

ORIGINAL

IN THE SUPREME COURT OF OHIO

JOHN WILLIAMS, Sr., et al. : Supreme Court No.: **13-0767**

Appellant(s), : On Appeal from the Butler
County Court of Appeals

-vs- : Twelfth Appellate District

McFARLAND PROPERTIES, et al., : CA 2012 09 0187

Appellee(s), :

**MEMORANDUM IN SUPPORT OF JURISDICTION OF THE
SUPREME COURT OF OHIO ON BEHALF OF APPELLANTS
JOHN WILLIAMS, Sr., et al.**

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<p>When this Court for the first time interprets the law, this is sufficient grounds for granting a <i>Civil Rule 60(B) (5)</i> Motion as it constitutes a meritorious claim for purposes of <i>Civil Rule 60(B) (5)</i>.</p>	
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I. EXPLANATION AS TO WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION:

This case involves a question of when *Civil Rule* 60(B)(5) allows the reopening of a case where this Court has announced for the first time an interpretation of *Ohio Revised Code* 2744.09(B).

Appellant originally filed an action in 2005 against the defendant City of Hamilton and others. The case against the other entities was settled. On March 23, 2007 the City filed a Motion for Summary Judgment which the Trial Court originally granted on August 23, 2007. Appellant appealed this finding to the Twelfth District Court of Appeals, who confirmed the Court's ruling that the City had immunity under RC 2744. *et sec.*, and that RC §2744.09(B) did not provide an exception. Appellant appealed to this Court, but this Court did not accept jurisdiction.

On February 16, 2012 this Court decided *Sampson v. Cuyahoga Metropolitan Housing Authority*, 131 OS 3rd 418, 2012- Ohio - 579 holding that a civil action alleging an intentional tort against a governmental employer, RC 2744.09(B) provided an exception to immunity to civil actions by an employee against the governmental agency.

In June 2012 plaintiffs filed a Motion for Relief of Judgment under *Civil Rule* 60(B)(5) based upon this Court's decision in *Sampson v. Cuyahoga Metropolitan Housing Authority*, *supra*.

transformer he was severely injured, suffering first degree burns over 60% of his body. He filed suit against the City of Hamilton and against McFarland Properties. The case was settled against all entities except for the City of Hamilton, which was granted summary judgment by the Trial Court and affirmed by the Twelfth District Court of Appeals. A discretionary appeal was denied by this Court.

After this Court's decision in *Sampson, supra*, plaintiff filed in the Trial Court a Rule 60(B)(5) Motion to reopen the case against the City of Hamilton which was denied. Plaintiff appealed the decision of the Trial court to the Twelfth District Court of Appeals which affirmed the Trial Court's denial of Appellant's 60(B)(5) motion. Plaintiff now appeals to this Court.

III. PROPOSITION OF LAW I:

WHEN THIS COURT FOR THE FIRST TIME INTERPRETS THE LAW, THIS IS SUFFICIENT GROUNDS FOR GRANTING A CIVIL RULE 60(B)(5) MOTION AS IT CONSTITUTES A MERITORIOUS CLAIM FOR PURPOSES OF CIVIL RULE 60(B)(5).

IV. ARGUMENT:

This Court in *Sampson v. Cuyahoga Metropolitan Housing Authority* 131 OS 3rd 418, 2012 - Ohio - 570 that RC 2744.09(B) provides an exception to immunity for civil actions by an employee against a governmental agency.

John Williams was an employee of the City of Hamilton and thus the City did not

have immunity as 2744.09(B) provides an exception to immunity.

This Court in *Doe v. Trumble County Children's Services Board*, 28 OS 3rd 128, (1986) held that a subsequent change in controlling case law in an unrelated proceeding does not constitute grounds for obtaining relief from judgment under *Civil Rule 60(B)*. This case was relied by both the Trial Court and the Court of Appeals in denying Appellant's *Civil Rule 60(B)* motion.

In *Doe, supra*, relief was sought on the basis that the Doctrine of Governmental Immunity had been changed by *Enghauser Manufacturing Company v. Eriksson Engineering Limited*, 1983, 6 OS 3rd 31. This Court held that *Enghauser* represented a change in the decisional law, not a pronouncement of the law, for the first time law for the first time. This Court has never decided whether a decision interpreting the law for the first time is grounds for *Civil Rule 60(B)* motion.

V. CONCLUSION:

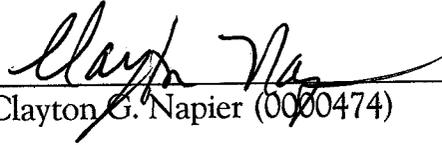
For reasons outlined above, this question involves matters of public and great general interest and a substantial constitutional question.

The appellant requests that this Court accept jurisdiction in this case so that the important question presented be reviewed on the merit.

Respectfully submitted,



Timothy R. Evans (0018593)



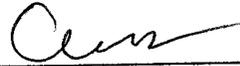
Clayton G. Napier (0000474)

Certificate of Service

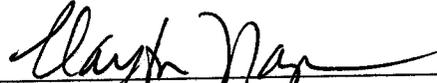
A copy of the foregoing was mailed by ordinary mail to counsel for appellees:

Gary Becker
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on April 10, 2013.



Timothy R. Evans (0018593)



Clayton G. Napier (0000474)

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APPENDIX

CA 12 09 0187

FILED
2012 SEP 21 PM 1:40
BUTLER COUNTY
COURT OF COURTS

COURT OF COMMON PLEAS
CIVIL DIVISION
BUTLER COUNTY, OHIO

JOHN WILLIAMS, SR., et al., : Case No.: CV2005 09 3061

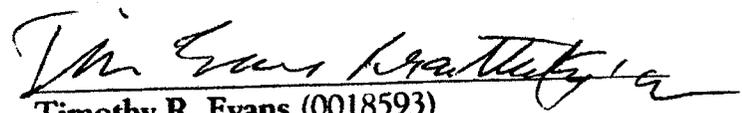
Plaintiff, : Appeal No. CA 2012 09 0187

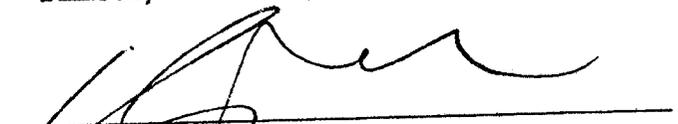
vs. : NOTICE OF APPEAL

McFARLAND PROPERTIES, INC. :
BUTLER CO. :
COURT OF APPEALS

Defendant. :
SEP 21 2012 :
MARY L. SWAIN :
CLERK OF COURTS

Now comes John Williams, Sr., by and through counsel, Timothy R. Evans and Clayton G. Napier, and gives his Notice of Appeal to the Twelfth District Court of Appeals from the entry of the Butler County Court of Common Pleas, dated August 27, 2012.


Timothy R. Evans (0018593)


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Attorneys for Appellant
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PRECIPE

**TO THE CLERK OF COURTS
COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO**

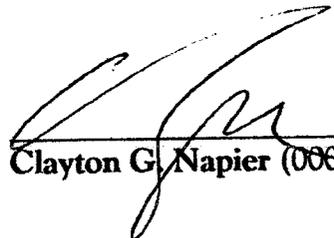
Please prepare and forward for filing with the Clerk of Courts for the Twelfth Appellate District Court of Appeals a certified copy of the entire transcript of the journal entries, docket entries and original papers in the above numbered case.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was forwarded by ordinary U.S. Mail on the 21st of September, 2012 to:

Gary E. Becker, Esq.
Robert M Zimmerman, Esq.
Dinsmore & Shohl, LLP
1900 First Financial Center
255 East Fifth Street
Cincinnati, OH 45202

this 21st day of September, 2012.


Clayton G. Napier (0000474)

FILED IN THE COURT OF APPEALS

2013 APR -8 PM 1:21
TWELFTH APPELLATE DISTRICT OF OHIO

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

BUTLER COUNTY

JOHN WILLIAMS, SR., et al.,

Plaintiffs-Appellants,

- vs -

McFARLAND PROPERTIES, et al.,

Defendants-Appellees.

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COURT OF APPEALS

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MARY L. SWAIN
CLERK OF COURTS

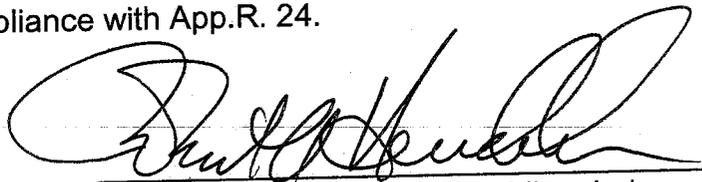
CASE NO. CA2012-09-187

JUDGMENT ENTRY

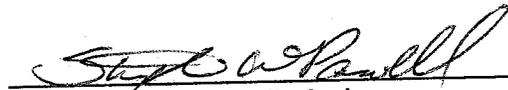
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.



Robert A. Hendrickson, Presiding Judge



Stephen W. Powell, Judge



Michael E. Powell, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

JOHN WILLIAMS, SR., et al.,	:	CASE NO. CA2012-09-187
Plaintiffs-Appellants,	:	
	:	<u>OPINION</u>
	:	4/8/2013
- vs -	:	
	:	
McFARLAND PROPERTIES, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2005-09-3061

Timothy R. Evans and Clayton G. Napier, 29 North D Street, Hamilton, Ohio 45013, for plaintiffs-appellants

Freund, Freeze & Arnold, Gordon D. Arnold, One Dayton Centre, Suite 1800, 1 South Main Street, Dayton, Ohio 45402, for defendants McFarland Properties, David McFarland, Griffin M. McFarland

Mike DeWine, Ohio Attorney General, 30 East Broad Street, Columbus, Ohio 43215, for Defendant Workers' Compensation

Dinsmore & Shohl LLP, Gary E. Becker and Robert M. Zimmerman, 1900 First Financial Center, 225 East Fifth Street, Cincinnati, Ohio 45202, for defendant-appellee, City of Hamilton

M. POWELL, J.

{¶ 1} Plaintiff-appellant, John Williams, Sr., appeals from a decision in the Butler

County Court of Common Pleas denying his motion for relief from summary judgment that the court entered in favor of defendant-appellee, the city of Hamilton ("city"). For the reasons outlined below, we affirm.

{¶ 2} Williams worked as a lineman for the city's electric distribution department. On September 27, 2004, Williams was injured while attempting to repair a downed electrical transformer located at University Boulevard and Lincoln Avenue in Hamilton. As a consequence, Williams filed suit against the city and several other parties on September 22, 2005. Among his claims, Williams asserted that the city had committed an intentional tort against him. The city moved for summary judgment, claiming that it was entitled to immunity on the basis of R.C. Chapter 2744 which addresses the tort liability of political subdivisions.

{¶ 3} On August 23, 2007, the trial court rendered summary judgment in favor of the city. Generally, political subdivisions are immune from liability, subject to some exceptions. Williams alleged that an exception to immunity for intentional tort claims was provided by R.C. 2744.09(B). However, the trial court held that R.C. 2744.09(B) does not apply to intentional tort claims and found that the city was immune from Williams' suit. Williams appealed the trial court's determination to this court in 2008, whereby we affirmed the decision of the trial court granting summary judgment to the city. *See Williams v. McFarland Properties, L.L.C.*, 177 Ohio App.3d 490, 2008-Ohio-3594 (12th Dist.). Williams then appealed to the Ohio Supreme Court, which declined to accept jurisdiction on December 3, 2008. *See Williams v. McFarland Properties, L.L.C.*, 120 Ohio St.3d 1421, 2008-Ohio-6166.

{¶ 4} Subsequently, in 2012, the Ohio Supreme Court held in *Sampson v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 418, 2012-Ohio-570, that R.C. 2744.09(B) applies to intentional tort claims made by political subdivision employees when there is a causal connection between claims raised by an employee and the employment relationship. Based on this decision, on June 18, 2012, Williams moved for relief from summary judgment. The

trial court denied Williams' motion, finding that Williams was not entitled to relief because *Sampson* represented a change in decisional law and overturned "a long-standing principle that political subdivisions were immune from liability based upon intentional torts." Williams now appeals, and asserts one assignment of error for review.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE COURT ERRED IN DENYING [WILLIAMS'] MOTION FOR RELIEF FROM JUDGMENT[.]

{¶ 7} Williams argues that the trial court erred in denying his motion for relief from judgment because the Ohio Supreme Court recently articulated law that allows political subdivisions to be sued by their employees under an intentional tort theory. As a consequence of this decision, Williams argues that he is entitled to relief under Civ.R. 60(B)(5). We disagree.

{¶ 8} In Williams' specific argument, he contends that *Sampson* merely articulated the law already in existence regarding political subdivision immunity and did not overrule prior case precedent. As discussed more fully below, *Sampson* represents a change in decisional law, and as such, may not serve as the basis of Civ.R. 60(B) relief. Consequently, we reject this argument.

{¶ 9} An appellate court will not disturb a trial court's decision regarding a Civ.R. 60(B) motion absent a showing of an abuse of discretion. *Veidt v. Cook*, 12th Dist. No. CA2003-08-209, 2004-Ohio-3170, ¶ 14, citing *Strack v. Pelton*, 70 Ohio St.3d 172, 174 (1994). An abuse of discretion occurs when the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 10} Civ.R. 60(B) provides in part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake,

inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

To prevail on a Civ.R. 60(B) motion, the movant must demonstrate that "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time * * *." *GTE Automatic Elec., Inc. v. ARC Industries., Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. The moving party fails the test by not meeting any one of the above requirements. *Fitzwater v. Woodruff*, 12th Dist. No. CA2006-01-001, 2006-Ohio-7040, ¶ 10; *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988).

{¶ 11} We find that Williams is not entitled to relief under Civ.R. 60(B)(5) as he asserts.¹ The Ohio Supreme Court has expressly stated that a change in decisional law in an unrelated proceeding does not entitle a party to relief from a final judgment under Civ.R. 60(B). *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128 (1986), paragraph one of the syllabus. The purpose for such a holding is "the strong interest in the finality of judgments." *Doe* at 131. To allow reopening would undermine the stability of final judgments. *Id.*

{¶ 12} In this case, the initial judgment was supported by case law in numerous appellate districts interpreting the Ohio Supreme Court case, *Brady v. Safety-Kleen Corp.*, 61

1. We also note that Williams is not entitled to relief under Civ.R. 60(B)(4) because "it is well-settled that relief under Civ.R. 60(B)(4), * * * is limited to cases in which the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel. It does not apply merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed." *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128 (1986), fn. 2, quoting Wright & Miller, *Federal Practice and Procedure*, Section 2863, at 204 (1973).

Ohio St.3d 624 (1991), that stated intentional torts necessarily occur outside of the employment relationship. These districts explicitly held that R.C. 2744.09(B) does not except an employer-intentional-tort claim from the general grant of immunity given to a political subdivision under R.C. Chapter 2744. See, e.g., *Schmitz v. Xenia Bd. of Edn.*, 2d Dist. No. 2002-CA-69, 2003-Ohio-213; *Fabian v. City of Steubenville*, 7th Dist. No. 00 JE 33, 2001 WL 1199061 (Sept. 28, 2001); *Engleman v. Cincinnati Bd. of Edn.*, 1st Dist. No. C-000597, 2001 WL 705575 (June 22, 2001); *Terry v. Ottawa Cty. Bd. of Mental Retardation & Dev. Disabilities*, 151 Ohio App.3d 234, 2002-Ohio-7299 (6th Dist.); *Ellithorp v. Barberton City School Dist. Bd. of Edn.*, 9th Dist. No. 18029, 1997 WL 416333 (July 9, 1997); *Coats v. Columbus*, 10th Dist. No. 06AP-681, 2007-Ohio-761; *Sabulsky v. Trumbull Cty.*, 11th Dist. No. 2001-T-0084, 2002-Ohio-7275. Additionally, a final judgment was rendered, it was affirmed on appeal, and jurisdiction was declined by the Ohio Supreme Court. This scenario clearly points to a change in decisional law. In any event, to allow relief under Civ.R. 60(B) in this instance would undermine the integrity of final judgments. Consequently, we cannot say the trial court abused its discretion by denying Williams' Civ.R. 60(B) motion. Williams' sole assignment of error is overruled.

{¶ 13} Judgment affirmed.

HENDRICKSON, P.J. and S. POWELL, J., concur.