

ORIGINAL

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

REPLY BRIEF OF DEFENDANT/APPELLANT CITY OF NORTH RIDGEVILLE

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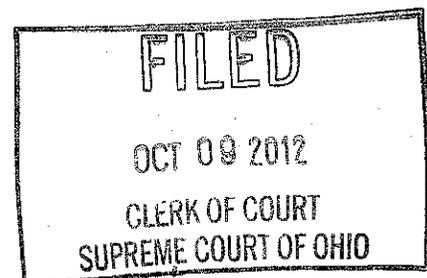
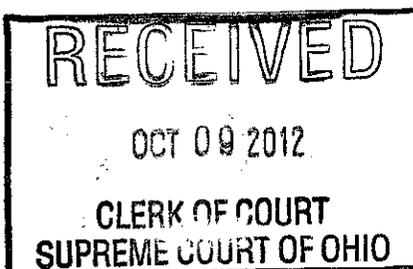


TABLE OF CONTENTS

I. REBUTTAL TO PLAINTIFF'S INTRODUCTION1

II. COUNTERSTATEMENT OF THE FACTS2

 A. Clarifying the Record..... 2

III. REBUTTAL TO PLAINTIFF'S LAW AND ARGUMENT4

 A. Despite Vacha's argument, the mere allegation of an intentional tort does not exempt her claim from the City's immunity under R.C. 2744.09(B). 4

 1. Section 2744.09(B) rejects Vacha/OAJ's interpretation. 4

 2. *Sampson* rejects Vacha/OAJ's interpretation. 5

 3. The intent of the Tort Liability Act is inconsistent with Vacha/OAJ's interpretation. 7

 B. The totality of the circumstances determines whether the Tort Liability Act applies under R.C. 2744.09(B), not a mere allegation contained in a complaint..... 9

 1. The subject matter of Vacha's claim is not causally connected to her employment relationship..... 9

IV. CONCLUSION.....12

CERTIFICATE OF SERVICE13

TABLE OF AUTHORITIES

Cases

<i>Bernardini v. Conneaut Area City School Dist. Bd. of Edn.</i> , 58 Ohio St.2d 1, 387 N.E.2d 1222 (1979)	5
<i>Byrd v. Faber</i> , 57 Ohio St.3d 56, 565 N.E.2d 584 (1991)	10
<i>Christian v. Wal-Mart Stores East, LP</i> , 5th Dist. No. 11CA002, 2011 WL 2739645, 2011-Ohio-3512	12
<i>Coats v. Columbus</i> , 10th Dist. No. 06AP-681, 2007-Ohio-761, 2007 WL 549462	12
<i>Coleman v. Portage Cty. Engineer</i> , --- N.E.2d---, 2012 WL 3734459, 2012-Ohio-3881	8
<i>Hubbell v. Xenia</i> , 115 Ohio St.3d 77, 873 N.E.2d 878, 2007-Ohio-4839	7
<i>Kuhn v. Youlten</i> , 118 Ohio App.3d 168, 692 N.E.2d 226 (8th Dist. 1997)	3, 12
<i>Moya v. DeClemente</i> , 8th Dist. No. 96733, 2011-Ohio-5843, 2011 WL 5506081	9
<i>Peters v. Ashtabula Metro. Housing Auth.</i> , 89 Ohio App.3d 458, 624 N.E.2d 1088 (11th Dist. 1993)	3, 12
<i>Reitz v. May Co. Dept. Stores</i> , 66 Ohio App.3d 188, 583 N.E.2d 1071 (8th Dist.1990)	10
<i>Rozzi v. Star Personnel Sers., Inc.</i> , 12th Dist. No. CA2006-07-162, 2007-Ohio-2555	3, 12
<i>Sampson v. CMHA</i> , 131 Ohio St.3d 418, 966 N.E.2d 247, 2012-Ohio-570	passim
<i>State v. Ralston</i> , 9th Dist. No. 08CA009384, 2008-Ohio-6347, 2008 WL 5122127	12
<i>Steppe v. Kmart Stores</i> , 136 Ohio App.3d 454, 737 N.E.2d 58 (8th Dist. 1999)	3, 12

<i>Summerville v. Forest Park</i> , 128 Ohio St.3d 221, 943 N.E.2d 522, 2010-Ohio-6280	7, 8
<i>Villa v. Village of Elmore</i> , 6th Dist. No. L-05-1058, 2005-Ohio-6649, 2005 WL 3440787	10
<i>Zieber v. Heffelfinger</i> , 5th Dist. No. 08CA0042, 2009-Ohio-1227, 2009 WL 695533	10
Statutes	
R.C. 2744.09(B).....	5

I. REBUTTAL TO PLAINTIFF'S INTRODUCTION

Vacha erroneously believes that the mere *allegation* of an employer intentional tort automatically removes the claim from the protections of the Tort Liability Act.

This is wrong. Vacha's position is contrary to the terms of R.C. 2744.09(B), inconsistent with *Sampson v. CMHA*, and destructive to the intent of the Tort Liability Act.

Despite Vacha's and the OAJ's arguments, whether immunity applies under R.C. 2744.09(B) is a case-by-case determination based on the evidence. *Sampson v. CMHA*, 131 Ohio St.3d 418, 966 N.E.2d 247, 2012-Ohio-570. The test for whether immunity will bar an intentional tort presents this question: Is there "a causal connection between the subject matter of [Vacha's] civil action and the employment relationship." *Id.* at ¶ 16. The answer is, no.

A legitimate connection cannot exist between Vacha's rape, her claims, and her employment with the City. First, the assailant's unpredictable attack on Vacha was a purely personal act of malevolence that did not facilitate the interests of the employer. Second, the subject matter of Vacha's claim had nothing to do with either her or her assailant's job duties. Third, the attack was unprecedented and unforeseeable. Finally, the assailant's attack, for which Ralston was imprisoned, severed any conceivable connection between the subject matter of Vacha's claim and her employment.

Construing the facts in favor of Vacha, the subject matter of her claim is not connected to her employment with the City as a matter of law. The Legislature never intended for a coworker's unexpected and violent rape of another co-worker to divest a political subdivision of immunity under the Tort Liability Act. 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. COUNTERSTATEMENT OF THE FACTS

A. Clarifying the Record

Even if Vacha's claims made in her statement of facts were true, they would not demonstrate "a causal connection between the subject matter of the civil action and the employment relationship." *Sampson* at ¶ 16. And, Vacha's contentions are irrelevant and misleading, if not simply untrue.

Vacha argues that the Mayor knowingly hired Ralston after having "seven prior convictions for crimes of violence," claiming "Ralston's past was not a secret to the Mayor ..." (Vacha's Br. at 1.) Despite Vacha's rhetoric, Mayor Gillock did not know Ralston had been charged with any crime. (Dep. of Mayor Gillock at 7.) Construing the facts most favorably to Vacha, the Record at best demonstrates that Mayor Gillock learned through hearsay that 8 years earlier in 1998 his daughter had contacted the police as a result of *verbal* arguments with Ralston. (Dep. of Mayor Gillock at 6-8; Dep. of Ralston at 20.) The Mayor never saw (or knew of) any injuries or evidence of physical violence related to his daughter. (Dep. of Mayor Gillock at 6-8.) Vacha's reliance on innuendo does not change the record.

Vacha also argues that Ralston "presented disciplinary problems, yet he was allowed to remain on the job with no supervision or oversight." (Vacha's Br. at 1.) Vacha insinuates that these purported "disciplinary problems" somehow alerted the City that Ralston was substantially certain to rape Vacha. The Record demonstrates that the only "disciplinary problem" occurred because Ralston was absent from work during his probationary employment period and had one verbal argument that occurred more than a year before Ralston's attack. There is no foreseeable connection between these issues and what occurred in this case. In fact, the Record shows that Vacha and Ralston had a friendly social relationship both inside and outside of work. For

instance, Vacha shared rides to work with Ralston; Vacha met with Ralston at her dog breeder's house; Vacha had Ralston over to her house to show him her Rottweiler; Vacha had Ralston at her fortieth birthday party; and Vacha had Ralston and his cousin over to her house for drinks. (Dep. of Vacha at 84-89; 92-99; Dep. of Ralston at 44-53.)

Vacha also insinuates that the Mayor knew Ralston would rape Vacha, yet hired him (or "oversaw the hiring") anyway because he was the father of the Mayor's grandchildren. (Vacha's Br. at 1.) Again, the Record does not support that Ralston would rape or attack a co-worker. And, the Record demonstrates that Mayor Gillock's involvement in the hiring of Ralston was limited to informing Ralston of the position and requesting that Don Daley interview Ralston and anyone else that applied for the position. (*Id.* at p. 10.) Mayor Gillock was not involved in the interview or the decision to hire. (*Id.*)

Although her only legal claim is an employer intentional tort, Vacha suggests in her statement of facts that the City *should* have conducted a criminal background check of Ralston. Vacha has failed to direct this Court to any legal authority imposing a duty upon an employer to conduct a criminal background check on a potential employee under these circumstances. To the contrary, Ohio law holds that no such duty exists. *See, e.g., Rozzi v. Star Personnel Sers., Inc.*, 12th Dist. No. CA2006-07-162, 2007-Ohio-2555 at ¶ 12; *Steppe v. Kmart Stores*, 136 Ohio App.3d 454, 467, 737 N.E.2d 58 (8th Dist. 1999); *Kuhn v. Youlten*, 118 Ohio App.3d 168, 177, 692 N.E.2d 226 (8th Dist. 1997); *Peters v. Ashtabula Metro. Housing Auth.*, 89 Ohio App.3d 458, 462; 624 N.E.2d 1088 (11th Dist. 1993). Even assuming a background check was conducted, there is no evidence that Ralston was likely to assault and rape a co-worker.¹ For

¹ Vacha also erroneously states a criminal background check would have revealed that Ralston had five prior convictions for domestic violence and one prior conviction for assault. The record reveals that, before his hiring, Ralston pled no contest to and was found guilty of a first degree

Vacha to take the position that the failure to conduct a background check -- which the City had no duty to conduct -- means that the City should have predicted or knew with substantial certainty that Ralston would sexually assault a coworker is unsupportable.

III. REBUTTAL TO PLAINTIFF'S LAW AND ARGUMENT

A. Despite Vacha's argument, the mere allegation of an intentional tort does not exempt her claim from the City's immunity under R.C. 2744.09(B).

Yet, Vacha and her amicus argue that merely *alleging* an intentional tort conclusively demonstrates that "this is a matter that arises out of the employment relationship" and therefore "there is a causal connection." (Vacha's Br. at 11, OAJ Amicus Br. at 3, arguing "but for her employment" a causal connection exists.) In doing so, Vacha and the OAJ ignore the language of R.C. 2744.09(B), the *Sampson* case, and the intent of Ohio's Political Subdivision Tort Liability Act.

1. Section 2744.09(B) rejects Vacha/OAJ's interpretation.

The Legislature did not intend that an employee's mere allegation of an employer intentional tort based on the criminal conduct of another employee would divest the political subdivision of immunity.

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

misdemeanor for domestic violence in 1994; that he pled no contest and was found guilty of a minor misdemeanor of disorderly conduct in 1998; and that he pled no contest and was found guilty of assaulting a male in 1999. (T.d. 58, Certified Court Records.) The disorderly conduct claim was the result of verbal arguments. (T.d. 58, Certified Court Records.) Moreover, the assault against another male does not indicate any violent physical propensities that could be associated with rape at the workplace. Finally, Ralston was not convicted of any felonies as the convictions consisted only of two first degree misdemeanors and a minor misdemeanor. (*Id.*) Ralston's criminal history before his hiring did not include five convictions for domestic violence and one conviction of assault. With no duty to conduct a background check, the issue is irrelevant. But a criminal background check would not have revealed Ralston would have raped a coworker.

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 her political subdivision employer when she sustained injuries during work hours or on work grounds." Rather, the Legislature expressly 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 [emphasis added]." R.C. 2744.09(B).

The Legislature is eminently capable of providing an absolute exemption from the provisions of the Act when that was its intent. For instance, under R.C. 2744.09(A), the Legislature placed an absolute ban on "Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability." Likewise, under R.C. 2744.09(D), the Legislature did the same when it precluded all "Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds." And again, under R.C. 2744.09(E), the Legislature precluded all "Civil claims based upon alleged violations of the constitution or statutes of the United States."

Vacha wants to delete from the statute the phrase, "matter that arises out of the employment relationship between the employee and the political subdivision." Of course, courts are prohibited from inserting or deleting language from a statute. *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.*, 58 Ohio St.2d 1, 4, 387 N.E.2d 1222 (1979). Ralston's violent act was unconnected to Vacha's employment. Rather, it was in violation of Ralston's employment duties and City policy. The R.C. 2744.09(B) exemption simply does not apply.

2. Sampson rejects Vacha/OAJ's interpretation.

This Court required lower courts to evaluate the totality of the circumstances by carefully analyzing all "the facts, supported by the evidence" when determining whether immunity is

exempted under R.C. 2744.09(B). (*Sampson* at ¶ 22.) Vacha tries to short-circuit *any* analysis by claiming that a mere *allegation* of an employer intentional tort is enough to avoid the Tort Liability Act. Vacha ignores the subject matter of her claim.

Sampson rejects Vacha's improper and extreme interpretation. Far from blindly relying on allegations contained in *Sampson's* complaint, this Court reviewed five factors, all of which relied on the "evidence" presented, not the mere allegations. (*Sampson* at ¶¶ 20-21.) This Court conducted a detailed and careful evaluation of the totality of the circumstances under that record:

- "First, the **record contains evidence** that the alleged tort arose from an accusation by the employer that the employee had stolen from the employer by using the employer-owned gasoline credit cards for personal needs. ... [emphasis added]" (*Sampson* at ¶ 20.)
- "Second, **Sampson presented evidence** that the investigation of CMHA employees was conducted entirely by CMHA police, based on CMHA documents. [emphasis added]" (*Sampson* at ¶ 21.)
- "Third, **Sampson adduced evidence** that his arrest occurred at a CMHA-called mandatory meeting of all CMHA employees as a part of their regular CMHA work day. ... [emphasis added]" (*Id.*)
- "Fourth, **Sampson presented evidence** that his arrest by CMHA police was publicized by CMHA at the mandatory meeting and through a subsequent press release and press conference. ... [emphasis added]" (*Id.*)
- "Fifth, **Sampson's evidence shows** that he was terminated from his employment by CMHA, that he grieved the termination through his CMHA and union arbitration agreement, and that he was reinstated by CMHA. [emphasis added]" (*Id.*)

The *Sampson* case does not support the position that a mere allegation of an employment-related cause of action, or mere claim that but-for the employee being hired and working at the time, a claim arises out of the employment relationship. Critically reviewed, the opposite is true. Rather than relying on the purported cause of action or some other improperly broad notion of but-for causation, the *Sampson* Court reviewed various factors based on the factual record. The

type of analysis applies to the present case. In a further effort to impede a meaningful analysis of whether there is a "causal connection" under *Sampson*, Vacha improperly suggests that the facts surrounding her claim cannot be discussed because this is an interlocutory appeal under R.C. 2744.02(C). That also is false. This Court has expressly held that "a court of appeals must conduct a de novo review of the law and facts" under the jurisdiction provided in R.C. 2744.02(C). *Hubbell v. Xenia*, 115 Ohio St.3d 77, 873 N.E.2d 878, 2007-Ohio-4839 at ¶21. The immunity issue here is whether the Tort Liability Act applies under R.C. 2744.09(B). Vacha's approach is telling because she does not have any record support for her position, and does not have record support for the underlying claim she makes. Vacha's claim is that the City knew Ralston was substantially certain to rape a coworker yet hired and retained him anyway. There is no support for this erroneous and rather extreme claim.

Under the circumstances and construing the facts most favorably to Vacha, the subject matter of Vacha's claim does not arise out of the employment relationship as a matter of law.

3. The intent of the Tort Liability Act is inconsistent with Vacha/OAJ's interpretation.

Vacha's absolute reliance on her allegations does not strip a political subdivision of immunity. This interpretation is destructive to the purpose of the Tort Liability Act. Further, Vacha's interpretation would merely create a game of creative pleading to avoid immunity.

The Legislature expressly designed the Tort Liability Act to limit liability, not expand the liabilities of political subdivisions. *Summerville v. Forest Park*, 128 Ohio St.3d 221, 943 N.E.2d 522, 2010-Ohio-6280 at ¶ 38. This Court has repeatedly explained the purpose of the Tort Liability Act:

"[T]he protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local

governments to provide public peace, health, and safety services to their residents.” Am.Sub.H.B. No. 176, Section 8, 141 Ohio Laws, Part I, 1733. We noted in *Hubbell [v. Xenia]*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, that “ ‘[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.’ ” *Id.* at ¶ 23, quoting *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 453, 639 N.E.2d 105 (1994).

Coleman v. Portage Cty. Engineer, --- N.E.2d---, 2012 WL 3734459, 2012-Ohio-3881 at ¶13, citing *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 38.

In light of the Tort Liability Act's purpose to limit liability, the Legislature did not intend for a political subdivision be subjected to liability when a plaintiff's mere allegation of an intentional tort was made. In fact, this approach confuses the pleading standards under Civ.R. 12(B)(6) with the evidentiary requirements under Civ.R. 56 that govern this case. Based on the purpose of the Tort Liability Act, it is impossible to believe that the Legislature intended that immunity would not apply based on a mere allegation in the context of Civ.R. 56.

This Court has held an early resolution of immunity is the goal of the statutory analysis:

“ ‘[D]etermination of whether a political subdivision is immune from liability is usually pivotal to the ultimate outcome of a lawsuit. Early resolution of the issue of whether a political subdivision is immune from liability pursuant to R.C. Chapter 2744 is beneficial to both of the parties. If the appellate court holds that the political subdivision is immune, the litigation can come to an early end, with the same outcome that otherwise would have been reached only after trial, resulting in a savings to all parties of costs and attorney fees. Alternatively, if the appellate court holds that immunity does not apply, that early finding will encourage the political subdivision to settle promptly with the victim rather than pursue a lengthy trial and appeals. Under either scenario, both the plaintiff and the political subdivision may save the time, effort, and expense of a trial and appeal, which could take years.’ ” (Emphasis sic.) [*Hubbell*] at ¶ 25, quoting *Burger v. Cleveland Hts.* (1999), 87 Ohio St.3d 188, 199–200, 718 N.E.2d 912 (Lundberg Stratton, J., dissenting).

Coleman at ¶14, citing *Summerville*, ¶ 39. Allowing a mere allegation to derail immunity at the summary judgment stage conflicts with the Legislature's purpose to limit liability as well as its

purpose to promote the quick, efficient and just application of immunity. Again, it also ignores the standards that govern this case under Civ.R. 56.

In pursuing an interpretation of R.C. 2744.09(B), Vacha clings to her legal position that a mere allegation is sufficient to avoid immunity, and the factually unsupportable (and fantastic) allegation that the City hired and retained Ralston knowing he would rape another employee. While unsupported, Vacha's position also is contrary to the Legislature's intent under R.C. 2744.09(B), inconsistent with this Court's opinion in *Sampson v. CMHA*, and destructive to the purpose of the Tort Liability Act.

B. The totality of the circumstances determines whether the Tort Liability Act applies under R.C. 2744.09(B), not a mere allegation contained in a complaint.

1. The subject matter of Vacha's claim is not causally connected to her employment relationship.

The relevant factors all favor a finding that "a causal connection" does not exist "between the subject matter of the civil action and the employment relationship," under *Sampson*.

First, Ralston's conduct did not further the interests of the employer in any conceivable way. Ralston's intentional attack was a purely personal act of "malevolence against" Vacha and an unequivocal departure from his employment as a helper at the treatment plant. See *Moya v. DeClemente*, 8th Dist. No. 96733, 2011-Ohio-5843. 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. The City does not promote or advocate violent acts between its employees. Such acts are expressly prohibited. Further, courts generally recognize that "criminal behavior of third persons is not predictable to any particular degree of certainty" and "thus, the totality of the circumstances must be somewhat overwhelming before a business will be held to be on notice of and therefore under the duty to protect against the criminal acts of others." *Reitz v. May Co.*

Dept. Stores, 66 Ohio App.3d 188, 193-194, 583 N.E.2d 1071 (8th Dist.1990)("It would be unreasonable, therefore, to hold a party liable for [criminal] acts that are for the most part unforeseeable.") Far from "overwhelming evidence," there was no evidence that would have alerted the City that Ralston would attack and rape Vacha. Further, Ralston's seriously criminal conduct in no way facilitated the interests of the City. In her brief at page 9, Vacha misunderstands the City's position in this regard. To be clear, the City's position is that the common law principle found in *Byrd v. Faber* about when an employee's intentional tort can give rise to liability of an employer is helpful in determining whether the subject matter of Vacha's claim arises out of her employment relationship with the City. (See Merits Br. at 9, citing *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991).) The City agrees that Vacha's vicarious liability claim is not at issue; that is not surprising because the trial court properly dismissed Vacha's vicarious liability claim. But, the factor of whether conduct facilitates an employer's business is helpful in determining whether there is a causal connection between the subject matter of Vacha's claim and the employment relationship under R.C. 2744.09(B).

Second, the mechanism of the injury was Ralston's seriously criminal conduct, not an issue having anything to do with the employment or job responsibilities of either person involved. Vacha's position with the City was an unlicensed operator at the treatment plant. Her duties included meter readings, general plant maintenance, lawn care, cleaning tanks, and painting. (Dep. of Vacha at 44, 46.) There is no connection between Vacha's job duties and the subject matter of her claims. 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). When Ralston attacked her, Vacha was playing with a woodchuck, which she admits was not part of her job responsibilities. (Dep. of Vacha at 168.) Vacha admitted that she asked Ralston to help trap a woodchuck so that she may have a pet; admitted that she was playing with the woodchuck at the time of the assault; admitted that she knew it was against City policy to bring alcohol or animals into the facility. (*Id.*) Vacha and Ralston's conduct at the time was not part of their job responsibilities.

Third, the City had no control over the mechanism of the injury at the time. The City did not know the rape was occurring and had no indication of a verbal argument or problems that preceded the violent rape of Vacha. Ralston and Vacha had worked together for almost two years without relevant issue. Ralston did not have any history of violence with anyone at the treatment plant. The City did not know of Ralston's conduct until after it happened. The two employees got along well, both professionally and personally. No one knew that Ralston would attack Vacha, not even Vacha herself who had a personal relationship with her assailant that involved going to parties, sharing rides to work, socializing over non-work issues, and drinking together. Other than Vacha's innuendo and incorrect interpretation of the record, no one knew of Ralston's history of misdemeanor criminal charges. Even if the City had a duty to conduct a background check of this entry level employee -- which Ohio law shows the City did not -- the City would not have known that Ralston would attack and rape a co-worker. The fact that Ralston lied about the misdemeanor charges on his application does not change that fact. Vacha has failed to direct this court to any legal authority imposing a duty upon an employer to conduct a criminal background check on a potential employee under these circumstances. In fact, Ohio law holds that no such duty exists. *See, e.g., Rozzi v. Star Personnel Sers., Inc.*, 12th Dist. No. CA2006-07-

162, 2007-Ohio-2555 at ¶ 12; *Steppe v. Kmart Stores*, 136 Ohio App.3d 454, 467, 737 N.E.2d 58 (8th Dist. 1999); *Kuhn v. Youlten* (1997), 118 Ohio App.3d 168, 177; *Peters v. Ashtabula Metro. Housing Auth.*, 89 Ohio App.3d 458, 462; 624 N.E.2d 1088 (11th Dist. 1993).

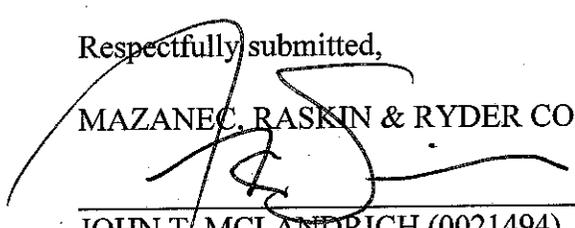
Fourth, the extremely criminal conduct of Ralston severs any “causal connection between the subject matter of the civil action and the employment relationship.” *Sampson, supra*, at ¶ 16. Ralston was convicted and sentenced to four years in prison for Vacha's rape. *State v. Ralston*, 9th Dist. No. 08CA009384, 2008-Ohio-6347, 2008 WL 5122127. Ralston's violent and seriously criminal attack severs any causal relationship between Vacha's employment and her claim for an employer intentional tort. *See 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); *see also Christian v. Wal-Mart Stores East, LP*, 5th Dist. No. 11CA002, 2011 WL 2739645, 2011-Ohio-3512.

IV. CONCLUSION

This Court must reverse and grant judgment in favor of the City of North Ridgeville.

Respectfully submitted,

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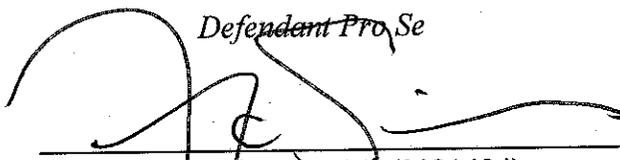
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