[Cite as *Grassia v. Cleveland*, 2010-Ohio-2483.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93647

RICHARD F. GRASSIA, ET AL.

PLAINTIFFS-APPELLEES

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-638750

BEFORE: Cooney, J., Gallagher, A.J., and Jones, J.

RELEASED: June 3, 2010

JOURNALIZED:

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, the city of Cleveland ("the City"), appeals the trial court's decision denying its motion for summary judgment. Finding merit to the appeal, we reverse and remand.

{¶ 2} This appeal arises from a lawsuit filed in 2007 by plaintiffs-appellees, Richard and Karen Grassia (individually as "Richard" and "Karen" and collectively as the "Grassias"), against the City, alleging that the City committed a common-law employer intentional tort when Richard contracted Legionnaire's disease while working as a truck driver in the City's streets department.[1] The Grassias further alleged that the City had knowledge of the presence of Legionnaire's disease at the work facility and failed to remedy the condition. The City moved to dismiss the matter, arguing that it was immune under R.C. Chapter 2744. The trial court denied the motion in January 2008.

{¶ 3} The City then appealed to this court, arguing that the trial court erred in denying its motion to dismiss. See *Grassia v. Cleveland*, Cuyahoga App. No. 91013, 2008-Ohio-3134. We dismissed that appeal, finding that "[b]ecause the court denied the City's motion in this case without elaboration

[1]Karen alleges loss of consortium as a result of Richard's injuries.

and there is, therefore, no record on the issue of immunity, based on the authority of the Supreme Court's decision in [*State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199], there is no final appealable order[.]" Id. at ¶11.

{¶ 4} On remand, the City proceeded with discovery and moved for summary judgment, again arguing immunity from employer intentional tort claims under R.C. 2744.02. The Grassias opposed, arguing that because they brought Richard's action as an employee of the City and not as a private citizen, R.C. 4123.74 rather than R.C. 2744.02 governed the case.[2] The trial court denied the City's motion for summary judgment in June 2009.

{¶ 5} It is from this order that the City now appeals, raising one assignment of error, in which it argues that the trial court erred by denying the City's motion for summary judgment because it is immune from intentional torts claims under R.C. 2744.02.[3]

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[2]R.C. 4123.74, the Workers' Compensation provision, states in pertinent part: "[e]mployers who comply with [R.C. 4123.35] shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment * * * occurring during the period covered by such premium so paid into the state insurance fund * * * whether * * * such injury, occupational disease, bodily condition, or death is compensable under this chapter."

[3]Because this appeal involves an issue of governmental immunity, the denial of the City's motion for summary judgment constitutes a final appealable order. See R.C. 2744.02(C); *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878.

Standard of Review

{¶ 6} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

> "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp*. (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274."

{¶ 7} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

Political Subdivision Immunity

{¶ 8} The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability. First, R.C. 2744.02(A) states the general rule of immunity that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function.[4] See, also, *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶7. However, the immunity afforded in R.C. 2744.02(A)(1) is not absolute. See R.C. 2744.02(B).

{¶ 9} "The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability." *Colbert* at ¶8. "If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability." Id. at ¶9. See, also, *Cater v. Cleveland*, 83 Ohio St.3d 24, 1998-Ohio-421, 697 N.E.2d 610.

[4]For purposes of immunity under R.C. Chapter 2744, "governmental function" is defined by R.C. 2744.01(C) and "proprietary function" is defined by R.C. 2744.01(G).

{¶ 10} Because the City is a political subdivision as defined by R.C. 2744.01(F), the general grant of immunity in R.C. 2744.02(A)(1) applies in the instant case.

Exceptions to Political Subdivision Immunity

{¶ 11} Under the second tier of the analysis, the City may be liable if one of the following exceptions under R.C. 2744.02(B) applies: (1) the negligent operation of a motor vehicle by an employee; (2) the negligent performance of acts by an employee with respect to a proprietary function; (3) the negligent failure to keep public roads in repair and open; (4) the negligence of employees occurring within or on the grounds of buildings used in connection with the performance of governmental functions; and (5) when civil liability is expressly imposed upon the political subdivision by statute. Id. at (B)(1)-(5).

Applicability of R.C. Chapter 2744

{¶ 12} Here, the City argues that it is immune from Richard's employer intentional tort claim. The Grassias argue that R.C. Chapter 2744 is inapplicable to their common-law employer intentional tort claim. They cite *Catalano v. Lorain*, 161 Ohio App.3d 841, 2005-Ohio-3298, 832 N.E.2d 134, to support their position that when a political subdivision is sued by an employee, the appropriate statute to consider is R.C. 4123.74.

{¶ 13} However, *Catalano* is distinguishable from the instant case. In *Catalano*, appellant, Catalano, a building-maintenance supervisor for the city of Lorain, was injured when a police dog jumped from a police vehicle and attacked him. Catalano received workers' compensation and filed a negligence action against his employer, the city of Lorain. The Ninth District Court of Appeals found that Catalano was limited to recovering his workers' compensation benefits and was precluded from pursuing additional actions against the city because he was injured by the negligence of another employee in the course and scope of his employment. Id. at ¶12, 13.

{¶ 14} The *Catalano* court found that R.C. 4123.74 was the appropriate statute to consider because Catalano alleged he was injured by the negligence of another employee in the course and scope of his employment. Whereas in the instant case, Richard alleges an intentional tort by his employer and makes no allegation involving another employee acting in the course and scope of employment. Therefore, R.C. 4123.74 does not apply, and the Grassias' reliance on *Catalano* is misplaced.

{¶ 15} The Grassias further argue that R.C. 2744.02 is inapplicable to Richard's employer intentional tort claim under R.C. 2744.09(B) and (C).

{¶ 16} R.C. 2744.09 sets forth several exceptions that remove certain types of civil actions entirely from R.C. Chapter 2744. 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) 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."

{¶ 17} Because Richard's injuries allegedly occurred within the scope of his employment, it would seem at first glance that R.C. 2744.09(B) is applicable. However, because Richard's complaint against the City alleged an employer intentional tort, R.C. 2744.09(B) does not apply for the following reasons.

{¶ 18} 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. (*Blankenship v. Cincinnati Milacron Chemicals, Inc.* [1982], 69 Ohio St.2d 608, 23 O.O.3d 504, 433 N.E.2d 572, approved and followed.)" Id., paragraph one of the syllabus.

{¶ 19} The *Brady* 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.'" (Emphasis in original.) Id. at 634, quoting *Taylor v. Academy Iron & Metal Co.* (1988), 36 Ohio St.3d 149, 162, 522 N.E.2d 464.[5]

{¶ 20} In *Ventura v. Independence* (May 7, 1998), Cuyahoga App. No. 72526, this court upheld the lower court's grant of summary judgment on behalf of the city of Independence in an action for intentional tort and intentional infliction of emotional distress brought by a former city worker. We found that R.C. 2744.09(B) does not create an exception to the immunity granted to political subdivisions by R.C. 2744.02(A)(1). Relying on *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), Summit App. No. 18029, the *Ventura* court stated:

> "'Because Section 2744.02(B) includes no specific exceptions for intentional torts, courts have consistently held that political subdivisions are immune from intentional tort claims. See, e.g., *Wilson*, supra (claims for fraud and intentional infliction of emotional

[5]After *Brady*, the Ohio Supreme Court in reviewing R.C. Chapter 2744, found that "[t]here are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress." See *Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450, 452, 1994-Ohio-394, 639 N.E.2d 105 (where the plaintiffs' damages arose from the actions of the defendant in placing adoptive children in the plaintiffs' home).

> distress); *Farra v. Dayton* (1989), 62 Ohio App.3d 487, 576 N.E.2d 807 (claim for intentional interference with business interests); *Monesky v. Wadsworth* (Apr. 3, 1996), Medina App. No. 2478-M * * * (claims for trespass and demolition of a building). * * *
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> "'Ms. Ellithorp also argued in the trial court, and has argued on appeal, that Section 2744.09(B) of the Ohio Revised Code provides an exception to sovereign immunity applicable to this case. * * * The school board has asserted, and this Court agrees, that Section 2744.09(B) is inapplicable to the facts of this case. An employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside of the scope of employment. *Brady* [at] paragraph one of the syllabus.'"

{¶ 21} The *Ventura* court found such reasoning persuasive, stating that "to allow such claims as appellant's would frustrate the purpose of both Chapter 2744 and laws providing for collective bargaining and workers' compensation; consequently, R.C. 2744.09(B) does not create an exception to immunity for the political subdivision on the facts of this case."

{¶ 22} In *Young v. Genie Industries United States*, Cuyahoga App. No. 89665, 2008-Ohio-929, this court upheld the lower court's grant of summary judgment on behalf of defendant, Euclid City School District, in an action for intentional tort brought by Young, an employee of the school district. Young argued that R.C. 2744.09(B) created an exception to the school district's immunity under R.C. 2744.02 because her intentional tort claim arose out of the employment relationship. We disagreed, finding that:

> "Under R.C. 2744.09(B), R.C. 2744 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.)
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> * *
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> "Generally, an employee's intentional tort claim does not arise out of the employment relationship. [*Brady* at paragraph one of the syllabus.] Further, in [*Thayer v. W. Carrollton Bd. of Edn.*], Montgomery App. No. 20063, 2004-Ohio-3921, ¶15, the court held that political subdivision immunity applies to intentional torts because those claims do not arise out of the employment relationship. Therefore, we find that R.C. 2744.09 is not an exception to political subdivision immunity in the context of intentional torts in the employment setting." Id. at ¶23-24.

See, also, *Chase v. Brooklyn City School Dist.* (2001), 141 Ohio App.3d 9, 19, 749 N.E.2d 798 (where this court relied on *Ventura* and found that the school district, as a political subdivision, had immunity from plaintiff's employer intentional tort claim.)[6]

{¶ 23} This court, in *Magda v. Greater Cleveland Regional Transit Auth.*, Cuyahoga App. No. 92570, 2009-Ohio-6219, has also considered whether an employer intentional tort was exempted from immunity by R.C. 2744.09(C). In *Magda*, the plaintiff argued that there is an exception to RTA's immunity under R.C. 2744.09(C) because his complaint contained

[6]We recognize this court's recent decision in *Sampson v. Cuyahoga Metro. Hous. Auth.*, Cuyahoga App. No. 93441, 2010-Ohio-1214, appears to contradict this long line of cases, but we find it distinguishable from the instant case because it did not involve a pure "employer intentional tort claim." Rather, Sampson alleged "that CMHA negligently accused and arrested [him] for theft." Id. at ¶1.

allegations concerning the conditions and general terms of his employment — it detailed how he was ordered to perform the electrical work as instructed by his supervisor. In finding that R.C. 2744.09(C) is inapplicable, we stated:

> "Courts have held that R.C. 2744.09(C) 'make[s] R.C. Chapter 2744 inapplicable to civil actions pertaining to terms of employment brought by employees of political subdivisions against their employers.' *Poppy v. Willoughby Hills City Council*, Lake App. No. 2004-L-015, 2005-Ohio-2071, at ¶29. This is because '[a]n employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside the scope of employment.' [*Ellithorp*]. To the extent that Magda argues that RTA committed an intentional tort against him, that tort would have occurred outside the employment relationship[.] [*Brady*] * * *."

{¶ 24} Furthermore, the Seventh District Court of Appeals in *Fabian v. Steubenville*, Jefferson App. No. 00 JE 33, 2001-Ohio-3522, noted that the language of R.C. 2744.09(C) is virtually identical to the language in R.C. Chapter 4117 (the Ohio Public Employees Collective Bargaining Act), which covers all subjects that affect "wages, hours, terms and conditions of employment." Applying R.C. 1.42, the 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."[7] Id.

[7] R.C. 1.42 provides in pertinent part that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."

{¶ 25} Thus, we find that neither R.C. 2744.09(B) nor (C) strips the City of its immunity under R.C. 2744.02 for Richard's intentional tort claim.

{¶ 26} Because the Grassias' complaint failed to allege a cause of action that was an exception to R.C. 2744.01(A)(1), we find that the trial court erred in denying the City's motion for summary judgment.[8]

{¶ 27} Accordingly, the sole assignment of error is sustained.

{¶ 28} Judgment is reversed, and the matter is remanded with instructions for the trial court to enter summary judgment in favor of the City.

It is ordered that appellant recover of said appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

[8]Having determined that the trial court erred in denying the City's motion for summary judgment, Karen's loss of consortium claim also fails. "[A] claim for loss of consortium is derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse who suffers bodily injury." *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 93, 585 N.E.2d 384.

LARRY A. JONES, J., CONCURS;
SEAN C. GALLAGHER, A.J., DISSENTS (SEE ATTACHED DISSENTING OPINION)

SEAN C. GALLAGHER, A.J., DISSENTING:

{¶ 29} I respectfully dissent from the majority opinion and would affirm the judgment of the trial court. I believe the City is not entitled to immunity in this matter.

{¶ 30} This is an employer intentional tort action that was brought by an employee of the City who contracted Legionnaire's disease. The employee claims that he was exposed to the disease at a work facility and that the City was aware of its presence, yet failed to remedy the condition. I would find that the alleged conduct that forms the basis of the employer intentional tort claim arose under the employment relationship, and that the City is not entitled to immunity from the claim. I believe this claim is exempted by R.C. 2744.09(B) from the general immunity provided to political subdivisions under R.C. Chapter 2744.

{¶ 31} The Ohio Supreme Court has not expressly considered whether an employer intentional tort claim falls under the exemptions to immunity provided under R.C. 2744.09, such that the R.C. Chapter 2744 immunity would not apply. Relevant to employee intentional tort claims, R.C. 2744.09 provides exemptions to immunity for a civil action by an employee against a political subdivision "relative to any matter that arises out of the employment relationship" or "relative

to wages, hours, conditions, or other terms of his employment." R.C. 2744.09(B) and (C).

{¶ 32} In the context of workers' compensation law, the Ohio Supreme Court has held that an intentional tort committed by an employer against an employee in the workplace "necessarily occurs outside the employment relationship." *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 635, 576 N.E.2d 722. Recently, the Ohio Supreme Court considered the constitutionality of the current employer intentional tort statute, R.C. 2745.01, but declined to revisit its earlier holding that employer intentional torts are outside the scope of employment. *Kaminski v. Metal & Wire Prods. Co.*, __ Ohio St.3d __, 2010-Ohio-1027, __ N.E.2d __, at ¶98. The court found that the statute is constitutional.[9] Id. at ¶102; *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, __ Ohio St.3d __, 2010-Ohio-1029, __ N.E.2d __.[10] Neither *Kaminski* nor *Stetter* were cases involving political subdivision immunity.

{¶ 33} Ohio appellate courts are split on the issue of whether R.C. 2744.09 exempts employer intentional torts from political subdivision immunity. See *Kollstedt v. Princeton City Schools Bd. of Edu.* (Feb. 27, 2010), S.D.Ohio

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[9] R.C. 2745.01, as enacted by Am.H.B. No. 498, effective April 7, 2005.

[10] "Because R.C. 2745.01 is constitutional, the standards contained in the statute govern employer intentional tort actions, and the statutory standards apply rather than the common-law standards of [*Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108]." *Kaminski*, supra at ¶ 103.

No. 1:08-CV-00822 (citing Ohio appellate cases); see, also, *Fuller v. Cuyahoga Metro. Housing Auth.* (C.A. 6, 2009), 334 Fed.Appx. 732, 736 (recognizing split among Ohio appellate cases). Many cases extend *Brady's* rationale to the R.C. Chapter 2744 immunity context and hold that a political subdivision retains immunity for employer intentional torts because they do not "arise out of the employment relationship." See, e.g., *Zieber v. Heffelfinger*, Richland App. No. 08CA0042, 2009-Ohio-1227; *Williams v. McFarland Properties, L.L.C.,* 177 Ohio App.3d 490, 2008-Ohio-3594, 895 N.E.2d 208; *Terry v. Ottawa Cty. Bd. of MRDD*, 151 Ohio App.3d 234, 2002-Ohio-7299, 783 N.E.2d 959; *Sabulsky v. Trumbull Cty.*, Trumbull App. No. 2001-T-0084, 2002-Ohio-7275.

{¶ 34} Other cases have declined to extend the *Brady* holding to a determination of whether R.C. 2744.09(B) applies to exempt employer intentional torts that arise from the employment relationship. See, e.g., *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, Hamilton App. No. C-090015, 2009-Ohio-6801; *Fleming v. Ashtabula Area School Bd. of Edn.*, Ashtabula App. No. 2006-A-0030, 2008-Ohio-1892; *Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, 833 N.E.2d 300; *Coolidge v. Riegle*, Hancock App. No. 5-02-59, 2004-Ohio-347 (Shaw, J., dissenting). Likewise, this court appears to have a split opinion on the issue. See *Magda*, supra (applying *Brady*); *Young*, supra (applying *Brady*); *Sampson*, supra at ¶26 (finding that R.C. 2744.09(B) bars a

political subdivision from asserting immunity with respect to intentional tort claims that are determined to arise out of the employment relationship).

{¶ 35} In *Nagel*, supra at ¶18, the court expressed that it was "not persuaded that the legislature intended to engraft the Supreme Court's interpretation of the workers' compensation scheme onto its general statutory provision for political-subdivision immunity. Because employer intentional torts are not a natural risk of employment, the Supreme Court concluded that they occur outside of the employment relationship in the workers' compensation context. * * * We continue to believe claims that are causally connected to an individual's employment fit into the category of actions that are 'relative to any matter that arises out of the employment relationship.'" (Citation omitted.)

{¶ 36} Indeed, the Ohio Supreme Court has stated that immunity is not available to a political subdivision in an employee's claim for unlawful discrimination, citing R.C. 2744.09(B) and (C). *Whitehall ex rel. Wolfe v. Ohio Civ. Rights Comm.*, 74 Ohio St.3d 120, 123, 1995-Ohio-302, 656 N.E.2d 684. The court also expressed in *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, 790 N.E.2d 1199, ¶40, 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 no employer intentional tort." Insofar as the court indicated in *Wilson v. Stark Cty. Dept. of Human Svcs.* (1994), 70 Ohio St.3d 450, 639 N.E.2d 105, that R.C. 2744.02(B) has no exceptions to immunity for fraud and intentional infliction of emotional distress, that case involved a suit by a citizen who was not a public employee and did not implicate R.C. 2744.09(B).

{¶ 37} As stated by the Eleventh District in *Fleming*, supra at ¶41: "[W]e do not believe that the *Brady* holding acts as a per se bar to any intentional tort claim by a political subdivision employee against his or her employer. If the conduct forming the basis of the intentional tort arose out of the employment relationship, the employer does not have the benefit of immunity pursuant to the plain language of R.C. 2744.09(B)." I believe that this approach should be followed and that any intentional conduct in exposing employees to Legionnaire's disease at a work facility would amount to conduct arising out of the employment relationship. Therefore, I do not believe the City is entitled to immunity.[11]

[11] It must be recognized that to prevail on an employer intentional tort claim under current Ohio law, an employee must present evidence showing that his employer acted with a specific or deliberate intent to cause injury to the employee. R.C. 2745.01; *Kaminski*, supra at ¶ 56. This appeal involves the immunity issue, and the merits of the intentional tort claim are not before this court.