

ORIGINAL

IN THE SUPREME COURT OF OHIO

ANDREA RIFFLE, et al.

Plaintiff-Appellees

v.

PHYSICIANS AND SURGEONS  
AMBULANCE SERVICE AND CITY OF  
AKRON

Defendant-Appellant

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

MERIT BRIEF OF PLAINTIFFS-APPELLEES

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

J. Michael Goldberg – No. 0046685  
Steven M. Goldberg Co., L.P.A.  
Centre Pointe Building, Suite 103  
34055 Solon Road  
Solon, Ohio 44139-2663  
(440) 519-9900 Fax: (877) 464-4652  
JMGoldberg@smglegal.com  
*Attorney for Amicus Curiae  
Ohio Association for Justice*

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

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

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

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

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## I. INTRODUCTION

Plaintiffs-Appellees, Andrea Riffle and Dan Riffle (“the Riffles”) brought this action, individually and as co-administrators of the Estate of their daughter, Tenley Jayne Riffle, against Defendant-Appellant, the City of Akron (“the City”), for medical malpractice arising from the City’s willful and wanton misconduct in providing emergency medical services to Andrea and Tenley Jayne Riffle. (Complaint).<sup>1</sup> After answering, the City moved for judgment on the pleadings, asserting that it was completely immune from the claims asserted pursuant to R.C. 2744.02. (Answer, Motion for Judgment on the Pleadings). The Riffles argued that R.C. 4765.49 allows those harmed by the City’s emergency medical services to recover from the City if the City’s conduct in providing those services rose to the level of willful or wanton misconduct. (Memorandum in Opposition to Defendant, City of Akron’s Motion for Judgment on the Pleadings).

The trial court denied the City’s motion, reasoning that unless R.C.4765.49 is construed as an express imposition of liability within the meaning of R.C. 2744.02(B)(5), its provisions regarding political subdivision liability are rendered null. (Order). The Court of Appeals affirmed the trial court’s decision, but reasoned instead that an irreconcilable conflict exists between R.C. 4765.49 and 2744.02, requiring application of the more specific provision: RC 4765.49. *Riffle v. Physicians and Surgeons Ambulance Serv.*, 9th Dist. CA No. 25829, 2011-Ohio-6595. The City appealed from that Decision to this Court.

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<sup>1</sup> The Complaint at issue in the present appeal was filed on November 24, 2009 and alleges claims arising from the willful and wanton misconduct of the City of Akron and Physicians & Surgeons Ambulance Service d/b/a American Medical Response (“AMR”). On December 15, 2010, the Riffles filed a second Complaint, naming the City of Akron and its employees, Stacy Frabotta and Todd Kelly, as defendants. This Complaint includes additional allegations describing the willful and wanton character of the City’s conduct on the night of December 26, 2008 and was consolidated with the November 24, 2009 Complaint.

## II. STATEMENT OF THE FACTS

The Riffles accept and incorporate herein the statement of facts set forth in the City's brief, with the following corrections and clarifications. The City's brief omits the fact that although the City's EMS crew knew that they were responding to a patient with a pregnancy related problem in her third trimester, specifically "SERIOUS bleeding", the City's EMS completely failed to evaluate the well-being of the Riffles' unborn daughter, Tenley Jayne Riffle. (Complaint at ¶7,8). Then, instead of transporting Andrea and Tenley Jayne to the hospital immediately, the City delayed and contacted a separate, private ambulance company to transport them. (Id. at ¶8). As a result of this delay, Tenley Jayne suffered fetal bradycardia, and after struggling to survive for three days, Tenley Jayne died as a result of that injury on December 29, 2008. (Id. at ¶11-13).

Although the City's brief characterizes its employees' conduct as merely negligent, the Complaint clearly alleges in several instances that the emergency medical care provided by the City and its employees rose to the level of willful or wanton misconduct. Specifically, the Complaint alleges that "the failure of Defendants, City of Akron Fire Department EMS and [co-Defendant] AMR and their employees and/or agents to assess and transport Andrea Riffle and Tenley Jayne Riffle immediately to Akron City Hospital demonstrates a total disregard and complete absence of all care for the safety of Andrea Riffle and her unborn infant with an indifference to the consequences of the failure to assess and failure to emergently transport." (Id. at ¶27). Dr. Michael Olinger, M.D.'s Affidavit of Merit submitted by the Riffles with their Complaint buttresses these allegations. (Affidavit of Merit).<sup>2</sup> "Pursuant to the National

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<sup>2</sup> Dr. Olinger's Affidavit of Merit was filed in support of the Riffles' Complaint, pursuant to Civ.R. 10(D)(2). (Complaint at 2). Because documents filed with a complaint are considered part of the pleadings, the Court may consider this Affidavit of Merit in its decision on the City's Motion for Judgment on the Pleadings. *Riolo v. Oakwood Plaza Ltd. Partnership*, 9th Dist. No. 04CA008555, 2005-Ohio-2150, ¶6, citing Civ.R. 10(C)

Curriculum of the United States Department of Transportation, any properly trained paramedic should have known that the failure to assess and failure to transport in the face of third trimester bleeding would in all probability result in injury to the unborn infant and/or mother.” (Complaint, ¶24). The City has not disputed that the Riffles’ allegations set forth facts which demonstrate willful or wanton misconduct, and the trial court expressly found that the Complaint sufficiently alleged willful and wanton misconduct. (Order, p.4: “Plaintiffs have articulated a claim for willful and wanton misconduct by medical care workers in the City of Akron’s employ.”) Thus, the only issue before this Court is whether or not to give effect to R.C. 4765.49 and allow recovery against the City for its stark failure to provide appropriate emergency medical care.

### **III. ARGUMENT IN OPPOSITION TO AKRON’S PROPOSITION OF LAW**

The City argues that it is immune from the claims asserted by the Riffles through R.C. 2744.02, ignoring the plain language of R.C. 4765.49(B) and contrary to the decisions of both the trial court and the Ninth District. The reasoning of those courts differ, but both courts reached the correct result in this case. Either by construing R.C. 4765.49 as an express imposition of liability, as the trial court did, or by applying the more specific statute in response to an irreconcilable conflict as the Ninth District did, the outcomes of both decisions are consistent with Ohio’s rules of statutory interpretation and prior Ohio case law on this subject. Both lines of reasoning are supported by the law and the facts of this case, and both lines of reasoning reach the appropriate result. In order to give full effect to the plain language of R.C. 4765.49(B) with respect to political subdivisions, one of these lines of reasoning must be applied. Either R.C. 4765.49(B) represents an express imposition of liability within the meaning of R.C. 2744.02(B)(5), or an irreconcilable conflict exists between the two statutes, resulting in

the application of R.C. 4765.49(B) to the specific factual scenario at issue here. Any other interpretation of this statute fails to give full effect to its plain language.

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

As the City correctly points out in its brief, the sovereign immunity defense as set forth in R.C. 2744.01 *et seq.* requires a three tier process to determine its applicability. *Cater v. Cleveland*, 83 Ohio St.3d 24 (1998). “First, R.C. 2744.02(A) sets forth the general rule of immunity, that political subdivisions are not liable in damages for the personal injuries or death of a person.” *Id.* at 30. The Riffles do not dispute that the City is a political subdivision or that the provision of emergency medical services is a governmental function.

“[O]nce immunity is established under R.C. 2744.02(A)(1), the second tier of analysis is whether any of the five exceptions to immunity in subsection (B) apply.” *Id.* In the present case, this second tier is the only disputed step – whether or not R.C. 2744.02(B)(5) applies and defeats the City’s immunity because R.C. 4765.49 expressly imposes liability on the City. R.C. 2744.02(B)(5) provides that “a political subdivision is liable for injury, death, or loss to person to property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code ....” According to multiple Ohio Courts of Appeals, R.C. 4765.49 fits this exception to immunity by expressly imposing liability on a political subdivision for its willful or wanton misconduct. *Fuson v. Cincinnati*, 91 Ohio App.3d 734 (1st Dist. 1993); *Johnson v. Cleveland*, 8th Dist. No. 95688, 2011-Ohio-2152; *Blair v. Columbus*, 10th Dist. No. 10AP-575, 2011-Ohio-3648.

R.C. 4765.49 imposes liability on a political subdivision for its willful and wanton misconduct in providing emergency medical services:

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

R.C. 4765.49(B) (emphasis added). R.C. 4765.49(B) expressly provides that it applies to political subdivisions, and it imposes liability for willful and wanton misconduct. It expressly imposes liability, and it directly applies to the facts of this case. By contrast, the blanket immunity of R.C. 2744.02(A) does not explicitly recognize an exception for willful or wanton misconduct. If R.C. 4765.49 is not interpreted as expressly imposing liability for willful or wanton misconduct as an exception to the general immunity otherwise provided to political subdivisions, then that portion of the statute has no effect.

If a court applies R.C. 2744.02 in a typical *Cater* analysis and offers R.C. 4765.49(B) to a political subdivision as an additional defense in the third step of the analysis, as the City suggests it should, the end result is that a political subdivision remains immune for any misconduct in providing emergency medical services, regardless of degree of fault. Using the specific facts of the present case, that analysis begins and ends by acknowledging that, pursuant to R.C. 2744.02(A), the City is a political subdivision, and the provision of emergency medical services is a governmental function (R.C. 2744.01(C)(2)(a)) and thus, the City is entitled to sovereign immunity. Because no other second tier exception applies, and because the City believes R.C. 4765.49(B) is a third tier restorative defense, R.C. 4765.49(B) is never applied, despite the fact that its plain language dictates a different outcome here, when the Riffles have alleged willful and wanton misconduct by the City.

The trial court recognized this inconsistency, pointing out that the City's argument that R.C. 4765.49 operates like the defenses enumerated in R.C. 2744.03 "would render R.C. 4765.49 a nullity. If R.C. 4765.49 does not provide an exception to that immunity, it has no meaning whatsoever." (Order, p.3). R.C. 4765.49 expressly provides that it applies to political subdivisions, and it imposes liability for willful and wanton misconduct where no liability would otherwise exist. The blanket immunity of R.C. 2744.02(A) does not explicitly recognize an exception for willful or wanton misconduct. Thus, if R.C. 4765.49 is not interpreted as expressly imposing liability for willful or wanton misconduct as an exception to the general immunity otherwise provided to political subdivisions, then that portion of the statute has no effect, contrary to this Court's requirement that all portions of a statute have some effect. *Cater*, 83 Ohio St. 3d at 24.

The City offers R.C. 1533.181 as an example of how R.C. 4765.49 should create additional immunity for political subdivision. The Eighth District Court of Appeals addressed the complementary application of R.C. 1533.181 with R.C. 2744.02 in *Onderak v. Cleveland Metroparks*, 8th Dist. No. 77864, 2000 Ohio App. LEXIS 5699 (Dec. 7, 2000), and engaged in the traditional, three tier *Cater* analysis. After acknowledging that Cleveland Metroparks qualified as an immune political subdivision, the Eighth District found that an exception to immunity applied, specifically R.C. 2744.02(B)(3), which withdraws immunity for claims arising from a political subdivision's failure to maintain its public grounds. *Id.* Cleveland Metroparks was then able to rely upon R.C. 1533.181 – which grants immunity to owners of property used for public recreation – as a restorative defense.<sup>3</sup> *Id.* As *Onderak* demonstrates,

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<sup>3</sup> In relevant part, R.C. 1533.181 provides: (A) No owner, lessee or occupant of premises; (1) Owes any duty to a recreational user to keep the premises safe for entry or use; ...

R.C. 1533.181 fits neatly within the traditional R.C. 2744.02 analysis and can be applied to its full extent thereby.

The differing analysis required to give effect to R.C. 1533.181 and R.C. 4765.49 belies the key distinction between these two statutes and undercuts the City's comparison. Fundamentally, R.C. 1533.181 is a statute that provides additional immunity to a political subdivision. After R.C. 2744.02(B) strips away immunity, R.C. 1533.181 grants further immunity. On the other hand, R.C. 4765.49 expressly decreases a political subdivision's immunity. Without R.C. 4765.49, a political subdivision would be immune for *any* conduct by its emergency response personnel; with R.C. 4765.49, a political subdivision is liable for the willful or wanton misconduct of its personnel. The analysis of a statute that grants additional immunity cannot be properly compared to the analysis of a statute which takes away immunity.

The facts of the present case fall squarely within the circumstances contemplated by R.C. 4765.49. But, because the City is a political subdivision, and provision of emergency medical services is a governmental function, the facts of this case also fall squarely within R.C. 2744.02. Ohio law requires that both statutes be applied together if possible, and Ohio law requires that this Court "give full application to both statutes". *Cater*, 83 Ohio St.3d at 29. Construing R.C. 4765.49 as a restorative defense fails to give full application to that statute, as this case demonstrates. Construing it as an express imposition of liability, however, gives full application of both statutes together. This proper construction requires that this Court affirm the judgments of the trial court and the Ninth District and remand this matter to the trial court for further proceedings.

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

If, however, this Court does not interpret R.C. 4765.49(B) as an express imposition of liability, a conflict exists between R.C. 2744.02 and R.C. 4765.49, but still the City is not immune from the Riffle's claims. "[R.C. 2744.02] appears to provide immunity to governmental entities that provide emergency medical services for all claims related to those services and [R.C. 4765.49] appears to provide immunity only to negligence claims related to those services." *Riffle*, 2011-Ohio-6595 at ¶9. "Applying section 2744.02(A)(1) to the facts of this case would render section 4765.49, to the extent it applies to political subdivisions, meaningless." *Id.* at ¶12.

If R.C. 4765.49 does not expressly impose liability, then both of these statutes cannot be applied fully and contemporaneously, and it is clear that R.C. 4765.49 and R.C. 2744.02 are in conflict. On its face, R.C. 4765.49(B) expressly provides that a political subdivision may be held liable in damages in a civil action for its willful or wanton misconduct in providing emergency medical services, but R.C. 2744.02 cloaks a political subdivision with immunity for the provision of EMS generally. Pursuant to R.C. 1.51, "[i]f the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevails." *State ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 2004-Ohio-4354 at ¶14.

Here, the special provision is R.C. 4765.49, and although R.C. 2744.02 is the later adoption, both statutes were amended in 2003 and again in 2007, and the conflicting language was allowed to remain. (2001 Ohio S.B. 106 and 2001 Ohio S.B. 115; 2005 Ohio HB 401 and 2007 Ohio HB 119, respectively). The Ohio Legislature has kept R.C. 4765.49 intact through both of those amendments; if the Legislature had intended to give political subdivisions blanket immunity for their misconduct of any character, it could have removed political subdivisions

from the purview of this statute. More, there is no “manifest intent” apparent in R.C. 2744.02 that it should prevail over R.C. 4765.49. “There is nothing in section 2744.02 that expresses an intention by the General Assembly for that section to prevail over a specific section regarding the immunity of political subdivisions that provide emergency medical services.” *Riffle*, 2011-Ohio-6595 at ¶16.

As it is written and as it has been interpreted by Ohio courts, R.C. 4765.49 operates to pull back a small portion of the blanket immunity provided to cities by R.C. 2744.02(A) and thereby expressly imposes liability for the City’s willful or wanton misconduct herein. *Fuson*, 91 Ohio App.3d at 738; *Bostic v. City of Cleveland*, 8th Dist. No. 79336, 2002-Ohio-333. In this case, the Ninth District correctly applied the more specific statute, R.C. 4765.49(B), and found that a political subdivision can be held liable for its willful or wanton misconduct in providing emergency medical services.

#### **IV. CONCLUSION**

The Riffles’ Complaint sets forth clear allegations describing the willful and wanton misconduct by the City that ultimately caused their daughter, Tenley Jayne, to lose her life. R.C. 4765.49 allows the Riffles to hold the City and its personnel responsible for that misconduct. Both the trial court’s and the Ninth District’s well reasoned decisions result in application of R.C. 4765.49(B) to its full extent in accord with its plain language. Both interpretations reach the same result: a political subdivision may be held liable for willful or wanton misconduct in providing emergency medical services, and the City cannot rely upon sovereign immunity to avoid the Riffles’ claims. For these reasons, the Ninth District’s decision should stand, and the Riffles respectfully request that this Court remand this matter to the trial court.

Respectfully submitted,

**KOHLEN & PATTON, LLP**



---

Ann Ruley Combs (0004810)

Rebecca Louise Cull (0083542)

800 PNC Center

201 East Fifth Street

Cincinnati, OH 45202

Tele: (513) 381-0656

Fax: (513) 381-5823

Email: [acombs@kplaw.com](mailto:acombs@kplaw.com)

Email: [rcull@kplaw.com](mailto:rcull@kplaw.com)

**ATTORNEYS FOR PLAINTIFFS-APPELLEES**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served this 25 day of July, 2012, via regular U.S. Mail, postage prepaid, upon the following:

Cheri B. Cunningham, Esq.  
John Christopher Reese, Esq.  
Michael J. Defibaugh, Esq.  
Assistant Directors Of Law  
City Of Akron, Department of Law  
202 Ocasek Government Office Building  
161 South High Street  
Akron, Oh 44308-1655  
*Attorneys for Defendant-Appellant  
City of Akron*

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

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

Stephen J. Smith, Esq.  
Chris W. Michael  
Ice Miller LLP  
250 West Street  
Columbus, Ohio 43215  
*Attorneys for Amicus Curiae  
The Ohio Municipal League*

J. Michael Goldberg, Esq.  
Steven M. Goldberg Co., L.P.A.  
Centre Pointe Building, Suite 103  
34055 Solon Road  
Solon, Ohio 44139-2663  
*Attorney for Amicus Curiae  
Ohio Association for Justice*

  
\_\_\_\_\_  
Rebecca L. Cull