was served on August 3, 2011 by depositing same in first-class United States mail, postage prepaid, to the following:

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Defendant Pro Se



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FRANK H. SCIALDONE (0075179)

Counsel for Defendant/Appellant City of North Ridgeville

COURT OF APPEALS

STATE OF OHIO)

COUNTY OF LORAIN)

LISA VACHA

Appellee

v.

NORTH RIDGEVILLE, OHIO (CITY
OF)

Appellant

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

C.A. No. 10CA009750

2011 JUL 27 P 1:45

FILED
LORAIN COUNTY
CLERK OF COMMON PLEAS
9th APPELLATE DISTRICT

JOURNAL ENTRY

Appellant has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on May 23, 2011, and the judgment of the 12th District Court of Appeals in *Williams v. McFarland Properties, L.L.C.*, 177 Ohio App.3d 490, 2008-Ohio-3594, as well as the judgments of the 5th, 6th, and 10th Appellate Districts in *Zieber v. Heffelfinger*, 5th Dist. No. 08CA0042, 2009-Ohio-1227; *Villa v. Elmore*, 6th Dist. No. L-05-1058, 2005-Ohio-6649; and *Coats v. Columbus*, 10th Dist. No. 06AP-681, 2007-Ohio-761. Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" Appellee has responded to the motion and acknowledges that there is a conflict between the districts.

Moreover, Appellant correctly notes that the certified issue is already pending before the Ohio Supreme Court in a discretionary appeal from the 8th Appellate District in Supreme Court Case NO. 2010-1561, *Darrell Sampson v. Cuyahoga Metropolitan Housing Authority*. The Supreme Court has also accepted a discretionary appeal from this Court in

Apx. 32

EXHIBIT

2

Supreme Court Case No. 2011-0258, *Jeffrey Buck v. Reminderville*, which is being held for the decision in *Sampson*. Therefore, we find that a conflict of law exists between the judgment in this case and the judgments of the 5th, 6th, 10th, and 12th Districts on the following issue:

“Does R.C. 2744.09 create an exception to Political Subdivision Immunity for intentional tort claims alleged by a public employee?”



Judge

Concur:
Belfance, J.
Dickinson, J.

COURT OF APPEALS

STATE OF OHIO)
COUNTY OF LORAIN)
LISA VACHA

Appellee

v.

NORTH RIDGEVILLE, OHIO (CITY OF),
et al.

Appellants

FILED
LORAIN COUNTY COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2011 MAY 23 P 12:39

CLERK OF COURT
FOR LORAIN COUNTY
A009750

9th APPELLATE DISTRICT JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CV156999

DECISION AND JOURNAL ENTRY

Dated: May 23, 2011

Per Curiam.

{¶1} Appellant, the city of North Ridgeville, appeals from a judgment of the Lorain County Court of Common Pleas that denied its motion for summary judgment on its defense that it was immune from civil liability to its former employee, Lisa Vacha. This Court affirms in part and reverses in part.

I.

{¶2} On June 2, 2006, Lisa Vacha was raped by a coworker, Charles Ralston, while she was working a shift with him at the French Creek Wastewater Treatment Plant, which is owned and operated by the city of North Ridgeville. Shortly after the incident, Vacha applied for worker's compensation benefits, seeking recovery for the physical and psychological injuries that she sustained in the attack. Although the specific details of her worker's compensation claim are not clear from the record, Vacha's application was approved and she was granted permanent total disability benefits.



{¶3} Vacha later filed this action against the city, alleging that it was liable for her injuries that resulted from the rape, on theories that included vicarious liability, negligent and reckless hiring and supervision of Ralston, and that the city committed an employer intentional tort by employing Ralston. The city eventually moved for summary judgment on all of Vacha's claims. It asserted, among other things, that it was entitled to immunity under R.C. 4123.74 and/or R.C. 2744.02. Although the trial court granted the city summary judgment on Vacha's claims for vicarious liability, it denied the city's motion for summary judgment on her remaining claims. The trial court found that there were genuine issues of material fact on those claims, implicitly rejecting the city's immunity defenses. Pursuant to R.C. 2744.02(C), the city appealed the trial court's denial of its immunity defenses, raising two assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE LOWER COURT ERRED WHEN IT DENIED THE APPELLANT/CITY OF NORTH RIDGEVILLE THE BENEFIT OF IMMUNITY UNDER R.C. CHAPTER 4123."

{¶4} The city's first assignment of error is that the trial court erred in denying its motion for summary judgment on Vacha's remaining claims because it was entitled to immunity under R.C. 4123.74, which provides that worker's compensation is an employee's exclusive remedy against her employer for workplace injuries. For ease of discussion, this Court will address Vacha's claims based on the city's alleged negligence and recklessness separately from her employer intentional tort claim.

Negligent and Reckless Hiring and Supervision

{¶5} The city first argued that it was immune from liability for Vacha's claims for negligent and reckless hiring and supervision of Ralston. R.C. 4123.74 provides that employers

who are in full compliance with their obligation to pay worker's compensation premiums "shall not be liable to respond in damages" for "any injury *** received or contracted by any employee in the course of or arising out of his employment[.]" The statute is a codification of the principle set forth in Section 35, Article II of the Ohio Constitution that worker's compensation benefits will be an employee's exclusive remedy against her employer for workplace injuries and provides, in part:

"Such compensation shall be in lieu of all other rights to *** damages, for such *** injuries *** and any employer who pays the premium or compensation provided by law *** shall not be liable to respond in damages at common law or by statute for such *** injuries[.]"

{¶6} The philosophy behind the exclusivity of the worker's compensation system is to balance the competing interests of employer and employee "whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability." *Bunger v. Lawson Co.* (1988), 82 Ohio St.3d 463, 465, quoting *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 614.

{¶7} At the time Vacha was assaulted by Ralston, R.C. 4123.01(C) defined the term "injury" for purposes of the worker's compensation act to include: "any injury *** received in the course of, and arising out of, the injured employee's employment." It further provided that "[i]njury" does not include ***[p]sychiatric conditions except where the conditions have arisen from an injury or occupational disease[.]" The Ohio Supreme Court has repeatedly construed this provision to mean that a psychiatric condition does not constitute a compensable "injury" under the worker's compensation system unless it accompanies a physical injury. See, e.g., *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, at paragraph one of the syllabus; *Kerans v. Porter Paint Co.* (1991), 61 Ohio St.3d 486.

{¶8} To support its motion for summary judgment under R.C. 4123.74, the city pointed to evidence that it was in full compliance with the payments of its worker's compensation premiums and that Vacha had sustained an "injury" within the meaning of the worker's compensation act because she had applied for worker's compensation benefits and her claim had been approved. It specifically pointed to evidence that the sexual assault had caused Vacha to sustain both physical and psychological injuries, that she applied for worker's compensation benefits for those injuries, that her worker's compensation claim had been approved, and that she was receiving permanent total disability benefits. Vacha admitted in her answers to interrogatories and when deposed by defense counsel that she had sustained physical injuries during the rape that included bruises, muscle soreness, chipped teeth, and an injured right shoulder. She testified that, after the rape, she "was so sore that [she] was bedridden for four days" and that she had her shoulder x-rayed five days after the rape because she thought that Ralston had dislocated it. Vacha further explained that she had been regularly seeing a psychologist and a psychiatrist, who had prescribed an antidepressant and sleep aid, and that all of those expenses are covered by her worker's compensation benefits.

{¶9} In opposition to the city's motion for summary judgment, Vacha did not dispute that the city was in full compliance with the payments of its worker's compensation premiums or that her worker's compensation claim had been approved for her to receive permanent total disability benefits for her injuries. Instead, she made a legal argument that her injury was not an "injury" as that term is defined in R.C. 4123.01(C)(1). She did not argue that her worker's compensation claim had been wrongly decided, however, nor did she cite any legal authority for the underlying premise of her argument that the same injury could fall within this definition for purposes of qualifying for worker's compensation benefits but outside of it for purposes of her

employer's immunity for civil suits. There is but one definition of "injury" in R.C. Chapter 4123; if an employee's "injury" is compensable within the workers' compensation system, the employer is consequently immune from a civil action by the employee for negligently or recklessly causing the injury.

{¶10} Vacha relied primarily on distinguishable case law such as *Kerans*, supra, in which the Court found that R.C. 4123.74 did not bar Kerans' civil claim against her employer because she had sustained a purely psychological injury that did not qualify for workers' compensation benefits. 61 Ohio St.3d at 488-489.¹ The *Kerans* court emphasized that employees who suffer purely psychological injuries caused by their employers' negligence would be left without any remedy if their only recourse were the workers' compensation system for which they do not qualify:

"[I]n order for this court to find that the workers' compensation statute provides the exclusive remedy for appellant's injury, we must find that it is theoretically possible for her to recover under the statute, i.e., that she has suffered the type of injury which is compensable under the statute." (Emphasis sic.) 61 Ohio St.3d at 431, fn.2.

{¶11} Likewise, in *Bunger*, 82 Ohio St.3d at 465, it was critical to the court's decision that *Bunger's* workers' compensation claim for purely psychological injuries had been denied because there had been no physical, compensable "injury" under R.C. 4123.01(C). Because the injuries sustained by *Bunger* and *Kerans* did not satisfy the definition of "injury" under R.C. 4123.01(C)(1), those employees did not qualify for workers' compensation benefits and,

¹ Although Vacha also relied on *Prewitt v. Alexson Servs., Inc.*, 12th Dist. No. 2007-09-218, 2008-Ohio-4306, we are not persuaded by its reasoning, which is at odds with a prior decision of this Court. See *Luo v. Gao*, 9th Dist. No. 23310, 2007-Ohio-959 (rejecting the argument that an "injury" must be accidental to qualify for workers' compensation benefits, the basic premise of the *Prewitt* decision).

therefore, R.C. 4123.74 did not provide their employers with immunity from their civil actions for damages.

{¶12} Those employers were not immune from liability for the employees' injuries because the injuries were not compensable within the workers' compensation system:

"If a psychological injury is not an injury according to the statutory definition of 'injury,' then it is not among the class of injuries from which employers are immune from suit. Any other interpretation is nonsensical, and leads to an untenable position that is unfair to employees." 82 Ohio St.3d at 465.

{¶13} Conversely, if an employee's "injury" does qualify for workers' compensation coverage, that remedy is exclusive and the employer is immune from civil action liability arising out of an allegation that the employer was negligent or reckless in causing the employee's injury. That is the only reasonable interpretation of the language of R.C. 4123.74 and 4123.01(C) and any other interpretation would be unfair to the employer in the overall balance of competing interests in the workers' compensation system.

{¶14} Because it was not disputed that Vacha's injuries qualified for compensation under the workers' compensation system and that she was, in fact, receiving permanent total disability benefits, there was no genuine issue of material fact that the city was immune from Vacha's claims for negligent and reckless hiring and supervision of Ralston. Therefore, the trial court erred in denying the city's motion for summary judgment under R.C. 4123.74 on those claims.

Employer Intentional Tort Claim

{¶15} The city conceded that an employee's claim for an employer intentional tort does not occur in the course of or arise out of employment and, therefore, is not barred by R.C. 4123.74. See, e.g., *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, paragraph one of the syllabus, approving and following *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982),

69 Ohio St.2d 608. It argued in its summary judgment motion, however, that Vacha could not prove that the city committed an employer intentional tort, citing the common law standard set forth in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115. The trial court found that there were genuine issues of material fact as to whether Vacha could establish a common law employer intentional tort claim against the city.

{¶16} On appeal, the city does not argue that the trial court wrongly determined that there were factual issues under the common law intentional tort standard. Instead, it argues that this Court should apply the more stringent standard for establishing an employer intentional tort set forth in R.C. 2745.01, because, since the trial court ruled on the summary judgment motions, the Ohio Supreme Court held that the statute is constitutional. See *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027.

{¶17} Although the current version of R.C. 2745.01 was in effect at the time of Vacha's injury, and it had not been declared unconstitutional by this appellate court, the city did not mention R.C. 2745.01 in its motion for summary judgment. The trial court had no authority to grant summary judgment on a ground that the city failed to raise in its motion for summary judgment. See *Smith v. Ray Esser & Sons, Inc.*, 9th Dist. No. 10CA009798, 2011-Ohio-1529, at ¶14-17 (fully addressing the impropriety of a defendant raising the statutory standard for the first time in its summary judgment reply brief). Therefore, the city has failed to demonstrate that the trial court erred in denying it summary judgment on Vacha's employer intentional tort claim.

{¶18} The city's first assignment of error is sustained insofar as it challenges the trial court's denial of its motion for summary judgment on Vacha's claims for the negligent and reckless hiring, employment, and supervision of Ralston, as alleged in counts two and four of her amended complaint. To the extent that the city challenges the denial of summary judgment on

Vacha's employer intentional tort claim, as alleged in count five of her complaint, the first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE LOWER COURT ERRED WHEN IT DENIED THE APPELLANT/CITY OF NORTH RIDGEVILLE THE BENEFIT OF IMMUNITY UNDER R.C. CHAPTER 2744."

{¶19} The city also argues that the trial court erred in denying its motion for summary judgment on Vacha's employer intentional tort claim because it was entitled to immunity under R.C. 2744.02. According to the city, it is immune from civil actions seeking to recover damages, except as provided in R.C. 2744.02(B), none of which apply here. Vacha responded in opposition to the summary judgment motion and argued, among other things, that R.C. 2744.09(B) explicitly provides that R.C. Chapter 2744 political subdivision tort immunity does not apply to "[c]ivil 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[.]"

{¶20} The city maintained that, as a matter of law, the "civil actions" that are within the scope of R.C. 2744.09(B) do not include employer intentional torts. It relied on a line of cases including *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), 9th Dist. No. 18029, in which this Court held that an employer intentional tort claim does not fall within R.C. 2744.09(B) because "[a]n employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside of the scope of employment." *Id.*, citing *Brady*, 61 Ohio St.3d at paragraph one of the syllabus.

{¶21} Since *Ellithorp* was decided, the Ohio Supreme Court decided *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, in which it determined that an employer's

intentional torts fall within an exclusion in the employer's commercial general liability insurance policy for injuries to an employee that arise out of or in the course of employment. *Id.* at ¶38 and 42. During its examination of this policy exclusion, the court distinguished its reasoning from *Brady*, *Blankenship*, and other worker's compensation cases about whether employer intentional torts occur within the scope of the employment relationship and/or arise out of or in the course of employment, emphasizing the significance that those decisions arose within the context of the worker's compensation system. *Id.* at ¶39-40.

{¶22} After the Ohio Supreme Court decided *Penn Traffic*, this Court was asked to reexamine its *Ellithorp* decision. See *Buck v. Reminderville*, 9th Dist. No. 25272, 2010-Ohio-6497. In *Buck*, at ¶16, this Court explicitly overruled *Ellithorp* to the extent that it held that a political subdivision employer's intentional tort can never be subject to the immunity exclusion of R.C. 2744.09(B). This Court concluded "that a claim by the employee of a political subdivision against the political subdivision for its intentionally tortious conduct may constitute a 'civil action[] *** relative to any matter that arises out of the employment relationship between the employee and the political subdivision' under Section 2744.09(B)." *Id.* at ¶10.

{¶23} Because Vacha's employer intentional tort claim may constitute a claim within the scope of R.C. 2744.09(B), the city failed to establish that it was entitled to summary judgment on that claim based on the immunity provisions of R.C. Chapter 2744. Consequently, the trial court did not err in denying it summary judgment on that basis. The city's second assignment of error is overruled.

III.

{¶24} The city's first assignment of error is sustained to the extent it challenges the trial court's denial of its motion for summary judgment on Vacha's claims for negligent and reckless

hiring and supervision of Ralston. The remainder of its first assignment of error, as well as its second assignment of error, are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed in part and reversed in part and the cause is remanded for further proceedings consistent with this opinion.

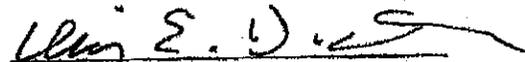
Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.


CLAIR E. DICKINSON
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

CARR, J.

CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶25} I respectfully dissent from the majority's conclusion that Vacha's employer intentional tort claim may fall within the scope of R.C. 2744.09(B) and that, therefore, the city was not entitled to summary judgment under the immunity provisions of R.C. Chapter 2744. As I stated in my dissenting opinion in *Buck v. Reminderville*, 9th Dist. No. 25272, 2010-Ohio-6497, at ¶18, I believe that political subdivisions are immune from employer intentional tort claims, as held by this Court in *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), 9th Dist. No. 18029, and *Dolis v. Tallmadge*, 9th Dist. No. 21803, 2004-Ohio-4454, at ¶ 6. For that reason, I would sustain the city's second assignment of error. I concur in the remainder of the majority opinion.

APPEARANCES:

JOHN T. MCCLANDRICH, JAMES A. CLIMER, and FRANK H. SCIALDONE, Attorneys at Law, for Appellant.

ANDREW CRITES, Law Director, for Appellant.

JOHN HILDERBRAND, SR., Attorney at Law, for Appellee.

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Court of Appeals of Ohio,
Twelfth District, Butler County.
WILLIAMS et al., Appellants,
v.
McFARLAND PROPERTIES, L.L.C., et al., Ap-
pellees.
No. CA2007-08-200.
Decided July 21, 2008.

Background: City employee brought action against city, alleging intentional tort in seeking to recover for injuries sustained when he was burned while attempting to repair a downed electrical transformer. Bureau of Workers' Compensation filed complaint against city, seeking subrogation. The Court of Common Pleas, Butler County, No. CV2005-09-3061, entered summary judgment in favor of city. Employee appealed.

Holdings: The Court of Appeals, William W. Young, J., held that:
(1) city was immune from liability on employee's intentional tort claim, and
(2) employee failed to establish standing to appeal grant of city's summary judgment motion against Bureau of Workers' Compensation.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ◀893(1)
30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate
Court
30k893(1) k. In General. Most
Cited Cases
Appellate court's review of a trial court's ruling

on a motion for summary judgment is de novo. Rules Civ.Proc., Rule 56(C).

[2] Judgment 228 ◀185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Bur-
den of Proof. Most Cited Cases

All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. Rules Civ.Proc., Rule 56(C).

[3] Judgment 228 ◀185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Bur-
den of Proof. Most Cited Cases

To prevail on a motion for summary judgment, the moving party must be able to point to evidentiary materials that show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law; the non-moving party must then present evidence that some issue of material fact remains to be resolved. Rules Civ.Proc., Rule 56(C).

[4] Electricity 145 ◀17

145 Electricity
145k12 Injuries Incident to Production or Use
145k17 k. Companies and Persons Liable.
Most Cited Cases

City was immune from liability on city employee's intentional tort claim seeking to recover for injuries sustained when he was burned while attempting to repair a downed electrical transformer. R.C. § 2744.02.



[5] Municipal Corporations 268 ↪723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases

Statutory exemption from the general grant of immunity granted to a political subdivision for civil actions by an employee against a political subdivision for any matter that arises out of the employment relationship does not apply to employer-intentional-tort claims. R.C. §§ 2744.02, 2744.09(B).

[6] Municipal Corporations 268 ↪723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases

Statutory exemption from the general grant of immunity granted to a political subdivision for civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of employment does not apply to employer-intentional-tort claims. R.C. §§ 2744.02, 2744.09(C).

[7] Workers' Compensation 413 ↪2142

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(B) Action by Third Person Against Employer

413XX(B)1 In General
413k2142 k. In General. Most Cited Cases

City employee suing city for intentional tort failed to establish standing to appeal trial court's grant of city's summary judgment motion against Bureau of Workers' Compensation, which had sought subrogation; employee failed to respond to

city's argument on appeal that employee had no standing, and trial court's decision did not impede employee's ability to pursue his intentional-tort claim against the city on appeal. R.C. §§ 2744.02, 4123.931.

[8] Appeal and Error 30 ↪151(1)

30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k151 Parties or Persons Injured or Aggrieved
30k151(1) k. In General. Most Cited Cases

An appeal lies only on behalf of a party aggrieved by the final order appealed from.

[9] Appeal and Error 30 ↪151(2)

30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k151 Parties or Persons Injured or Aggrieved
30k151(2) k. Who Are "Aggrieved" in General. Most Cited Cases

A party is aggrieved, for purposes of standing to appeal, if it has an interest in the subject matter of the litigation that is immediate and pecuniary, rather than a remote consequence of the judgment.

[10] Appeal and Error 30 ↪150(1)

30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k150 Interest in Subject-Matter
30k150(1) k. In General. Most Cited Cases

Appeal and Error 30 ↪151(1)

30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k151 Parties or Persons Injured or Aggrieved

895 N.E.2d 208
 177 Ohio App.3d 490, 895 N.E.2d 208, 2008 -Ohio- 3594
 (Cite as: 177 Ohio App.3d 490, 895 N.E.2d 208)

grieved

30k151(1) k. In General. Most Cited

Cases

To have standing to appeal, the person must be able to show he has a present interest in the subject matter of the litigation and that he has been prejudiced by the judgment of the lower court.

[11] Appeal and Error 30 ⇨ 901

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k901 k. Burden of Showing Error. Most

Cited Cases

The party seeking to appeal bears the burden of establishing standing.

**210 Clayton G. Napier, Timothy R. Evans, Hamilton, for appellants.

Freund, Freeze & Arnold, Gordon D. Arnold, Dayton, for appellee, McFarland Properties.

Dinsmore & Shohl, Gary Becker, Cincinnati, for appellee, city of Hamilton.

Benjamin W. Crider, Columbus, for appellee, Ohio Bureau of Workers' Compensation.

Frank Leonetti III, Cleveland, for appellee, Butler County Behavioral Health.

WILLIAM W. YOUNG, Judge.

*492 {¶ 1} Plaintiff-appellant John Williams Sr. appeals a decision of the Butler County Court of Common Pleas granting summary judgment to defendant-appellee the city of Hamilton, in an employer-intentional-tort action. Appellant also appeals the trial court's decision granting summary judgment in favor of the city and against the Ohio Bureau of Workers' Compensation.

{¶ 2} In 2004, appellant was a lineman for the city's Electric Distribution Department. On September 27, 2004, appellant was injured when he was

burned while attempting to repair a downed transformer located at University Boulevard and Lincoln Avenue in Hamilton, Ohio. Appellant filed a complaint alleging several claims against several parties, including an intentional-tort claim against the city. Specifically, appellant alleged that the city had knowledge of a dangerous condition, a malfunctioning and defective piece of electrical equipment; *493 failed to use proper safety devices and techniques; failed to warn appellant of the danger; and failed to supervise appellant's actions.

{¶ 3} The city moved for summary judgment against appellant on the ground that under R.C. Chapter 2744, it was immune from liability for damages caused by an intentional tort. The city also moved for summary judgment against the bureau. On May 2, 2007, the trial court granted the city's motion for summary judgment against appellant on the ground that the city was immune from liability under R.C. Chapter 2744. On June 25, 2007, the trial court granted the city's motion for summary judgment against the bureau as follows: "The Workers' Compensation statute [R.C. 4123.931] does not express[ly] impose liability on a political subdivision for employer intentional torts. In addition, the statute does not grant the Bureau greater rights than those available to [appellant]. [Appellant] is not entitled to any recovery from the City of Hamilton; therefore, there is no valid claim to which the Bureau may be subrogated."

{¶ 4} Appellant appeals, raising two assignments of error.

{¶ 5} Assignment of error No. 1:

{¶ 6} "The court erred in granting summary judgment to the city of Hamilton against John and Melissa [appellant's wife] Williams."

[1][2][3] {¶ 7} This court's review of a trial court's ruling on a motion for summary judgment is de novo. *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887, 694 N.E.2d 167. Summary**211 judgment is appropriate when there are

no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760, 732 N.E.2d 422. All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First Natl. Bank & Trust Co.* (1970), 21 Ohio St.2d 25, 50 O.O.2d 47, 254 N.E.2d 683. To prevail on a motion for summary judgment, the moving party must be able to point to evidentiary materials that show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The nonmoving party must then present evidence that some issue of material fact remains to be resolved. *Id.*

[4] {¶ 8} Appellant first argues that the trial court erred by finding that the city was immune from liability under R.C. Chapter 2744 because immunity granted under R.C. 2744.02 does not extend to proprietary functions. It is undisputed that in the case at bar the city is a political subdivision engaged in a proprietary function. See R.C. 2744.01 (F) and (G)(2)(c). Nonetheless, we find *494 that the city is immune under R.C. 2744.02 from the intentional-tort claim whether or not it is engaged in a proprietary function.

{¶ 9} As a general rule, “[e]xcept as provided in [R.C. 2744.02(B) * * *], a political subdivision is not liable in damages in a civil action for injury * * * allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.” (Emphasis added.) R.C. 2744.02(A)(1). R.C. 2744.02(B) lists five exceptions to the general grant of immunity: the negligent operation of a motor vehicle by an employee, R.C. 2744.02(B)(1); the negligent performance of acts by an employee with respect to a proprietary

function, R.C. 2744.02(B)(2); the negligent failure to keep public roads in repair and open, R.C. 2744.02(B)(3); the negligence of employees occurring within or on the grounds of buildings used in connection with the performance of governmental functions, R.C. 2744.02(B)(4); and when civil liability is expressly imposed upon the political subdivision by statute, R.C. 2744.02(B)(5).

{¶ 10} We find that none of the exceptions under R.C. 2744.02(B) are applicable. Because the alleged conduct of the city did not involve the operation of a vehicle, the failure to keep public roads in repair and open, or the negligence of employees in buildings used in connection with a governmental function, R.C. 2744.02(B)(1), (3), and (4) do not apply. With regard to R.C. 2744.02(B)(5), appellant has not alleged any section of the Ohio Revised Code that imposes liability on a political subdivision for the injuries he received. Finally, although it refers to proprietary functions, R.C. 2744.02(B)(2), by its very language, applies only to cases where injury results from negligence. Appellant’s complaint against the city alleged only an intentional-tort claim. Thus, R.C. 2744.02(B)(2) is not applicable.

{¶ 11} In fact, because R.C. 2744.02(B) includes no specific exceptions for intentional torts, Ohio courts have consistently held that political subdivisions are immune under R.C. 2744.02 from intentional-tort claims. See *Thayer v. W. Carrollton Bd. of Edn.*, Montgomery App. No. 20063, 2004-Ohio-3921, 2004 WL 1662198; **212 *Terry v. Ottawa Cty. Bd. of Mental Retardation & Developmental Disabilities*, 151 Ohio App.3d 234, 783 N.E.2d 959, 2002-Ohio-7299; *Fabian v. Steubenville* (Sept. 28, 2001), Jefferson App. No. 00 JE 33, 2001 WL 1199061; *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), Summit App. No. 18029, 1997 WL 416333; *Coats v. Columbus*, Franklin App. No. 06AP-681, 2007-Ohio-761, 2007 WL 549462; and *Sabulsky v. Trumbull Cty.*, Trumbull App. No. 2001-T-0084, 2002-Ohio-7275, 2002 WL 31886686. See also

Wilson v. Stark Cty. Dept. of Human Servs. (1994), 70 Ohio St.3d 450, 639 N.E.2d 105 (“Consequently, except as specifically provided in R.C. 2744.02(B)(1), (3), (4) and (5), with respect to governmental functions, political subdivisions retain their cloak of *495 immunity from lawsuits stemming from employees’ negligent or reckless acts. * * * There are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress”); *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 8, quoting *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 452, 639 N.E.2d 105 (“This court has reviewed R.C. 2744.02(B)(5) in the context of intentional torts and concluded that ‘there are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress’”).

[5] {¶ 12} Appellant next argues that R.C. Chapter 2744 is inapplicable to employer intentional torts under R.C. 2744.09(B) and (C). We disagree.

{¶ 13} R.C. 2744.09 sets forth several exceptions that remove certain types of civil actions entirely from the purview of R.C. Chapter 2744. Specifically, R.C. 2744.09(B) provides that R.C. Chapter 2744 “does not apply to * * * [c]ivil 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.” R.C. 2744.09(C), in turn, provides that R.C. Chapter 2744 “does not apply to * * * [c]ivil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment.”

{¶ 14} Because appellant’s injuries occurred within the scope of his employment, it appears at first blush that R.C. 2744.09(B) might be applicable here. However, because appellant’s complaint against the city alleged solely an employer intentional tort, R.C. 2744.09(B) does not apply for the

following reasons.

{¶ 15} In *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, the Ohio Supreme Court held that “[a] cause of action brought by an employee alleging intentional tort by the employer in the workplace is not preempted by Section 35, Article II of the Ohio Constitution, or by R.C. 4123.74 and 4123.741. While such cause of action contemplates redress of tortious conduct that occurs during the course of employment, an intentional tort alleged in this context necessarily occurs outside the employment relationship.” Id. at paragraph one of the syllabus. The Supreme Court noted that “[i]njuries resulting from an employer’s intentional torts, even though committed at the workplace, * * * are totally unrelated to the fact of employment,” and that “such intentional tortious conduct will always take place outside the [employment] relationship.” Id. at 634, 576 N.E.2d 722, quoting *Taylor v. Academy Iron & Metal Co.* (1988), 36 Ohio St.3d 149, 162, 522 N.E.2d 464 (Douglas, J., dissenting).

{¶ 16} In *Engleman v. Cincinnati Bd. of Edn.* (June 22, 2001), Hamilton App. No. C-000597, 2001 WL 705575, relying upon the foregoing language from the **213 *496 Supreme Court, the First Appellate District held that because an employer intentional tort does not arise out of the employment relationship, but occurs outside the scope of employment and is always outside the employment relationship, R.C. 2744.09(B) does not apply to intentional-tort claims:

{¶ 17} “ R.C. 2744.09(B) prevents the application of R.C. Chapter 2744 to a civil action by an employee against a political subdivision only for any matter that arises out of the employment relationship. * * * To [conclude otherwise] would frustrate the general statutory purpose of conferring immunity on political subdivisions. It would render meaningless R.C. 2744.02(B) and 2744.03(A)(2), which provide the exceptions and defenses to immunity for intentional acts committed by an employee of a political subdivision. Moreover, it

would require the rejection of a line of Ohio appellate cases that have consistently held political subdivisions immune from intentional-tort claims." Id. at *4-5.

{¶ 18} We are mindful of the Ohio Supreme Court's decision in *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, 790 N.E.2d 1199, but find that it does not overrule *Brady*. In *Penn*, the Supreme Court held that "[a]lthough an employer intentional tort occurs outside the employment relationship for purposes of recognizing a common-law cause of action for intentional tort, the injury itself must arise out of or in the course of employment; otherwise, there can be employer intentional tort." Id. at ¶ 40. However, the Supreme Court "took care to specifically limit its holding in *Penn Traffic* to situations involving the applicability of recovery under a private insurance policy. Therefore, *Brady* remains good law." *Thayer*, 2004-Ohio-3921, 2004 WL 1662198, ¶ 17 (internal citations omitted). See also *Kohler v. Wapakoneta* (N.D. Ohio 2005), 381 F.Supp.2d 692.

{¶ 19} We therefore find the reasoning in *Engleman* persuasive and hold that 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. See also *Ellithorp*, Summit App. No. 18029, 1997 WL 416333; *Sabulsky*, 2002-Ohio-7275, 2002 WL 31886686; *Terry*, 151 Ohio App.3d 234, 2002-Ohio-7299, 783 N.E.2d 959; and *Coats*, 2007-Ohio-761, 2007 WL 549462. But see, *Nagel v. Horner*, Scioto App. No. 04CA2975, 2005-Ohio-3574, 833 N.E.2d 300; and *Marcum v. Rice* (July 20, 1999), Franklin App. Nos. 98AP717, 98AP718, 98AP719, and 98AP721, 1999 WL 513813.

[6] {¶ 20} We now turn to R.C. 2744.09(C). In *Fabian*, the Seventh Appellate District was asked to determine whether an employer intentional tort was exempted from immunity under R.C. Chapter 2744 by R.C. 2744.09(C). *Fabian*, Jefferson App. No. 00 JE 33, 2001 WL 1199061. The appellate court

noted that 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 *497 " 'affect wages, hours, terms and conditions of employment.' " Id. at *4. Applying R.C. 1.42 ("[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly"), the appellate court found that "[b]oth the language of [R.C. 2744.09(C)] and [prior] court decisions make clear that the term 'conditions of employment' refers to the conditions an employee must meet to maintain employment, not the conditions an employee works within." Id.

{¶ 21} We find the reasoning in *Fabian* persuasive and hold that R.C. 2744.09(C) **214 does not except an employer-intentional-tort claim from the general grant of immunity granted to a political subdivision under R.C. Chapter 2744. See also *Terry*, 151 Ohio App.3d 234, 783 N.E.2d 959; *Dollis v. City of Tallmadge*, 2004-Ohio-4454, 2004 WL 1885348; and *Coolidge v. Riegler*, Hancock App. No. 5-02-59, 2004-Ohio-347, 2004 WL 170319.

{¶ 22} We therefore find that neither R.C. 2744.09(B) or (C) strips the city of its immunity under R.C. 2744.02 from appellant's intentional-tort claim.

{¶ 23} Finally, appellant argues that R.C. 2744.02 is unconstitutional because it violates Section 16, Article I of the Ohio Constitution, which provides for open access to the courts and for suits against the state. This argument has been rejected by several Ohio courts, including the Ohio Supreme Court. See *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 639 N.E.2d 31; *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 653 N.E.2d 1186; *Terry*, 151 Ohio App.3d 234, 783 N.E.2d 959; *Dollis*, 2004-Ohio-4454, 2004 WL 1885348; and *Coolidge*, 2004-Ohio-347, 2004 WL 170319.

{¶ 24} Likewise, Ohio appellate courts have rejected appellant's argument that R.C. 2744.02 is un-

constitutional because it violates the Equal Protection Clauses of the Ohio and United States Constitution. See *Dolts*, 2004-Ohio-4454, 2004 WL 1885348; *Fabian*; and *Coolidge*, 2004-Ohio-347, 2004 WL 170319. We find the reasoning and precedent of these cases to be persuasive.

{¶ 25} In light of all of the foregoing, we find that the trial court did not err by granting the city's summary-judgment motion against appellant on the ground that the city was immune under R.C. Chapter 2744 from appellant's employer-intentional-tort claim. Appellant's first assignment of error is overruled.

{¶ 26} Assignment of error No. 2:

{¶ 27} "The court erred in granting the city's motion for summary judgment as to the Bureau of Workers' Compensation."

[7] {¶ 28} Appellant argues that the trial court erred by granting the city's motion for summary judgment against the bureau. Appellant asserts that even if the city is immune from liability under R.C. Chapter 2744, R.C. 4123.931, *498 specifically R.C. 4123.931(I)(2) and (3),^{FN1} provides the bureau with an independent right of recovery and subrogates the bureau to appellant's rights against the city with respect to past, present, and estimated future payments of compensation and benefits. The bureau did not appeal the trial court's grant of summary judgment in favor of the city and against the bureau.

FN1. R.C. 4123.931(I) states that "[t]he statutory subrogation right of recovery applies to, but is not limited to * * * (2)[a]mounts that a claimant would be entitled to recover from a political subdivision, notwithstanding any limitations contained in [R.C.] Chapter 2744 * * *; (3)[a]mounts recoverable from an intentional tort action."

[8][9][10][11] {¶ 29} We decline to address

appellant's argument as we find that he lacks standing to appeal the grant of the city's summary-judgment motion against the bureau. It is well established that an appeal lies only on behalf of a party aggrieved by the final order appealed from. See *Midwest Fireworks Mfg. Co., Inc. v. Deerfield Twp. Bd. of Zoning Appeals* (2001), 91 Ohio St.3d 174, 743 N.E.2d 894. A party is aggrieved if it has an interest in the subject matter of the litigation that is "immediate and pecuniary" rather than "a remote consequence of the judgment." *Id.* at 177, 743 N.E.2d 894. To have standing to appeal, the person must be able to show he has a present interest in the subject matter of the litigation and that he has **215 been prejudiced by the judgment of the lower court. See *Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24, 591 N.E.2d 1203. The party seeking to appeal bears the burden of establishing standing. See *Deutsche Bank Trust Co. v. Barksdale Williams*, 171 Ohio App.3d 230, 2007-Ohio-1838, 870 N.E.2d 232.

{¶ 30} The record shows that the city raised the issue of appellant's standing to appeal the grant of the city's summary-judgment motion against the bureau in its appellate brief. Yet although he filed a reply appellate brief, appellant did not respond to the argument at all. He has therefore failed to establish standing. In addition, while appellant may have an interest in the subject matter of the litigation (his workers' compensation claim), we fail to see how he was aggrieved by the decision of the trial court. Certainly, the trial court's decision granting the city's summary-judgment motion against the bureau did not impede appellant's ability to pursue his intentional-tort claim against the city on appeal.

{¶ 31} We therefore find that appellant lacks standing to appeal the trial court's decision granting the city's motion for summary judgment against the bureau. Appellant's second assignment of error is overruled.

Judgment affirmed.

WALSH, P.J., and POWELL, J., concur.

895 N.E.2d 208
177 Ohio App.3d 490, 895 N.E.2d 208, 2008 -Ohio- 3594
(Cite as: 177 Ohio App.3d 490, 895 N.E.2d 208)

Ohio App. 12 Dist.,2008.
Williams v. McFarland Properties, L.L.C.
177 Ohio App.3d 490, 895 N.E.2d 208, 2008 -
Ohio- 3594

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 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Fifth District, Richland County.
 Debra L. ZIEBER, Plaintiff-Appellant

v.
 Robin HEFFELFINGER, et al., Defendants-Appellees.

No. 08CA0042.
 Decided March 17, 2009.

Appeal from the Richland County Court of Common Pleas, Case No. 06 CV 883.
 James H. Banks, Dublin, OH, for plaintiff-appellant.

Timothy S. Rankin, Jeffrey A. Stankunas, Columbus, OH, for defendants-appellees.

DELANEY, J.

*1 {¶ 1} Plaintiff-Appellant, Debra L. Zieber, appeals the April 16, 2008 decision of the Richland County Court of Common Pleas to grant Defendants-Appellees' Motions for Summary Judgment. The facts giving rise to this appeal are as follows.

{¶ 2} Appellant has been a Deputy Clerk with the office of Richland County Treasurer Bart Hamilton since February 1998. Defendant-Appellee, Robin Heffelfinger is the Chief Deputy Clerk with the Richland County Auditor Pat Dropsey.

{¶ 3} The Richland County Treasurer's Office and Auditor's Office share a database system. One of Appellant's responsibilities in the Treasurer's Office is the mailings. On May 18, 2006, Appellant had a discussion with an employee in the Auditor's

Office concerning mailings issued from the database system. Appellant followed up the discussion with an email to the same Auditor's Office employee.

{¶ 4} Later that day, Heffelfinger came to the Treasurer's Office to speak with Appellant concerning the email. Heffelfinger had Appellant's email and told Appellant that she wanted to speak privately with her in Mr. Hamilton's office regarding the email. Appellant voluntarily followed Heffelfinger into the empty office.

{¶ 5} While Appellant and Heffelfinger were in the office, Heffelfinger stood with her back to the closed door and faced Appellant, who stood near the desk in the center of the room. The parties then engaged in a loud discussion regarding the email and the mailing system. The other employees working in the Treasurer's office that afternoon could hear the argument. After a few minutes, Appellant informed Heffelfinger that she was leaving. Heffelfinger stepped forward and grabbed Appellant's right wrist, but quickly released her wrist and stepped back. Seconds later, Mona Adams from the Treasurer's Office knocked on the office door and simultaneously opened it. She opened the door a few inches when it hit Heffelfinger's foot. Ms. Adams stuck her head in the door and asked Heffelfinger to move her foot, which she immediately did. Ms. Adams opened the door the rest of the way and walked into the room. She asked the parties to stop yelling and for Heffelfinger to leave the Treasurer's Office.

{¶ 6} Appellant and Heffelfinger both exited the office and went to Appellant's desk. Appellant sat at her desk and Appellant, Heffelfinger, and two other Treasurer's Office employees professionally discussed the database and mailing system. After the ten-minute discussion, Heffelfinger leaned over and hugged Appellant. Appellant hugged her back. Heffelfinger then left the Treasurer's Office.

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{¶ 7} The following Monday, Appellant and Ms. Adams met with Mr. Hamilton about what had occurred. Mr. Hamilton recommended that Appellant file a police report, but Appellant declined stating that she wanted Mr. Dropsey to take disciplinary action against Heffelfinger. Mr. Hamilton asked the other Treasurer Office employees who witnessed the incident to make written statements about their observations. In their statements, the witnesses stated that Appellant showed them bruising on her right wrist.

*2 {¶ 8} Richland County Commissioner Gary Utt spoke with Appellant a few days later. Commissioner Utt was acting as a go-between for the Treasurer's Office and the Auditor's Office. Appellant apparently requested that Heffelfinger's employment be terminated, but Commissioner Utt stated it was an isolated incident. Appellant spoke further with Mr. Hamilton who stated that Mr. Dropsey and Heffelfinger were accusing Appellant of lying about the incident.

{¶ 9} As a result of the incident, Appellant states that she has suffered emotional stress that has caused her diabetic condition to deteriorate so that she now requires medication for treatment. She was also afraid to use the restroom at work in fear that she would run into Heffelfinger, further exacerbating her diabetes and causing kidney stones. She stated that she suffered bruising to her right wrist where Heffelfinger had grabbed it.

{¶ 10} On July 27, 2006, Appellant filed a complaint against Heffelfinger and Defendant-Appellee, Richland County, in the Richland County Court of Common Pleas. Because her complaint included claims under 42 U.S.C. § 1983, Appellees removed Appellant's complaint to federal court. Appellant filed a motion with the federal court requesting leave to file an amended complaint, which eliminated her federal claims, and for remand. The District Court granted Appellant's motion and remanded the matter back to the Richland County Court of Common Pleas.

{¶ 11} In Appellant's amended complaint, she alleged the following claims against Richland County: (1) civil conspiracy, (2) negligent hiring and retention, and (3) intentional infliction of emotional distress. She alleged the following against Heffelfinger: (1) assault and battery, (2) kidnapping, and (3) intentional infliction of emotional distress. Appellant sought to recovery compensatory damages, special damages, punitive damages, injunctive relief and reasonable attorney fees and costs.

{¶ 12} Appellees filed individual motions for summary judgment against Appellant's complaint. On April 16, 2008, the Richland County Court of Common Pleas granted summary judgment in favor of Appellees on all of Appellant's claims. It is from this decision Appellant now appeals.

{¶ 13} Appellant raises six Assignments of Error:

{¶ 14} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AND DISMISSING ALL OF PLAINTIFF-APPELLANT'S CLAIMS, SUCH THAT THE JUDGMENT MUST BE REVERSED.

{¶ 15} "II. THE TRIAL COURT ERRED IN FINDING THAT THE ACTS COMPLAINED OF BY THE PLAINTIFF-APPELLANT ARE NOT ACTIONABLE BASED UPON STATUTORY IMMUNITY SUCH THAT THE JUDGMENT MUST BE REVERSED.

{¶ 16} "III. THE TRIAL COURT APPLIED INCORRECT STANDARDS IN DETERMINING THE ISSUES OF ASSAULT AND BATTERY.

{¶ 17} "IV. THE TRIAL COURT APPLIED INCORRECT STANDARDS IN DETERMINING THE ISSUES OF KIDNAPPING AND FALSE IMPRISONMENT.

{¶ 18} "V. THE TRIAL COURT IMPROPERLY ANALYZED PLAINTIFF'S CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL

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*3 ¶ 19) "VI. THE TRIAL COURT'S DETERMINATION OF PLAINTIFF-APPELLANT'S CLAIMS OF NEGLIGENT HIRING/RETENTION IS NOT SUPPORTED BY THE FACTS OF THIS CASE."

¶ 20) Appellant's six Assignments of Error address the trial court's judgment entry granting summary judgment in favor of Appellees. In the interests of clarity and judicial economy, we consolidate the summary judgment issues presented in the assigned errors and address them jointly.

¶ 21) Summary judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

¶ 22) "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.3d 466, 472, 364 N.E.2d 267, 274."

¶ 23) As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

¶ 24) Appellant argues the trial court erred in its application of statutory immunity to her claims against Richland County and Heffelfinger.

CLAIMS AGAINST RICHLAND COUNTY

¶ 25) We will first address the applicability of statutory immunity to Appellant's claims of civil conspiracy, intentional infliction of emotional distress and negligent hiring/retention against Appellee Richland County.

¶ 26) R.C. Chapter 2744 was enacted by the General Assembly to provide Ohio's political subdivisions with immunity from tort liability, with a few enumerated exceptions. *Wilson v. Stark Cty. Dept. of Human Services* (1994), 70 Ohio St.3d 450, 452, 639 N.E.2d 105. A county is a political subdivision under the statute. R.C. 2744.01(E). As a general rule, "[e]xcept as provided in [R.C. 2744.02](B) * * *, a political subdivision is not liable in damages in a civil action for injury * * * allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.02(A)(1). R.C. 2744.02(B) lists five exceptions to the general grant of immunity: the negligent operation of a motor vehicle by an employee, R.C. 2744(B)(1); the negligent performance of acts by an employee with respect to a proprietary function, R.C. 2744.02(B)(2); the negligent failure to keep public roads in repair and open, R.C. 2744.02(B)(3); the negligence of employees occurring within or on the grounds of buildings used in connection with the performance of governmental functions, R.C. 2744.02(B)(4); and when civil liability is expressly imposed upon the political subdivision by statute, R.C. 2744.02(B)(5).

*4 ¶ 27) Upon review of Appellant's claims against Richland County, we find that the R.C. 2744.02(B) exceptions to immunity are not applicable and further, Appellant's claims of intentional infliction of emotional distress and civil conspiracy are specifically barred pursuant to R.C. 2744.02. Ohio courts have consistently held that political subdivisions are immune under R.C. 2744.02 from intentional tort claims. See *Thayer v. W. Carrollton Bd. of Edn.*, Montgomery App. No. 20063, 2004-Ohio-3921; *Terry v. Ottawa Cty. Bd. of Men-*

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tal Retardation & Developmental Disabilities, 151 Ohio App.3d 234, 783 N.E.2d 959, 2002-Ohio-7299; *Fabian v. Steubenville* (Sept. 28, 2001), Jefferson App. No. 00 JE 33, 2001 WL 1199061; *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), Summit App. No. 18029; *Coats v. Columbus*, Franklin App. No. 06AP-681, 2007-Ohio-761; and *Sabulsky v. Trumbull Cty.*, Trumbull App. No.2001-T-0084, 2002-Ohio-7275. See also *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 639 N.E.2d 105 ("Consequently, except as specifically provided in R.C. 2744.02(B)(1), (3), (4) and (5), with respect to governmental functions, political subdivisions retain their cloak of immunity from lawsuits stemming from employees' negligent or reckless acts. * * * There are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress"); *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 8, quoting *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 452, 639 N.E.2d 105 ("This court has reviewed R.C. 2744.02(B)(5) in the context of intentional torts and concluded that 'there are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress'"); *USX v. Penn Central Corp.* (2000), 137 Ohio App.3d 19, 26, 738 N.E.2d 13 ("Civil conspiracy is considered an intentional tort"). § ¶ 28) Appellant next argues that R.C. Chapter 2744 is inapplicable to an employer intentional tort under R.C. 2744.09(B). R.C. 2744.09 sets forth several exceptions that remove certain types of civil actions entirely from the purview of R.C. Chapter 2744. *Williams v. McFarland Properties*, 117 Ohio App. 3d, 2008-Ohio-3594, 895 N.E.2d 208, at ¶ 13. R.C. 2744.09(B) states that R.C. Chapter 2744 "does not apply to * * * [c]ivil 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."

{¶ 29} While Appellant's injuries arguably oc-

curred within the scope of her employment, we agree with the majority of other 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. See *Williams*, supra; *Terry v. Ottawa Cty. Bd. Of MRDD*, 151 Ohio App.3d 234, 2002-Ohio-7299, 783 N.E.2d 959; *Chase v. Brooklyn City School Dist.* (2001) 141 Ohio App.3d 9, 749 N.E.2d 798; *Engleman v. Cincinnati Bd. of Edn.* (June 22, 2001), Hamilton App. No. C-000597; *Stanley v. Miamisburg* (Jan. 28, 2000), Montgomery App. No. 17912; *Ventura v. Independence* (May 7, 1998), Cuyahoga App. No. 72526; *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), Summit App. No. 18029. But see, *Nagel v. Horner*, 162 Ohio App.3d 221, 833 N.E.2d 300, 2005-Ohio-3574 and *Marcum v. Rice* (July 20, 1999), Franklin App. Nos. 98AP717, 98AP718, 98AP719 and 98AP721. The rationale underlying this finding is that an employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside of the scope of employment. *Terry*, supra; *Williams*, supra, citing *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, paragraph one of the syllabus. As stated in *Terry*, supra, we decline to depart from established appellate law and find that R.C. 2744.09(B) does not except an employer intentional tort from the immunity granted under the Political Subdivision Tort Liability Act.

*5 {¶ 30} The remaining claim against Richland County is Appellant's cause of action for negligent hiring/retention. The parties agree that this tort is excepted from statutory immunity under R.C. 2744.09(B) as this claim arose from the employment relationship between Appellant and Richland County. Appellant argues in her sixth Assignment of Error the trial court erred in granting summary judgment to Richland County on this claim. We disagree.

{¶ 31} The elements of a negligent hiring and retention claim are: (1) the existence of an employ-

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ment relationship; (2) the fellow employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission which caused the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as a proximate cause of the injury. *Hull v. J.C. Penney Co.*, Stark App. No.2007CA00183, 2008-Ohio-1073, at ¶ 29.

{¶ 32} The trial court determined that Appellant's claim failed as matter of law because Appellant did not provide any Civ.R. 56 evidence creating a genuine issue of fact that Heffelfinger had a propensity toward violence or aggression to render her an incompetent employee or that Richland County was aware that Heffelfinger had such a propensity prior to the incident on May 18, 2006.

{¶ 33} We agree with the trial court's determination upon our review of the evidence presented. In Appellant's deposition, she testified that after the May 18, 2006 incident, an employee told her that Heffelfinger previously had a confrontation with another employee. (Zieber Depo., pp. 65-68). Appellant also stated that she personally witnessed Appellant yell at another employee. (Zieber Depo., p. 68). Appellant did not present any Civ.R. 56 evidence that Richland County was aware of Heffelfinger's conduct before the May 18, 2006 incident. Construing the facts in a light most favorable to Appellant, we cannot find that Richland County had actual or constructive knowledge of Heffelfinger's incompetence.

{¶ 34} In response to Defendants-Appellees' Motions for Summary Judgment, Appellant submitted her affidavit concerning the events at issue. The trial court determined that Appellant's affidavit was inconsistent with her prior deposition testimony and the affidavit did not provide an explanation for the contradictions to her prior testimony. As such, the trial court found pursuant to *Byrd v. Smith*, 110 Ohio St.3d 24, paragraphs one and two of the syllabus, it would not "consider those affidavit statements when evaluating whether or not genuine issues of fact exist that would preclude summary

judgment." (Judgment Entry, Apr. 16, 2008). Appellant did not raise this issue as an Assignment of Error, but appears to argue it within her first Assignment of Error that the trial court erred in granting summary judgment in favor of Appellees. Upon our *de novo* review of this matter, we must agree with the trial court's analysis and application of *Byrd*, supra.

*6 {¶ 35} Accordingly, Appellant's Assignments of Error as they relate to the trial court's decision to grant summary judgment in favor of Richland County are overruled.

CLAIMS AGAINST HEFFELFINGER

{¶ 36} We will next address Appellant's claims against Heffelfinger. As stated above, Appellant alleged the following against Heffelfinger: (1) assault and battery, (2) kidnapping, and (3) intentional infliction of emotional distress. Heffelfinger argued in her motion for summary judgment that she was entitled to summary judgment on Appellant's claims based upon the statutory immunity granted by R.C. 2744.03(A)(6).

{¶ 37} R.C. 2744.03(A)(6) is the relevant statute when dealing with immunity for political subdivision employees. It provides:

{¶ 38} "(A) In a civil action brought against * * * an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

{¶ 39} " * * *

{¶ 40} "(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or section 3746.24 [providing immunity in situations involving voluntary cleanup of contaminated property] of the Revised Code, the employee is immune from liability unless one of the following ap-

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plies:

{¶ 41} "(a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;

{¶ 42} "(b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

{¶ 43} "(c) Liability is expressly imposed upon the employee by a section of the Revised Code."

{¶ 44} "R.C. 2744.03(A)(6) operates as a presumption of immunity." *Lutz v. Hocking Technical College* (May 18, 1999), Athens App. No. 98CA12, citing *Cook v. Cincinnati* (1995), 103 Ohio App.3d 80, 90, 658 N.E.2d 814, 820-821. It is a qualified immunity, in the sense that it will attach so long as one of the exceptions does not apply. *Lutz*, supra. To defeat summary judgment in favor of Heffelfinger, Appellant was required to present evidence tending to show a material issue of fact as to one of the exceptions to qualified immunity, e.g., Heffelfinger's act was beyond the scope of employment or was performed with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 45} The trial court determined there was no genuine issue of material fact as to whether Heffelfinger acted beyond the scope of her employment or whether she acted with malicious purpose, in bad faith, or in a wanton and reckless manner. We will address each of Appellant's claims against Heffelfinger under our *de novo* review to determine the applicability of R.C. 2744.03(A)(6).

{¶ 46} Appellant argues in her third Assignment of Error the trial court erred in its determination of Appellant's claim of assault and battery against Heffelfinger. We agree in part.

*7 {¶ 47} A cause of action for civil assault involves "the 'intentional offer or attempt, without authority or consent, to harm or offensively touch another that reasonably places the other in fear of such contact.'" *Hopkins v. Columbus Bd. Of Educ.*,

Franklin App. No. 07AP-700, 2008-Ohio-1515, ¶ 29 citing *Batchelder v. Young*, Trumbull App. No.2005-T-0150, 2006-Ohio-6097. A cause of action for battery "involves the 'intentional, unconsented, contact with another.'" *Id.* Appellant's claim for assault and battery is based upon the heated exchange that occurred in the office culminating in Heffelfinger grabbing Appellant's wrist with enough pressure to leave a bruise.

{¶ 48} We first find the trial court was correct in its determination that the Civ.R. 56 evidence presented did not demonstrate any genuine issue of material fact that Heffelfinger's actions were done with malicious purpose, in bad faith, or in a wanton and reckless manner. "Wanton misconduct" has been defined as a failure to exercise any care whatsoever. *Jackson v. McDonald* (2001), 144 Ohio App.3d 301, 309, 760 N.E.2d 24 citing *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 4 O.O.3d 243, 363 N.E.2d 367, syllabus. In *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97, 55 O.O.2d 165, 166, 269 N.E.2d 420, 422, the Ohio Supreme Court stated that "mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor." The perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury. *Id.* at 97, 55 O.O.2d at 166, 269 N.E.2d at 423. To act in reckless disregard of the safety of others, the conduct must be of such risk that it is substantially greater than that which is necessary to make the conduct negligent. *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104, 559 N.E.2d 705, 708.

{¶ 49} "Bad faith" has been defined as a "dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud." *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 454, 602 N.E.2d 363, 367, quoting *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, 21 O. O.2d 420, 187 N.E.2d 45, paragraph two of the syllabus. "Malice"

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has been defined as "willful and intentional design to do injury." *Id.*, 76 Ohio App.3d at 453-454, 602 N.E.2d at 367.

{¶ 50} However, examination of the issue of whether the intentional tort of assault and battery is within the scope of employment yields a different result. In determining whether an employee's act is within the scope of employment, the Ohio Supreme Court set the following rationale in *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58, 565 N.E.2d 584:

{¶ 51} "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. Moreover, where the tort is intentional, as in the case at bar, the behavior giving rise to the tort must be 'calculated to facilitate or promote the business for which the servant was employed * * *.' *Little Miami RR. Co. v. Wetmore* (1869), 19 Ohio St. 110, 132; *Taylor v. Doctor's Hosp.* (1985), 21 Ohio App.3d 154, 21 OBR 165, 486 N.E.2d 1249. For example, an employer might be liable for an intentional tort if an employee injures a patron when removing her from the employer's business premises or blocking her entry. The removal of patrons, who may be unruly, underage, or otherwise ineligible to enter, is calculated to facilitate the peaceful and lawful operation of the business. Consequently, an employer might be liable for an injury inflicted by an employee in the course of removal of a patron. See, e.g., *Stewart v. Napuche* (1952), 334 Mich. 76, 53 N.W.2d 676; *Kent v. Bradley* (Tex.Civ.App.1972), 480 S.W.2d 55.

*8 {¶ 52} "However, the employer would not be liable if an employee physically assaulted a patron without provocation. As we held in *Vrabel v. Acri* (1952), 156 Ohio St. 467, 474, 46 O.O. 387, 390, 103 N.E.2d 564, 568, 'an intentional and willful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person, is a clear departure from his employment and his principal or employer is not responsible therefor.' See, also, *Schulman v. Cleveland*

(1972), 30 Ohio St.2d 196, 59 O.O.2d 196, 283 N.E.2d 175. In other words, an employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business."

{¶ 53} Construing the Civ.R. 56 evidence most favorably to Appellant, we hold that there is genuine issue of material fact that Heffelfinger's action of grabbing Appellant's wrist with enough force to leave a bruise was not within the scope of Heffelfinger's employment as a Chief Deputy Auditor. While the discussion between Heffelfinger and Appellant regarding the database system was calculated to facilitate or promote the business for which the servant was employed, when Heffelfinger grabbed Appellant's wrist to prevent her from leaving the discussion, her act creates a genuine issue of material fact whether Heffelfinger was acting outside the scope of employment.

{¶ 54} The Ohio Supreme Court has made a similar determination regarding the exception to the qualified immunity of a public employee. In order to determine for purposes of governmental immunity whether an attorney for the City of Cleveland was acting within the scope of his employment when he physically assaulted his opposing counsel, the Ohio Supreme Court stated,

{¶ 55} "We are unable to discern any grant of authority in either the Revised Code or the Cleveland Municipal Charter which allows an assistant law director to gratify his personal resentments, either in the form of a physical assault or a lawsuit arising therefrom, while engaged in the execution of his appointed tasks." *Schulman v. City of Cleveland* (1972), 30 Ohio St.2d 196, 197, 283 N.E.2d 175.

{¶ 56} We find Appellant has presented evidence tending to show a material issue of fact as to an exception to qualified immunity under R.C. 2744.03(A)(6)(a) to defeat summary judgment on this issue. Further, we find this same evidence demonstrates a genuine issue of material fact as to

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Appellant's claim for battery. Considering the evidence is a light most favorable to Appellant, we find that Heffelfinger's act of grabbing Appellant's wrist could be construed as an intentional, unconsented touching of another. We note the trial court reached the same determination on Appellant's claim for battery and would have denied summary judgment on that claim, but for its application of qualified immunity to Heffelfinger.

{¶ 57} The evidence in this matter, however, does not lend the same credence to Appellant's claim for assault. There was no evidence presented that Heffelfinger intentionally offered or attempted, without authority or consent, to harm or offensively touch Appellant to reasonably place Appellant in fear of such contact. In Appellant's deposition, counsel asked Appellant what Appellant said to her when they were alone in the office. Appellant responded, "It's kind of hard to remember everything she said because she was talking so loud. So I would say that she said I didn't understand their side would be one of them. I don't know. Mostly it was that, and then she would talk over top of me when I would try to explain" (Zieber Depo., p. 35). Counsel cross-examined Appellant regarding the moments when Heffelfinger grabbed Appellant's wrist.

*9 {¶ 58} "A. She moved forward one time that I can remember and that was to grab my wrist.

{¶ 59} "Q. And you are saying she moved forward to you or you stepped towards her and the door?

{¶ 60} "A. No. She grabbed me first before I stepped forward.

{¶ 61} "Q. And that was precipitated by you simply saying I'm leaving now?

{¶ 62} "A. I would think so, yes. * * *"
 (Zieber Depo., p. 26).

{¶ 63} Appellant testified that other than Heffelfinger grabbing her wrist, there was no other

contact between her and Heffelfinger during the time they were in the office alone. (Zieber Depo., p. 27).

{¶ 64} Accordingly, Appellant's first, second and third Assignments of Error are sustained in part and overruled in part.

{¶ 65} Appellant's fourth Assignment of Error argues the trial court incorrectly determined Heffelfinger was entitled to judgment as a matter of law on Appellant's claim of kidnapping, which the trial court restyled as false imprisonment.

{¶ 66} False imprisonment occurs when a person confines another intentionally without privilege and against her consent within a limited area for any appreciable time, however short. *Bennett v. Ohio Dept. of Rehab. & Corr.* (1991), 60 Ohio St.3d 107, 109, 573 N.E.2d 633. When an individual voluntarily agrees to be in a certain place, however, that individual is not confined since she is not held against her will. *Sharp v. Cleveland Clinic*, 176 Ohio App.3d 226, 2008-Ohio-1777, 891 N.E.2d 809, at ¶ 23 citing *Denovich v. Twin Valu Stores, Inc.* (Feb. 23, 1995), Cuyahoga App. Nos. 67580 and 67922.

{¶ 67} As a first matter, we must determine whether Appellant has presented genuine issues of material fact to overcome Heffelfinger's presumption of immunity pursuant to R.C. 2744.03(A)(6). Appellant does not dispute that she voluntarily went into the private office with Heffelfinger. Appellant argues that the false imprisonment occurred when Heffelfinger stood in front of the door and placed her foot in front of the door. Using the analysis stated above regarding R.C. 2744.03(A)(6), we cannot find by construing these facts most favorably to Appellant that Appellant has defeated the presumption of Heffelfinger's immunity. First, Appellant went into the room voluntarily. Second, the location of Heffelfinger in the room does not demonstrate Heffelfinger's action was outside the scope of employment or that she acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Ap-

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pellant testified that she could not say that Heffelfinger was standing in a position to prevent anyone from entering the door. (Zieber Depo., p. 51). Third, Appellant testified, as corroborated by Ms. Adams, that when Ms. Adams attempted to open the door and could not because of the placement of Heffelfinger's foot, Heffelfinger immediately moved her foot so that Ms. Adams could fully open the door and enter the room. (Zieber Depo., pp. 50-52, Adams Depo., 25-26).

*10 {¶ 68} Appellant also argues that Heffelfinger's grabbing of Appellant's wrist could be construed as imprisonment for purposes of the false imprisonment claim. We disagree with this argument because Appellant testified that as soon as Heffelfinger grabbed her wrist, Heffelfinger immediately let go. While the contact may be sufficient to constitute an unconsented and offensive touch for purposes of battery, we cannot find the grabbing of the wrist and immediate release to create a genuine issue of material fact for purposes of false imprisonment. Construing the facts most favorably to Appellant, we cannot find a genuine issue of material fact to overcome the presumption of immunity pursuant to R.C. 2744.03(A)(6). Assuming *arguendo* the facts were such that Appellant met her burden under R.C. 2744.03(A)(6), we find there exist no genuine issues of material fact as to her claim for false imprisonment.

{¶ 69} Appellant's fourth Assignment of Error is therefore overruled.

{¶ 70} Appellant argues in her fifth Assignment of Error the trial court incorrectly analyzed Appellant's claim of intentional infliction of emotional distress. We disagree. This Court discussed the standard for demonstrating a claim for intentional infliction of emotional distress in *Hull v. J.C. Penney*, *supra*. We stated:

{¶ 71} "The court correctly cited the seminal case of *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369. In *Yeager*, the Supreme Court found one who by extreme and outrageous conduct intention-

ally or recklessly causes serious emotional distress to another is subject to liability for damages due to the emotional distress. The Supreme Court warned it is insufficient that the tortfeasor acted with tortious, or even criminal, intent. It is insufficient to show malice, or a degree of aggravation which would entitle a plaintiff to punitive damages for other torts. Liability for intentional infliction of emotional distress requires conduct so outrageous in character and extreme in degree as to go beyond all possible bounds of decency, which would be regarded as atrocious and utterly impossible in a civilized community, *Yeager* at 374-375." *Id.* at ¶ 26.

{¶ 72} The trial court did not err in finding no disputed facts as to whether Heffelfinger acted with malicious purpose, in bad faith, or in a wanton or reckless manner for the purposes of Appellant's claim for intentional infliction of emotional distress. The Civ.R. 56 evidence does not rise to the level of a conscious disregard of the fact that her conduct would in all probability result in injury. The next determination is whether Appellant has established a genuine issue of material fact that Heffelfinger's alleged intentional infliction of emotional distress was outside the scope of employment.

{¶ 73} Upon review of the record and construing the facts most favorably to Appellant, we cannot find that Heffelfinger's interactions with Appellant on May 18, 2006, and thereafter, remove Heffelfinger from her scope of employment in regards to this specific claim. We further find that even if Appellant overcame the presumption of immunity, her claim for intentional infliction of emotional distress would not survive summary judgment. We agree with the trial court that Heffelfinger's actions towards Appellant were not so outrageous in character and extreme degree as to go beyond all possible bounds of decency and to be regarded by a civilized community as atrocious. Appellant's fifth Assignment of Error is overruled.

*11 {¶ 74} Accordingly, pursuant to our above analysis, we hereby overrule in part and sustain in

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part Appellant's first, second and third Assignments of Error. We overrule Appellant's fourth, fifth and sixth Assignments of Error in their totality.

{¶ 75} The judgment of the Richland County Court is affirmed in part, reversed in part and remanded to the trial court for further proceedings consistent with this decision and judgment entry.

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed in part, reversed in part and remanded for further proceedings consistent with this decision and judgment entry. Costs are to be split between Appellant and Appellees.

DELANEY, J., HOFFMAN, P.J. and WISE, J.,
concur.

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▶ CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.
Susan COATS, Administrator of the Estate of Lt.
Brandon Ratliff, Plaintiff-Appellant,

v.

City of COLUMBUS, Defendant-Appellee.

No. 06AP-681.
Decided Feb. 22, 2007.

Appeal from the Franklin County Court of Common Pleas.
Blue, Wilson and Blue, and Douglas J. Blue, for appellant.

Richard C. Pfeiffer, Jr., City Attorney, and Glenn Redick, for appellee.

SADLER, P.J.

*1 ¶ 1 Appellant, Susan Coats, Administrator of the Estate of Lieutenant Brandon Ratliff, deceased ("appellant"), filed this appeal seeking reversal of a decision by the Franklin County Court of Common Pleas granting summary judgment in favor of appellee, City of Columbus ("appellee" or "the City"). For the reasons that follow, we affirm the trial court's decision.

¶ 2 Brandon Ratliff ("Brandon") was employed by the Columbus Health Department starting in 1995, as a seasonal employee while still in high school. In 2001, Brandon started working full-time for the Health Department as a Disease Intervention Specialist. At some point, Brandon approached Debbie Coleman, his manager at the Health Department, and told her he was experiencing financial problems and needed a job that

would pay him more money. The two discussed a Health Education Program Planner position that would be available as part of a grant program that was funded for the period from October 1, 2002 through September 30, 2003. Brandon applied for and was ultimately offered the position. Appropriate personnel action forms were completed, and the only action remaining to be taken was what was known as the "civil service walkthrough," which entailed having Brandon sign some forms and have his picture taken.

¶ 3 The week before Brandon was to start in his new position, he received orders to report for military duty as part of the Army Reserves. Brandon was deployed to Afghanistan, where he served in a medical unit until he returned to Columbus in June of 2003. Brandon returned to work at the Health Department in September of 2003.

¶ 4 While Brandon was deployed in Afghanistan, Larry Thomas, Human Resources Director for the Health Department, determined that since Brandon had not completed the process of taking his new position, there was no requirement that the position be held for him pending his return from military service. Instead, the position was given to Linda Norris, a Health Education Program Planner in a different program, who was about to be laid off from her position due to budget constraints. Ms. Norris questioned her placement in that position because she was aware the position had been offered to Brandon before he left for military service, but was told that Brandon had not signed the papers necessary to actually take the position.

¶ 5 Thus, upon his return from military service, Brandon returned not to the position he had been about to start, but to his old job as a Disease Intervention Specialist. Brandon was working in a work area in which he had no computer and no other work equipment other than a shared telephone, which had not been the case before he was deployed to Afghanistan. Brandon expressed to some

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of his co-workers that he felt hurt by this situation, and like he had been demoted for some reason.

{¶ 6} In February of 2004, Brandon went to meet with Thomas Horan, Assistant Commissioner of the Health Department, to express his feelings about the way he had been treated upon his return from Afghanistan. Mr. Horan told Brandon he would look into the situation to see if there was anything that could be done, and that this process would take a couple of weeks. Mr. Horan then directed Larry Thomas to investigate what had happened and to see if anything needed to be done. Mr. Horan also consulted with Alan Varhus of the City Attorney's office regarding the issue.

*2 {¶ 7} On March 5, 2004, Mr. Horan met with Brandon again. Mr. Horan explained that based on the review that had been conducted, he believed the City had taken all legal steps it was required to take when Brandon returned to work. Mr. Horan offered to hold further discussions regarding the issue, but Brandon ultimately informed him that someone representing him would contact the City for any further discussions.

{¶ 8} On March 15, 2004, the Columbus Dispatch published an article detailing Brandon's story. The story was seen by a number of City officials, including Mr. Horan, Dr. Teresa Long of the Health Department, and Mayor Michael Coleman. Mayor Coleman's Chief of Staff, Michael Schwarzwald, contacted Dr. Long and expressed Mayor Coleman's wishes that Brandon receive the promotion he had been promised or a comparable job or, in the lack of an available comparable job, that Brandon at least be given the additional salary he would have received with the promotion. Dr. Long then began to take steps to follow the Mayor's wishes.

{¶ 9} Unfortunately, the efforts undertaken by City officials on Brandon's behalf were not communicated to him. On March 16, 2004, Brandon visited the office of Health Department's Employee Assistance Program for counseling, where he expressed the mental and emotional problems he was

experiencing as a result of the situation. On March 18, 2004, Brandon shot and killed himself.

{¶ 10} Appellant, Brandon's mother and the administrator of his estate, filed this action alleging two causes of action: one a survivorship action seeking recovery for intentional infliction of emotional distress, and the other a wrongful death claim. The trial court ultimately granted summary judgment to appellee, and appellant filed this appeal alleging the following as the sole assignment of error:

THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFF/APPELLEE (sic) IN GRANTING DEFENDANT/APPELLEE'S BECAUSE (sic) REASONABLE MINDS COULD DIFFER AS TO WHETHER DEFENDANT/APPELLEE ACTED WANTONLY OR RECKLESSLY DIRECTLY AND PROXIMATELY CAUSING INJURY AND DEATH TO LIETENANT (sic) BRANDON RATLIFF.

{¶ 11} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 654 N.E.2d 1327. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the nonmoving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Rels. Bd.* (1997), 78 Ohio St.3d 181, 183, 677 N.E.2d 343.

{¶ 12} The trial court concluded that appellee was entitled to judgment as a matter of law by application of the immunity granted to political subdivisions by R.C. Chapter 2744. In reviewing a claim of political subdivision immunity, R.C. Chapter 2744 sets forth a three-tiered analysis. *Cater v.*

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Cleveland (1998), 83 Ohio St.3d 24, 697 N.E.2d 610. First, R.C. 2744.02(A)(1) sets forth the general rule that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Next, it is necessary to determine whether any of the exceptions to this general rule listed in R.C. 2744.02(B)(1) through (5) are applicable. Finally, if it is determined that one of the exceptions might apply, the political subdivision may assert one of the affirmative defenses set forth in R.C. 2744.03(A). See *Colbert v. Cleveland* (2003), 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781.

*3 {¶ 13} In this case, there is no question that appellee is a political subdivision entitled to the general rule of immunity. Therefore, the issue is whether any of the exceptions to immunity set forth in R.C. 2744.02(B)(1) through (5) would apply to appellant's claims. Initially, we note that at the trial court, there was some argument about whether appellee violated a statutory duty under the Uniformed Service Employment and Reemployment Rights Act ("USERRA"). The trial court concluded that jurisdiction to hear USERRA claims is vested solely in the Federal courts, and the statute could therefore not be used as the basis for appellant's claims. In her appellate brief, appellant specifically stated that she is not claiming any violation of USERRA, the collective bargaining agreement covering City Health Department employees, or the City's Management Compensation Plan. Thus, it is not necessary for us to consider that portion of the trial court's decision.

{¶ 14} Appellant's survivorship and wrongful death claims allege the intentional infliction of emotional distress. Ohio courts have traditionally and consistently held that since R.C. 2744.02 includes no provisions excepting intentional torts from the general rule of immunity, political subdivisions are immune from intentional tort claims.

Featherstone v. City of Columbus, Franklin App. No. 06-89, 2006-Ohio-3150, citing *Wilson v. Stark Cty. Dept. of Hum. Servs.* (1994), 70 Ohio St.3d 450, 1994-Ohio-394, 639 N.E.2d 105; *Hubbard v. Canton City Sch. Bd. Of Edn.* (2002), 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543.

{¶ 15} Appellant argues that the cases applying political subdivision immunity to intentional tort claims are distinguishable because those cases involved claims that were outside the employer-employee context. R.C. 2744.09 does establish an exception to immunity for claims by an employee of a political subdivision arising out of the employee relationship between the employee and the political subdivision. However, Ohio courts have generally held that intentional tort claims, by definition, cannot arise out of the employee relationship because such intentional acts necessarily occur outside the scope of the employee relationship. See *Brady v. Safety Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722; *Ellithorp v. Barberton City Sch. Dist. Bd. of Edn.* (Jul. 9, 1997), Summit App. No. 18029.

{¶ 16} Appellant argues that the exception to political subdivision immunity set forth in R.C. 2744.02(B)(4) should apply here. Prior to April 9, 2003, that section specified that political subdivisions could be liable for negligence occurring on grounds or buildings used in conjunction with a governmental function. In *Hubbard*, supra, the Ohio Supreme Court held that this language was not limited to injuries suffered as a result of physical defects within the property. *Hubbard*, at syllabus.

{¶ 17} We reiterate that R.C. 2744.02(B) speaks solely in terms of negligence, a claim appellant has not made. Even if the exception were not limited to negligence claims, the General Assembly amended R.C. 2744.02(B)(4) effective April 9, 2003 to make it clear that the exception applies only to cases where the injuries resulted from physical defects in the property. Appellant argues that in this case, Brandon's injuries resulted from a course of conduct that began when he left for military service in October of 2002, and that the prior version

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of R.C. 2744.02(B)(4) and, by extension, the Ohio Supreme Court's decision in *Hubbard*, applies. However, it is clear that Brandon did not suffer any injury until after he returned to work in September of 2003. Therefore, the amended version of R.C. 2744.02(B)(4) would apply, and since appellant's claims were not based on injury resulting from a physical defect in appellee's property, the exception would not apply even if negligence had been raised.

*4 {¶ 18} Appellant also argues that appellee's immunity should be stripped away because appellant acted in a wanton or reckless manner in its dealings with Brandon. Appellant argues that R.C. 2744.03(A)(5) would apply in this situation. R.C. 2744.03(A)(5) provides that:

The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 19} As we noted in *Hiles v. Franklin Cty. Bd. of Commrs.*, Franklin App. No. 05AP-253, 2006-Ohio-16, R.C. 2744.03 does not create a basis for liability, but rather provides immunities and defenses to liability. *Hiles*, at ¶ 35. Under the framework set forth in *Cater*, supra, it is only necessary to consider whether one of the R.C. 2744.03 defenses applies if it is first determined that one of the exceptions to immunity in R.C. 2744.02(B)(1) through (5) applies, a hurdle appellant has not overcome in this case. Further, even if one of the exceptions to immunity did apply, the question of whether appellee acted in a reckless or wanton manner is only relevant to defeat a claim by the political subdivision that its action involved "the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources" as provided in R.C. 2744.03(A)(5). The City has not

asserted that as a defense.

{¶ 20} Even if appellee did not have the benefit of the immunity provided to political subdivisions, appellee correctly argues that it would still be entitled to summary judgment, because Brandon's suicide was an intervening cause for which appellee cannot be held responsible. It is well-settled that "[t]he general rule is that suicide constitutes an intervening force which breaks the line of causation stemming from the wrongful act, and, therefore, the wrongful act does not render the defendant civilly liable." *Fischer v. Morales* (1987), 38 Ohio App.3d 110, 112, 526 N.E.2d 1098. An exception to this general rule exists where the intervening cause could have been reasonably foreseen or was a normal incident of the risk involved. *Id.* at 112.

{¶ 21} In this case, Brandon's suicide could not have been reasonably foreseen, nor was it a normal incident of the risk involved. As we stated in *Fischer*, "It is common knowledge that virtually all human beings experience depression of varying degrees at various times of their lives. Depression is not an unusual emotional condition. Seldom does depression lead to suicide." *Id.* It is truly tragic that nobody with the City who was aware of the efforts being made on Brandon's behalf communicated to him that those efforts were being made, an act that may well have prevented the outcome that occurred. However, that failure cannot result in the imposition of legal liability against the City, because Brandon's act could not have been foreseen.

*5 {¶ 22} Consequently, we overrule appellant's assignment of error, and affirm the decision of the trial court.

Judgment affirmed.

BROWN and WHITESIDE, JJ., concur.
WHITESIDE, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

Ohio App. 10 Dist., 2007.

Not Reported in N.E.2d, 2007 WL 549462 (Ohio App. 10 Dist.), 2007 -Ohio- 761
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C
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Sixth District, Lucas County.
Timothy R. VILLA Appellant,

v.
VILLAGE OF ELMORE, et al. Appellees.

No. L-05-1058.
Decided Dec. 16, 2005.

Background: Former village police officer brought action against village, clerk of city municipal court, newspaper, and newspaper's editor for violation of expungement statute, invasion of privacy and defamation for release of information about conviction against him for impersonating an officer and charge against him for carrying a concealed weapon, notwithstanding expungement orders. The Court of Common Pleas, Lucas County, No. CI-03-1818, granted summary judgment defendants, and police chief appealed.

Holdings: The Court of Appeals, Parish, J., held that:
(1) order expunging officer's conviction of impersonating a police officer that was not journalized was not valid or enforceable;
(2) officer had no cause of action against village or municipal court clerk under expungement statute for failing to seal the record of his conviction and charge or for producing information relating to the conviction for impersonating an officer;
(3) village and municipal court clerk were not liable for failure to seal record of charge against officer for carrying concealed weapon under expungement order the officer had obtained over 20 years earlier or for not removing from his personnel file all documents relative to the weapon charge;
(4) village was exempt from action under Privacy

Act for release of information about conviction and charge;

(5) village was immune from claim for common law invasion of privacy; and

(6) newspaper and newspaper editor did not invade officer's right to privacy when they published articles about charges against him.

Affirmed.

[1] Criminal Law 110 ↪ 1226(3.1)

110 Criminal Law
110XXVIII Criminal Records
110k1226 In General
110k1226(3) Expungement or Correction;
Effect of Acquittal or Dismissal
110k1226(3.1) k. In General. Most
Cited Cases

Expungement order signed by municipal court judge expunging former village police officer's conviction for impersonating a police officer was not journalized as required by rule to become effective; letter from an official with the Attorney General's office that referred to a copy of the order, memo from clerk of court that referred to a certified copy of the order, and document purported to be written by municipal clerk regarding her search for officer's expungement documents did not show the order was in fact journalized. Rules Civ.Proc., Rule 58(A).

[2] Criminal Law 110 ↪ 1226(3.1)

110 Criminal Law
110XXVIII Criminal Records
110k1226 In General
110k1226(3) Expungement or Correction;
Effect of Acquittal or Dismissal
110k1226(3.1) k. In General. Most
Cited Cases

Expungement order signed by municipal court judge expunging former village police officer's conviction for impersonating a police officer that was



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not journalized was not valid or enforceable; order was not file-stamped indicating the order had been filed with the clerk for journalization, and fact that the officer relied on its validity and others may have believed it was valid did not constitute proof it was valid. Rules Civ.Proc., Rule 58(A).

[3] Criminal Law 110 ⇨ 1226(3.1)

110 Criminal Law
110XXVIII Criminal Records
110k1226 In General
110k1226(3) Expungement or Correction;
Effect of Acquittal or Dismissal
110k1226(3.1) k. In General. Most
Cited Cases

Whether former village police officer had actually been previously convicted of impersonating an officer was irrelevant to determination of whether an expungement order he obtained from municipal court was valid. Rules Civ.Proc., Rule 58(A).

[4] Criminal Law 110 ⇨ 1226(3.1)

110 Criminal Law
110XXVIII Criminal Records
110k1226 In General
110k1226(3) Expungement or Correction;
Effect of Acquittal or Dismissal
110k1226(3.1) k. In General. Most
Cited Cases

Former village police officer had no cause of action against village or municipal court clerk under expungement statute for failing to seal the record of his conviction for impersonating an officer and charge of carrying a concealed weapon or for producing information relating to the conviction for impersonating an officer; statutory order to expunge officer's conviction for impersonating an officer was not journalized as required by rule to be effective and the order to expunge the charge of carrying a concealed weapon for which he was not convicted was granted judicially, not under statute. R.C. § 2953.31 et seq.

[5] Clerks of Courts 79 ⇨ 72

79 Clerks of Courts
79k72 k. Liabilities for Negligence or Misconduct. Most Cited Cases

Criminal Law 110 ⇨ 1226(3.1)

110 Criminal Law
110XXVIII Criminal Records
110k1226 In General
110k1226(3) Expungement or Correction;
Effect of Acquittal or Dismissal
110k1226(3.1) k. In General. Most
Cited Cases

Limitation of Actions 241 ⇨ 58(2)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense

241k58 Liabilities Created by Statute
241k58(2) k. Liability of Municipality
or Public Officers. Most Cited Cases

Village and municipal court clerk were not liable for failure to seal the record of charge against former village police officer for carrying a concealed weapon under expungement order the officer had obtained over 20 years earlier or for not removing from his personnel file all documents relative to the weapon charge; there was no evidence showing misconduct on part of the present clerk, any claim against clerk in office at time of the order had abated under two-year statute of limitations, and there was no evidence in record that village received notice of the order. R.C. § 2744.04.

Village and municipal court clerk were not liable for failure to seal the record of charge against former village police officer for carrying a concealed weapon under expungement order the officer had obtained over 20 years earlier or for not removing from his personnel file all documents relative to the weapon charge; there was no evidence showing misconduct on part of the present clerk, any claim against clerk in office at time of the order had abated under two-year statute of limitations, and

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there was no evidence in record that village received notice of the order. R.C. § 2744.04.

Village and municipal court clerk were not liable for failure to seal the record of charge against former village police officer for carrying a concealed weapon under expungement order the officer had obtained over 20 years earlier or for not removing from his personnel file all documents relative to the weapon charge; there was no evidence showing misconduct on part of the present clerk, any claim against clerk in office at time of the order had abated under two-year statute of limitations, and there was no evidence in record that village received notice of the order. R.C. § 2744.04.

[6] Criminal Law 110 ⇨ 1226(3.1)

110 Criminal Law

110XXVIII Criminal Records

110k1226 In General

110k1226(3) Expungement or Correction;
 Effect of Acquittal or Dismissal
 110k1226(3.1) k. In General. Most Cited Cases

Village did not have duty to comply with expungement orders obtained by former village police officer expunging his conviction for impersonating an officer and his charge for carrying a concealed weapon, where village had not received copies of the orders from clerk of municipal court in action against village for failure to seal its records.

[7] Records 326 ⇨ 31

326 Records

326II Public Access

326II(A) In General

326k31 k. Regulations Limiting Access;
 Offenses. Most Cited Cases

Village was exempt from action under Privacy Act for release of information about conviction against former village police officer for impersonating an officer and charge of carrying a concealed weapon, notwithstanding an expungement order; officer's personnel file was maintained by and re-

leased by village's police chief, who kept the file as a part of his duties as the chief law enforcement officer for the village and was exempt under exception for release of information by individual who performed as principal function "activit[ies] relating to the enforcement of the criminal laws". R.C. §§ 1347.04(A)(1), 1347.10(A)(2).

[8] Municipal Corporations 268 ⇨ 747(3)

268 Municipal Corporations

268XII Torts

268XII(B) Acts or Omissions of Officers or Agents

268k747 Particular Officers and Official Acts

268k747(3) k. Police and Fire. Most Cited Cases

Cited Cases

Village was immune from former village police officer's claim for common law invasion of privacy for release of information about conviction against him for impersonating an officer and charge of carrying a concealed weapon; political subdivision was entitled to blanket immunity for tort action under statute where no exception applied. R.C. § 2744.02.

[9] Torts 379 ⇨ 351

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Communications in General

379k351 k. Miscellaneous Particular Cases. Most Cited Cases

Torts 379 ⇨ 357

379 Torts

379IV Privacy and Publicity

379IV(B) Privacy

379IV(B)3 Publications or Communications in General

379k356 Matters of Public Interest or Public Record; Newsworthiness

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379k357 k. In General. Most Cited Cases

Newspaper and newspaper editor did not invade police chief's right to privacy when it published articles about charges against him 30 years earlier for impersonating an officer and carrying a concealed weapon; articles were published within a few weeks of police chief's appointment in response to citizens' concern over his past performance in law enforcement, information related to chief's public life and was of legitimate concern to the public, and there was no evidence the published information was believed by the newspaper and editor to be private.

Marilyn L. Widman and Ellen Grachek, for appellant.

Michael K. Farrell and Kelly M. King, for appellees The Press and Kelly Kaczala.

Teresa L. Grigsby, James E. Moan and P. Martin Aubry, for appellees Village of Elmore, Clerk of Courts, and City of Sylvania Municipal Court.

DECISION AND JUDGMENT ENTRY

PARISH, J.

*1 ¶ 1 This is an appeal from a judgment of the Lucas County Court of Common Pleas that granted the motions for summary judgment filed by appellees on appellant's claims of a violation of Ohio's expungement statute, invasion of privacy and defamation. For the following reasons, this court affirms the judgment of the trial court.

¶ 2 Appellant sets forth nine assignments of error:

¶ 3 "1. The trial court erred when it determined as 'immaterial' the question of fact as to whether Plaintiff was convicted of impersonating an officer.

¶ 4 "2. The trial court erred when it determined that the expungement order signed by Judge Erb was not journalized.

¶ 5 "3. The trial court erred when it determined that the expungement order signed by Judge Erb was not valid and enforceable.

¶ 6 "4. The trial court erred when it ruled that Plaintiff does not have a claim against any Defendant under R.C. 2935.31 et seq. because Judge Handwork 'must have issued the [expungement] order pursuant to his judicial authority.'

¶ 7 "5. The trial court erred when it found Defendant Clerk had no liability for failing to seal the record of the CCW charge, despite the existence of a valid and enforceable expungement order.

¶ 8 "6. The trial court erred when it found Defendant Village did not have knowledge of either expungement order.

¶ 9 "7. The trial court erred when it determined Defendant Village was exempt from Ohio's Privacy Act.

¶ 10 "8. The trial court erred when it determined Plaintiff did not have any claim for common law invasion of privacy against Defendant Village.

¶ 11 "9. The trial court erred when it determined Plaintiff did not have any claim for common law invasion of privacy against Defendants Newspaper and Editor."

¶ 12 The facts relevant to the issues raised on appeal are as follows. Appellant was employed by the village of Elmore as a police officer from October 1969 until April 27, 1970. The record contains a letter dated May 2, 1970, to appellant from the village clerk notifying appellant that his services as deputy policeman were terminated as of April 27, 1970, and an undated memo from an officer with the Elmore Police Department to the Lucas County Sheriff's Office stating appellant was discharged on April 29, 1970.

¶ 13 In August 1970, appellant was charged in Sylvania Municipal Court with carrying a concealed weapon (case no. 25224) and impersonating

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a law enforcement officer (case no. 25225). A court journal entry for the weapon charge indicates appellant entered a not guilty plea and contains a notation that the case was bound over to the grand jury. A criminal docket index sheet confirms appellant entered a not guilty plea to the weapon charge. However, there is no indication in the record that appellant was ever convicted of that charge. As to the impersonating charge, the criminal docket index sheet indicates a "No C." plea was entered. However, the record also contains copies of subpoenas indicating the impersonating case was set for trial on October 23, 1970. Under "remarks" on the criminal docket index sheet is a notation that on October 23, 1970, the case was continued to the call of the prosecutor, along with the notation "Guilty."

*2 {¶ 14} The next event relevant to this appeal occurred in December 1976, when appellant filed an application for expungement of his conviction on the misdemeanor charge of impersonating a police officer. On March 28, 1977, an order for expungement regarding that charge was signed by Sylvania Municipal Court Judge William Erb. The order referred to appellant's no contest plea and the finding of guilty. The record also contains a copy of an order for expungement regarding the weapon charge signed July 26, 1978, by Lucas County Court of Common Pleas Judge Peter Handwork. That order referred to a journal entry dated December 21, 1970, which stated that no indictment was found against appellant on the charge of carrying a concealed weapon. The order further stated appellant was entitled to expungement of the record of the proceedings pursuant to R.C. 2953.31-2953.35.

{¶ 15} On July 17, 2000, appellee The Press, a newspaper published in Millbury, Ohio, printed an article which discussed the 1970 charges against appellant. The editor of the paper at that time was appellee Kelly Kaczala. At the time the article was published, appellant was employed as chief of police for the village of Walbridge, Ohio, an area served by The Press. Appellees village of Elmore ("village") and the clerk of courts, City of Sylvania

Municipal Court, both made information regarding the 1970 charges available in response to public records requests by The Press. Information made available by the village of Elmore consisted of appellant's personnel file, which included two subpoenas on which were written the Sylvania Municipal Court case numbers for the impersonating and weapons charges. The reporter then went to the Sylvania Municipal Court Clerk's Office and was allowed to review the criminal docket index sheet containing information on the charges. The Press published a follow-up article on December 10, 2001.

{¶ 16} On February 21, 2003, appellant filed a complaint in the trial court against the village of Elmore and the Clerk of Sylvania Municipal Court claiming a violation of R.C. 1347 (the Ohio Privacy Act), invasion of his common law privacy rights, and a violation of the Ohio expungement statutes (R.C. 2953.31 et seq.). The complaint also asserted claims against The Press and Kaczala for common law invasion of privacy and defamation. Appellant claimed an order for expungement regarding the impersonation charge was entered with the clerk in the Sylvania Municipal Court in 1977, and an order for expungement of the concealed weapon charge was entered with the Lucas County Court of Common Pleas in 1978. Appellant further claimed the clerk of Sylvania Municipal Court and the village of Elmore intentionally permitted The Press to have access to sealed records and information that was personal and confidential.

{¶ 17} On August 19, 2003, the trial court denied a motion to dismiss filed by The Press and Kaczala. A motion for summary judgment was filed by appellees village and clerk on July 14, 2004, and by appellees The Press and Kaczala on July 26, 2004. Appellant filed oppositions to both motions and appellees filed replies. On July 19, 2005, the trial court granted both motions for summary judgment.

*3 {¶ 18} This court notes at the outset that in reviewing a motion for summary judgment, we

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must apply the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129, 572 N.E.2d 198. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 19} In support of his appeal, appellant asserts the trial court overlooked material facts which raise genuine issues as to several of his claims. Appellant's first three assignments of error relate to the charge of impersonating a police officer; for reasons of clarity, we will address appellant's second and third assignments of error before addressing the first.

[1] {¶ 20} In his second and third assignments of error, appellant asserts the trial court erred by finding that the expungement order from Sylvania Municipal Court was never journalized and therefore not valid and enforceable. In considering whether the expungement statutes were violated by the clerk of the Sylvania Municipal Court, the trial court found there was no evidence in the record that the 1977 order to expunge the impersonating offense was ever journalized. Civ.R. 58(A), effective July 1, 1970, states that "[a] judgment is effective only when entered by the clerk upon the journal." Appellant calls the court's attention to several documents which he claims raise a question of fact as to whether the order was journalized, including a letter from an official with the Ohio Attorney General's office that referred to a copy of the order; a memo from the Lucas County clerk of courts that referred to a certified copy of the expungement order; and a document purported to be written by Sylvania Municipal Clerk of Courts Bonnie Chromik regarding her search for appellant's expungement documents. Upon review, however, we find that none of the documents offered by appellant show that the order was in fact journalized. Accordingly, the trial court properly found that the or-

der expunging the impersonating conviction was not journalized and appellant's second assignment of error is not well-taken.

[2] {¶ 21} Having determined there was no evidence that the order was journalized, the trial court found that it was therefore not valid and enforceable. In his third assignment of error, appellant asserts the judgment was valid and enforceable regardless of whether it was journalized. Appellant appears to argue the order is valid and enforceable because he relied on its validity. Appellant also attempts to gloss over the absence of a file-stamped and journalized order by citing to some documents in the case file which referred to the order. The documents cited by appellant, set forth above in paragraph 20, do not constitute proof that the order was valid. The issue before the trial court was not whether there were other documents indicating some people believed the order to be valid, or whether appellant relied on the order's validity. The question before the trial court, which it correctly answered in the negative, was whether the expungement order was journalized. Ohio courts have consistently held that a court acts and speaks *only through its journal*. "[A] judge speaks as the court only through journalized judgment entries." *William Cherry Trust v. Hoffmann* (1985), 22 Ohio App.3d 100, 103, 489 N.E.2d 832. "[I]n order to be 'effective,' a court's judgment, whatever its form may be, must be filed with the trial court clerk for journalization." (Emphasis in original.) *Id.* at 105, 489 N.E.2d 832. Further, the expungement order at issue in this case is not file-stamped. As this court has held, proper journalization requires "some indication *on the document* that it was filed with the trial court clerk and, most importantly, when." (Emphasis added.) *Hoffmann*, supra, at 106, 489 N.E.2d 832. Accordingly, the trial court did not err by finding the impersonating expungement order was not valid and enforceable and appellant's third assignment of error is not well-taken.

*4 [3] {¶ 22} Appellant's first assignment of error stems from the trial court's findings as dis-

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cussed above. In this assignment of error, appellant argues the trial court erred by finding that whether he was actually convicted of impersonating an officer was "immaterial" in light of the failure of the Sylvania Municipal Court to journalize the order. As discussed above, the trial court based its finding as to the validity of the expungement order on the fact that the order was never journalized. The determining factor was that *the order was not journalized*; whether appellant was convicted of impersonating an officer was irrelevant to the issue of the order's validity. Appellant's first assignment of error is not well-taken.

{4} {¶ 23} In his fourth assignment of error, appellant asserts the trial court erred by finding that he did not have a claim against the village of Elmore and the Sylvania Municipal Court Clerk under R.C. 2935.31 et seq. for failure to honor the seals over his criminal records.

{¶ 24} As we found above under our discussion of appellant's second assignment of error, the expungement order signed by Judge Erb was not valid because it was never journalized. On that basis, appellant had no cause of action against the village or clerk under R.C. 2953.31 et seq. for failing to seal the record of his two cases or for producing information relating to the conviction for impersonating an officer. When the two orders herein were signed, there were two kinds of expungements in Ohio-judicial and statutory. A judicial expungement could be ordered when a defendant was charged but never convicted of an offense. See *City of Pepper Pike v. Doe* (1981), 22 Ohio St.2d 374. Once convicted, a defendant's remedy was a statutory expungement as allowed by R.C. 2953.32 for first offenders who applied to the sentencing court. It was not until 1984, approximately seven years after the orders in this case were signed, that a law was enacted providing for the sealing of records in cases which did not result in convictions. See R.C. 2953.51-.55. The expungement order signed by Judge Handwork was enforceable as a "judicially granted" expungement since it related to a charge

for which appellant was not convicted. However, because the authority for the concealed weapon expungement was not statutory in nature, appellant could not properly assert a claim under R.C. 2953.31 et seq. based on the clerk's disclosure of documents related to the charge. Since the one order was not journalized and the other was not statutorily granted, appellant *had no statutory basis* for a claim for violation of his rights under R.C. 2953.31 et seq. Appellant's fourth assignment of error is not well-taken.

{5} {¶ 25} In his fifth assignment of error, appellant asserts the trial court erred by finding the clerk and village had no liability for failing to seal their records relating to the concealed weapon charge. Appellant claims the clerk "failed to eradicate its docket references to the criminal charges from 1970." The record reflects, however, that the individual who was Clerk of the Sylvania Municipal Court when this action was filed was not in office when the expungement orders were signed more than 25 years earlier and had no knowledge of what may have occurred during that time in connection with the orders. Appellant has not presented any evidence showing misconduct on the part of the present clerk. Further, any claim against the clerk who was in office in 1977 or 1978 abated many years ago and cannot be asserted against the person presently holding that position. Claims against public officers in Ohio are governed by the same two-year statute of limitations that applies to political subdivisions. See R.C. 2744.04; *Read v. Fairview Park* (2001), 146 Ohio App.3d 15, 764 N.E.2d 1079. Appellant also claims the village should have removed from his personnel file the subpoenas and any other documents relative to the weapon charge. However, as is discussed more fully below, there is no evidence in the record that the village received notice of the expungement order. Absent evidence of notice, the village cannot be liable for failing to seal or remove records from its files. Based on the foregoing, appellant's fifth assignment of error is not well-taken.

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*5 [6] {¶ 26} In his sixth assignment of error, appellant asserts the trial court erred by finding that the village of Elmore did not have knowledge of either expungement order. Appellant asserts the village had "official records" pertaining to the case in the form of subpoenas issued by the Sylvania Municipal Court to employees of the village. Appellant states that the Clerk of the Lucas County Court of Common Pleas and the Lucas County Sheriff's Office properly sealed their records of the charges. Based on that information, appellant infers the village must have received notice of the expungements and the failure of the village to seal its documents relative to the criminal charges was not because of lack of notice but for "some other reason." Appellant further assumes that if the Sylvania Municipal Court contacted the sheriff's office and the common pleas court it must have also contacted the village of Elmore, which held subpoenas issued relative to the two charges. Appellant has pointed to no such evidence, merely surmising that if the common pleas court and sheriff's office knew of the orders, the village also must have known. Absent evidence the village received copies of the orders or otherwise was made aware of their existence, the village cannot be held to have violated a duty to keep its records sealed. Accordingly, because there is no evidence in the record that the village of Elmore knew of the expungement orders we cannot find that the village had a duty to comply with the orders. Appellant's sixth assignment of error is not well-taken.

[7] {¶ 27} Appellant's final three assignments of error raise issues relevant to his claims of invasion of privacy brought against the village of Elmore, The Press and Kaczala. In his seventh assignment of error, appellant asserts the trial court erred by finding the village was exempt from the provisions of R.C. Chapter 1347, known as Ohio's Privacy Act.

{¶ 28} R.C. 1347.10(A)(2) provides as follows:

{¶ 29} "(A) A person who is harmed by the use of personal information that relates to him and that

is maintained in a personal information system may recover damages in civil action from any person who directly and proximately caused the harm by doing any of the following:

{¶ 30} " * * *

{¶ 31} "(2) *Intentionally* using or disclosing the personal information in a manner prohibited by law * * *." (Emphasis added.)

{¶ 32} However, R.C. 1347.04(A)(1) provides exemptions from the privacy act for "[a]ny state or local agency or part of a state or local agency that performs as its principal function any activity relating to the enforcement of criminal laws; * * *." (Emphasis added.)

{¶ 33} In its decision, the trial court found that the village was exempt because there was no evidence that it intentionally disclosed information protected by an expungement order. This court has thoroughly reviewed the record of proceedings in this case and finds there is no evidence the village was aware of an executed expungement order as to either 1970 case. Further, if the village intentionally disclosed personal information in a manner prohibited by law, the act would be protected by the exemption specified in R.C. 1347.04(A)(1), above. The record reflects that appellant's personnel file was maintained by the village police chief, who kept the file as a part of his duties as the chief law enforcement officer for the village. This file was separate from personnel files for other village employees and it was the chief of police who actually released appellant's file to the media. Because the information was released by an individual who performed as his principal function "activit[ies] relating to the enforcement of the criminal laws," the law enforcement exception in R.C. 1347.04(A)(1) applies. Accordingly, appellant's seventh assignment of error is not well-taken.

*6 [8] {¶ 34} In his eighth assignment of error, appellant asserts the trial court erred by finding he did not have a valid claim against the village for

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common law invasion of privacy. Pursuant to R.C. 2744.02(A)(1), political subdivisions are entitled to blanket immunity for tort claims unless it is demonstrated that the claim fits within one of the statutorily recognized exceptions set forth in R.C. 2744.02(B). See *Cater v. Cleveland* (1988), 83 Ohio St.3d 24, 28, 697 N.E.2d 610. Even if one of the exceptions applies, a political subdivision is entitled to have immunity reinstated if it is able to invoke one of the affirmative defenses set forth in R.C. 2744.03. In its motion for summary judgment, the village claimed immunity under R.C. 2744 and argued that none of the exceptions to immunity set forth in R.C. 2744.02(B) applied. The village also argued it had a defense pursuant to R.C. 2744.03(A)(2) as conduct required or authorized by law.

{¶ 35} Upon consideration of the five enumerated exceptions to immunity, we find that none of them apply to the village in this case. The exceptions set forth in R.C. 2744.02(B)(1) and (3) clearly do not apply as the first refers to negligent operation of motor vehicles and the other to the failure to keep public roads and grounds open, in repair and free of nuisance. Next, R.C. 2744.02(B)(2) removes a political subdivision's immunity in cases where the loss is caused by the "negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." However, the provision of police services is not a proprietary function; it is defined under R.C. 2744.01(C)(2)(a) as a governmental function. Also, this exception requires a showing of negligence. In this case, appellant does not allege negligence on the part of the village; in paragraphs 28, 30 and 38 of his complaint, he alleges that the village "intentionally" disclosed personal and confidential information about him to The Press and Kaczala by providing them access to sealed records. The exception set forth in R.C. 2744.02(B)(4) likewise would not apply herein as it also refers to certain losses caused by the "negligence" of employees. Finally, we find that the exception to immunity stated in R.C. 2744.02(B)(5) does not apply to the village. This

exception applies "when liability is expressly imposed upon the political subdivision by a section of the Revised Code." However, for the reasons discussed above, neither the Ohio expungement statutes nor the Ohio Privacy Act impose liability on the village in this case. Therefore, they cannot be used to support the exception to immunity set forth in R.C. 2744.02(B)(5). Accordingly, although the immunity provided the village by R.C. 2744.02(A) is potentially subject to the five exceptions discussed above, we find that those exceptions have no application to appellant's claim against the village of Elmore. See *Inghram v. City of Sheffield Lake* (March 7, 1996), 8th Dist. No. 69302 (finding that immunity applied when no exception was triggered).

*7 {¶ 36} Appellant also argues the village is not entitled to immunity for release of his records because his claim against the village arises out of his former employment with its police department. In support, appellant cites R.C. 2744.09(B), which states 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 their employment relationship. We find, however, that this action did not arise out of an employment relationship between appellant and the village of Elmore. This case arose out of the village's disclosure of several subpoenas issued to village officials 30 years earlier regarding their potential testimony in the two cases against appellant in 1970. This case is not about appellant's employment with the village 35 years ago; it is about the village police chief allowing the media to view the subpoenas in appellant's personnel file three decades after his employment with the village was terminated. Further, this court has held that R.C. 2744.09(B) does not remove an employer's immunity for intentional torts as granted under Chapter 2744. See *Terry v. Ottawa County Board of MRDD, et al.*, 151 Ohio App.3d 234, 783 N.E.2d 959, 2002-Ohio-7299. Based on the foregoing, appellant's eighth assignment of error is not well-taken.

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{¶ 37} In his ninth assignment of error, appellant asserts the trial court erred by determining he did not have a claim for common law invasion of privacy against The Press and Kaczala. Appellant bases his argument on the premise that appellees were subject to valid and enforceable expungement orders. He also argues that the records were not public and were of no legitimate public interest. Appellant claims the newspaper had "ample evidence" the records had been sealed, but published the information anyway. In support of this argument, appellant quotes the July 2000 article which stated "the records at the Lucas County Sheriff's Office have reportedly been sealed."

{¶ 38} Ohio courts have recognized that the following five elements must be proved to establish a claim for invasion of privacy by publication of private facts: (1) the disclosure was public in nature; (2) the facts disclosed concerned an individual's private life, not his public life; (3) the matter publicized would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; (4) the publication was made intentionally, not negligently and (5) the matter publicized was not of legitimate concern to the public. *Early v. The Toledo Blade* (1998), 130 Ohio App.3d 302, 342, 720 N.E.2d 107, citing *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163, 166-167, 499 N.E.2d 1291.

{¶ 39} First, upon review of the two articles in question, we find that the information published did not concern appellant's private life. The first article was published July 17, 2000, under the headline "New chief once charged for impersonating an officer." It stated in part:

*8 {¶ 40} " * * * Timothy R. Villa, sworn in as the new police chief in May, was charged in 1970 with impersonating a police officer and carrying a concealed weapon, according to the Sylvania Municipal Court.

{¶ 41} "Mr. Villa pled no contest to the charge of impersonating an officer and was found guilty,

according to the Sylvania Municipal Court. He pled not guilty to the charge of carrying a concealed weapon, and the case was bound over to the Lucas County Grand Jury in September, 1970, according to the Sylvania Municipal Court.

{¶ 42} "A disposition of the case was not on file in the Lucas County Court of Common Pleas. The records at the Lucas County Sheriff's office have reportedly been sealed."

{¶ 43} The second article was published December 10, 2001, under the headline "Villa may file suit against Elmore." The article again mentioned that appellant pled no contest to a charge of impersonating an officer and guilty to the concealed weapon charge.

{¶ 44} The information about which appellant complains clearly related only to his professional life in the area of law enforcement. The two charges brought against appellant in 1970, arose following a dispute between appellant and the village of Elmore over whether his services as a police officer had been terminated. The information was published in 2000, within a few weeks of appellant's being appointed police chief for Walbridge in response to citizens' concern over appellant's past performance in law enforcement. Clearly, the information published related to appellant's public life and was of legitimate concern to the public appellant was then serving as chief of police. In a democratic society, the role of the press as a check against government ineptitude and corruption is vital to the well-being of society as a whole. The right of a free press legally to seek information that is part of a public record is absolute and unqualified. In this case, The Press' articles served to document the very concerns expressed by the citizens of Walbridge over the selection of appellant as their chief of police.

{¶ 45} Finally, there is no evidence The Press or Kaczala intentionally published information it believed was private. Based on all of the foregoing, we find the trial court did not err by concluding ap-

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pellant did not have a claim against The Press or Kaczala for common law invasion of privacy, and appellant's ninth assignment of error is not well-taken.

(¶ 46) On consideration of the foregoing, this court finds that there is no genuine issue of material fact and appellees The Press, Kaczala, the village of Elmore and the Clerk of Sylvania Municipal Court are entitled to judgment as a matter of law. The judgments of the Lucas County Court of Common Pleas are affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

*9 JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

MARK L. PIETRYKOWSKI, J., ARLENE SINGER, P.J. and DENNIS M. PARISH, J., concur.

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Baldwin's Ohio Revised Code Annotated Currentness
 Title XXVII. Courts--General Provisions--Special Remedies
 Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)
 →→ 2744.09 Applicability of chapter

This chapter does not apply to, and shall not be construed to apply to, the following:

(A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;

(B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;

(C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;

(D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;

(E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

CREDIT(S)

(1985 H 176, eff. 11-20-85)

CONSTITUTIONALITY

"Ohio Revised Code § 2744" was held on 12-16-2003 to violate the right to trial by jury, under Ohio Constitution Article 1, § 5, and the right to a remedy, under Ohio Constitution Article 1, § 16. The ruling was by the U.S. District Court for the Southern District of Ohio, deciding as it believes the Supreme Court of Ohio would have, in the case of *Kammeyer v City of Sharonville*, 311 F.Supp.2d 653 (SD Ohio 2003). The Court also observed that the state is sovereign but political subdivisions are not.

Current through all 2011 laws and statewide issues and 2012 Files 70 through 116, 118, 119, and 121 through 123 of the 129th GA (2011-2012).

R.C. § 2744.09

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