

IN THE SUPREME COURT OF OHIO

<p>Lisa Vacha,  Plaintiff-Appellee,  v.  The City of North Ridgeville, Ohio,  Defendant-Appellant.</p>	<p>Cases No. 2011-1050 and 2011-1327  On Appeal from the Lorain County Court of Appeals, Ninth Appellate District</p>
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BRIEF OF *AMICUS CURIAE*  
THE OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF PLAINTIFF-APPELLEE LISA VACHA

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## **APPELLANT'S 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.

## **CERTIFIED CONFLICT QUESTION**

Does R.C. 2744.09 create an exception to political subdivision immunity for intentional tort claims alleged by a public employee?

## **INTEREST OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE**

The Ohio Association for Justice (“OAJ”) is Ohio’s largest victims-rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The Association is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable.

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

The Ohio Association for Justice accepts the Statement of the Case and the Statement of Facts in Appellee Lisa Vacha's brief.

### ARGUMENT

**The R.C. 2744.09(B) exception to political subdivision immunity applies to Ms. Vacha's employer-intentional-tort claim against North Ridgeville.**

**A. Standard of review.**

This case presents questions of law, which this Court reviews *de novo*.

**B. *Sampson v. Cuyahoga Metro Hous. Auth.* answered the certified question in this case and rejected Appellant's proposition of law in this case.**

R.C. 2744.02(A)(1) generally grants immunity to cities and other political subdivisions of the State of Ohio. R.C. 2744.02(A)(1) provides:

Except as provided in division (B) of this section, 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.

R.C. 2744.09 creates five classes of exceptions to that general rule of immunity. One of those classes of exceptions is claims by employees "relative to any matter that arises out of the employment relationship between the employee and the political subdivision." R.C. 2744.09(B) provides:

This chapter [2744] does not apply to, and shall not be construed to apply to, the following:

.....

(B) 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.

This Court has already answered the certified conflict question in this case and rejected the City of North Ridgeville’s proposition of law in this case. In *Sampson v. Cuyahoga Metro Hous. Auth.*, 131 Ohio St.3d 418, 2012-Ohio-570, this Court held that an employer intentional tort committed by a political subdivision *can* be “relative to any matter that arises out of the employment relationship between the employee and the political subdivision” within the meaning of R.C. 2744.09(B):

1. When an employee of a political subdivision brings a civil action against the political subdivision alleging an intentional tort, that civil action *may qualify* as a “matter that arises out of the employment relationship” within the meaning of R.C. 2744.09(B).
2. An employee’s action against his or her political-subdivision employer arises out of the employment relationship between the employee and the political subdivision within the meaning of R.C. 2744.09(B) if there is a causal connection or a causal relationship between the claims raised by the employee and the employment relationship.

*Id.* at syllabus (emphasis added).

Thus, all that remains in this case is for this Court to apply *Sampson* to the facts of this case – or remand for the court of common pleas to do so.

**C. North Ridgeville’s intentional tort against Ms. Vacha lies within the scope of R.C. 2744.09(B).**

The second paragraph of the syllabus of *Sampson* explains that an employer intentional tort is “relative to any matter that arises out of the employment relationship between the employee and the political subdivision” within the meaning of R.C. 2744.09(B) “if there is a causal connection or a causal relationship between the claims raised by the employee and the employment relationship.” *Id.* at paragraph two of the syllabus.

North Ridgeville's intentional tort against Ms. Vacha satisfies this test: but for her employment with North Ridgeville, North Ridgeville could not have committed this employer intentional tort against her.

North Ridgeville contends that the only actionable conduct in this case is Mr. Ralston's raping Ms. Vacha – in other words, that North Ridgeville is liable, if at all, only by vicarious liability for Mr. Ralston's conduct. (North Ridgeville's Brief, 8-17.)

That is not so. It is true that Ms. Vacha asserted a claim alleging that North Ridgeville is vicariously liable for Mr. Ralston's conduct – Counts 1 and 3 of the Amended Complaint. The court of common pleas granted North Ridgeville summary judgment on Counts 1 and 3. (Those Counts were not at issue in the court of appeals.) But North Ridgeville remains liable for the intentional tortious conduct of exposing Ms. Vacha to Mr. Ralston as part of her employment – Counts 5.<sup>1</sup>

The decision to expose Ms. Vacha to Mr. Ralston was so egregious as to constitute an intentional tort.<sup>2</sup> “[W]here the tort is intentional, . . . the behavior giving rise to the tort must be

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<sup>1</sup> Count 5 states:

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

36. Defendant, City's, failure to select, supervise or otherwise control Defendant, Charles Ralston, was done intentionally, with malicious purpose, in bad faith or in a wanton or reckless manner with disregard for the safety of others and constitutes an intentional tort on the part of Defendant, City.

<sup>2</sup> For two reasons, this Court should ignore the argument of *amicus* the Ohio Municipal League that North Ridgeville is entitled to summary judgment due to lack of evidence (Brief of the Ohio Municipal League 9-10). *First*: North Ridgeville has conceded for the sake of argument in this appeal that its decision to retain Mr. Ralston constitutes an intentional tort. The court of common pleas ruled that there are genuine issues of material fact as to whether North Ridgeville committed an intentional tort. (Decision 2 (Dec. 8, 2009) [North Ridgeville Brief Appx. 2].) The court of appeals affirmed. *Vacha v. North Ridgeville*, 2011-Ohio-2446, ¶¶ 16-17 (9th Dist.).

calculated to facilitate or promote the business.” *Byrd v. Faber*, 57 Ohio St.3d 56, 58 (1991) (quotation marks omitted). Retaining employees is fundamental to facilitating and promoting a business.<sup>3</sup> It is thus beyond dispute that retaining employees (here, Mr. Ralston) to work at the city’s wastewater treatment facility was “calculated to facilitate and promote the business” of the wastewater treatment facility.

North Ridgeville’s reliance on *Moya v. Declemente*, 2011-Ohio-5843 (8th Dist.), is misplaced. In *Moya*, the plaintiff sued a fellow public school teacher for battery. The plaintiff also sued their school-district employer for *respondeat superior* and negligence. *Id.* at ¶ 2. The plaintiff did *not* allege that the school district engaged in any intentional wrongdoing. Here, Ms. Vacha alleges that North Ridgeville engaged in intentional wrongdoing – knowing of Mr. Ralston’s proclivity toward assaulting women yet requiring her to work with Mr. Ralston daily without warning her. This wrongdoing is separate from Mr. Ralston’s intentional wrongdoing.

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North Ridgeville’s brief in this Court does not address the issue. *Second*: Denial of summary judgment on a non-immunity issue is not subject to immediate appellate review, even when a simultaneous denial of immunity is immediately appealable under R.C. 2744.02(C). *Leasure v. Adena Local School Dist.*, 2012-Ohio-3071 (4th Dist.) (collecting cases).

<sup>3</sup> Conduct less fundamental to the employment relationship still falls within the scope of R.C. 2744.09(B). See *Buck v. Reminderville*, 2010-Ohio-6497, ¶ 15 (9th Dist.) (holding that municipality’s publication of defamatory statements regarding plaintiff’s performance as the municipality’s police chief was within the scope of R.C. 2744.09(B)), summarily affirmed on the authority of *Sampson* by 132 Ohio St.3d 24, 2012-Ohio-1580; *Steinbrink v. Greenon Local School Dist.*, 2012-Ohio-1438 (2nd Dist.) (applying *Sampson* and holding that employer’s defamation and intentional infliction of emotional distress were within the scope of R.C. 2744.09(B)); *Kravetz v. Streetsboro Bd. of Ed.*, 2012-Ohio-1455 ¶¶ 2, 41 (11th Dist.) (applying *Sampson* and holding that employer’s multiple intentional torts were within the scope of R.C. 2744.09(B)); *Schmitt v. Educational Service Center of Cuyahoga County*, 2012-Ohio-2208, ¶ 17 (8th Dist.) (applying *Sampson* and holding that employer’s intentional infliction of emotional distress was within the scope of R.C. 2744.09(B)).



## CONCLUSION

By its decision in *Sampson*, this Court answered the certified conflict question in this case and rejected the City of North Ridgeville's proposition of law in this case. This Court should apply *Sampson* and affirm.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

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