[Cite as *Sampson v. Cuyahoga Metro. Hous. Auth.*, 2010-Ohio-1214.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93441

DARRELL SAMPSON

PLAINTIFF-APPELLEE

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-600324

BEFORE: Kilbane, P.J., Blackmon, J., and Sweeney, J.

RELEASED: March 25, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANTS

Joseph W. Boatwright, IV
Lewis W. Adkins
Gina A. Kuhlman
Roetzel & Andress, LPA
1375 East Ninth Street
One Cleveland Center - 9th Floor
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

Nancy C. Schuster
Schuster & Simmons Co., LPA
2913 Clinton Avenue
Cleveland, Ohio 44113-2940

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellee, Darrell Sampson, a Cuyahoga Metropolitan Housing Authority ("CMHA") plumber, brought suit against CMHA and three of its employees, George Phillips, Anthony Jackson, and Ronald Morenz ("appellants"), alleging that CMHA negligently accused and arrested Sampson for theft. Appellants filed a motion for summary judgment with the trial court alleging they were immune from suit, which the trial court denied. After a review of the record and applicable law, we affirm.

{¶ 2} The following facts give rise to this appeal.

{¶ 3} Sampson was raised in a CHMA housing development. In 1988, at age 22, CMHA hired him as a groundskeeper. In 2000, Sampson was promoted to the position of Serviceman V Plumber. CMHA plumbers work in the Property Maintenance Department, reporting for work each day at the plumbers' shop, which is located at 4315 Quincy Avenue, Cleveland, Ohio. At the plumbers' shop, they punch in for work, pick up their tools, and receive their work assignments for the day.

{¶ 4} The plumbers service CMHA properties in Cleveland as well as the surrounding suburbs, and CMHA provides the plumbers with numerous vehicles to drive to these locations. Gasoline credit cards were assigned to CMHA vehicles so that employees could purchase gasoline for the vehicles using their individual employee PIN numbers provided by CMHA.

{¶ 5} On July 20, 2004, CHMA received an anonymous tip on the CMHA "tips hotline," accusing plumber Alvin Roan ("Roan") of using a CMHA gasoline credit card to purchase gasoline for his personal vehicle. Lieutenant Ronald Morenz ("Lieutenant Morenz") worked at the CMHA Police Detective Bureau and was assigned to investigate the allegations against Roan under the supervision of CMHA Police Chief, Anthony Jackson ("Chief Jackson"), who worked under the direction of CMHA Executive Director, George Phillips ("Director Phillips").

{¶ 6} Lieutenant Morenz investigated Roan and the other plumbers for approximately four weeks. On August 27, 2004, Director Phillips, along with Chief Jackson, called a special meeting of CMHA employees. Director Phillips, Chief Jackson, and Lieutenant Morenz, all orchestrated a plan to arrest numerous plumbers as well as painters (the subjects of a separate investigation) at the employee meeting. When Director Phillips had worked at the Chicago Housing Authority, he had witnessed a very similar mass arrest, where numerous Chicago Housing Authority employees were arrested by police at a warehouse. (Deposition of Phillips 75.) Director Phillips determined that arresting the employees in front of 200 of their fellow coworkers would save them the embarrassment of being arrested at home in front of their children. (Deposition of Phillips 104.) Director Phillips and Chief Jackson issued a press release detailing the agenda for a press conference to be held on

August 31, 2004, at 10:30 a.m., immediately following the employee meeting regarding employee theft and arrests.

{¶ 7} On August 30, 2004, the plumbers were told not to follow their daily routine of reporting to the plumbers' shop on Quincy Avenue the following morning, but rather to report for work directly to the CMHA Warehouse located at 4700 Lakeside Avenue, Cleveland, Ohio for an employee meeting.

{¶ 8} On August 31, 2004, approximately 200 CMHA employees gathered at the CMHA Warehouse. Sergeant Ray Morgan ("Sergeant Morgan") of the CMHA Community Policing Unit announced the names of 13 CMHA employees, including Sampson. Sergeant Morgan then announced that the 13 individuals (six plumbers and seven painters) were under arrest for theft. The men were handcuffed and searched in front of their fellow CMHA employees. The arrested employees were then taken behind a partition where they were photographed, and then led outside into waiting patrol cars. Television news cameras were present outside and photographed the arrested employees, video of which later aired on local news broadcasts depicting the identity of those arrested. Appellants maintain that they did not contact the media prior to the arrests.

{¶ 9} Arrested employees spent the night in jail before being released the following day without charges. All arrested employees were placed on administrative leave from their positions with CMHA.

{¶ 10} On October 7, 2004, Sampson and several other plumbers were indicted on theft, misuse of credit cards, and theft in office. The State contended that Sampson had misused the gasoline credit cards provided in the CMHA vehicles. On February 2, 2005, nearly five months after his arrest at the employee meeting, the State dismissed the charges.

{¶ 11} On November 22, 2005, an arbitration hearing was held to determine whether Sampson should be reinstated to his position with CMHA. Ultimately, the arbitrator concluded that CMHA had failed to present any evidence of gasoline theft and ordered that Sampson be reinstated. The arbitrator stated in pertinent part:

> **"There were other failures in Lt. Morenz's investigation. Lt. Morenz testified that he did not check to see if each vehicle in the Property Maintenance Department had its own gas card until September 2004. At no time did he talk to Grievant or any of his co-workers. * * * In the face of the evidence, the arbitrator finds that the preponderance of the evidence shows no theft of gasoline at all, much less any evidence that the grievant was guilty of such theft."**

{¶ 12} In March 2006, Sampson returned to work for CMHA. According to Sampson, the position he returned to involved different duties than his position prior to the arrest. Further, Sampson claims that he was no longer

permitted to retrieve his own equipment or drive CMHA vehicles. Sampson was subsequently diagnosed with posttraumatic stress disorder.

{¶ 13} On August 31, 2006, Sampson filed suit against appellants, alleging intentional infliction of emotional distress, negligent infliction of emotional distress, and abuse of process. Sampson later amended his complaint to include negligent misidentification.

{¶ 14} On November 3, 2006, appellants filed a motion for judgment on the pleadings with respect to the negligent infliction of emotional distress. On November 17, 2006, after receiving one extension of time, Sampson filed his brief in opposition. On December 5, 2006, appellants filed their reply brief. On October 2, 2007, the trial court granted the motion, dismissing the negligent infliction of emotional distress claim but leaving all other claims pending.

{¶ 15} On December 12, 2008, appellants filed a motion for summary judgment on all remaining claims, alleging sovereign immunity. On January 9, 2009, Sampson filed his brief in opposition. On January 13, 2009, appellants filed their reply brief.

{¶ 16} On June 4, 2009, the trial court denied the motion for summary judgment, finding that a genuine issue of material fact still existed as to whether appellants' conduct was wanton or reckless.

{¶ 17} Appellants filed the instant appeal pursuant to R.C. 2744.02, which allows political subdivisions and employees of political subdivisions to immediately appeal an order that denies immunity, asserting two assignments of error.

{¶ 18} ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT ERRED AS A MATTER OF LAW, IN THE PREJUDICE OF THE CUYAHOGA METROPOLITAN HOUSING AUTHORITY IN NOT DISMISSING ALL CLAIMS AGAINST IT ON SUMMARY JUDGMENT BECAUSE POLITICAL SUBDIVISIONS ARE ABSOLUTELY IMMUNE FROM INTENTIONAL TORT CLAIMS PURSUANT TO OHIO REVISED CODE 2744 AND NO EXCEPTION TO IMMUNITY APPLIES TO PLAINTIFF'S NEGLIGENT MISIDENTIFICATION CLAIM."

{¶ 19} CMHA argues that pursuant to R.C. 2744.02, it is immune from liability for the all the claims alleged in Sampson's complaint.

Summary Judgment Standard

{¶ 20} In Ohio, appellate review of summary judgment is de novo. *Comer v. Risko* 106 Ohio St.3d 185, 186, 2005-Ohio-4559, 833 N.E.2d 712. "Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is

appropriate." *Mobsy v. Sanders*, 8th Dist. No. 92605, 2009-Ohio-6459, at ¶11, citing *Hollins v. Schaffer*, 182 Ohio App.3d 282, 286, 2009-Ohio-2136, 912 N.E.2d 637.

{¶ 21} The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 1998-Ohio-389, 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." See, also, *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

Analysis

{¶ 22} Political subdivisions are immune from suit, with the exception of limited situations provided for by statute. *Campolieti v. Cleveland*, 8th Dist. No. 92238, 2009-Ohio-5224, 921 N.E.2d 286, at ¶32, citing *Hodge v. Cleveland* (Oct. 22, 1998), 8th Dist. No. 72283. Whether a political subdivision is immune from liability is a question of law that should be resolved by the trial court, preferably on a motion for summary judgment. *Sabulsky v. Trumbull*

Cty., Trumbull App. No. 2001-T-0084, 2002-Ohio-7275, at ¶7, citing *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 595 N.E.2d 862.

{¶ 23} In the motion for summary judgment, CMHA argued that it was entitled to immunity from suit pursuant to R.C. 2744.02, which states:

> **"[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."**

{¶ 24} In response, Sampson maintains that R.C. 2744.02 is inapplicable pursuant to an express exception outlined in R.C. 2744.09(B), which states that Ohio Revised Code Chapter 2744 shall 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." (Emphasis added.)

{¶ 25} This court recently addressed the applicability of a similar statutory provision, R.C. 2744.09(C), with respect to intentional tort claims in *Magda v. Greater Cleveland Regional Transit Auth.*, 8th Dist. No. 92570, 2009-Ohio-6219. R.C. 2744.09(C) states that Chapter 2744 of the Ohio Revised Code shall not apply to cases pertaining to claims brought by an employee with respect to "wages, hours, conditions or other terms of

employment." In *Magda*, this court concluded that R.C. 2744.09(C) does not apply to intentional tort claims because intentional torts are actions that occur *outside* of the employment relationship. Id. at ¶22.

{¶ 26} However, *Magda* is distinguishable from the instant case because here, R.C. 2744.09(B), rather than R.C. 2744.09(C), applies. R.C. 2744.09(B) states that Chapter 2744 does not apply to "any matter that arises out of the employment relationship," as opposed to the more specific language used in R.C. 2744.09(C) that discusses claims specifically relating to wages, hours, and employment conditions. Intentional tort claims could obviously not arise out of such a specific provision. R.C. 2744.09(B) is considerably more broad, encompassing *any matter* that arises out of the employment relationship. Therefore, we find that R.C. 2744.09(B) bars political subdivisions from asserting immunity with respect to both intentional tort and negligence claims when such claims arise out of the employment relationship.

{¶ 27} When determining whether an injury arose out of the employment relationship, we must look to the totality of the circumstances. *Ruckman v. Cubby Drilling Inc.*, 81 Ohio St.3d 117, 1998-Ohio-455, 689 N.E.2d 917, citing *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277, 551 N.E.2d 1271. In order for a claim to arise out of one's employment, there must be a causal relationship between the employment and the claim. *Keith v. Chrysler, L.L.C.*, 6th Dist. No. L-09-1126, 2009-Ohio-6974, at ¶16, citing *Aiken v. Indus. Comm.*

(1944), 143 Ohio St. 113, 117, 53 N.E.2d 1018. A direct causal connection is not required, an indirect causal relationship is sufficient. *Keith* at ¶17, citing *Merz v. Indus. Comm. of Ohio* (1938), 134 Ohio St. 36, 15 N.E.2d 632.

{¶ 28} The facts of this case clearly indicate that Sampson's claims stem from his employment with CMHA. Sampson, along with approximately 200 other coworkers were specifically told to report to the Lakeside Avenue warehouse for their work assignment. The meeting occurred during the workday, and the arrested employees were handcuffed and searched in front of their fellow employees. The facts indicate that CMHA intended this meeting to serve as an example to other employees, demonstrating that if caught stealing you too will be placed on display and arrested, searched, handcuffed, and taken away in a patrol car before hundreds of your fellow coworkers. Director Phillips acknowledged that this served as an example to other CMHA employees, and Sampson maintains that while the employees were being arrested, Director Phillips announced to the remainder of the employees that this should serve as an example to them. (Deposition of Phillips 105; Deposition of Sampson 17.) Sampson's claims clearly arose out of his employment when he was arrested during the workday in front of all of his fellow coworkers, rather than being arrested at home.

{¶ 29} Further, the investigation into the alleged gasoline theft by the plumbers was considerably shorter than other investigations into employee

theft. Director Phillips stated that the investigation into theft by CMHA painters, who were arrested on the same day as Sampson and the other plumbers, lasted approximately nine months, as opposed to the mere several weeks of investigation conducted regarding the alleged plumber theft. (Deposition of Phillips 109.)

{¶ 30} Consequently, we find that R.C. 2744.09(B) bars CMHA from raising immunity pursuant to Chapter 2744. Therefore, summary judgment was properly denied with respect to all claims asserted against CMHA.

{¶ 31} This assignment of error is overruled.

{¶ 32} ASSIGNMENT OF ERROR NUMBER TWO

> **"THE TRIAL COURT ERRED, AS A MATTER OF LAW, TO THE PREJUDICE OF ANTHONY JACKSON, GEORGE PHILLIPS, AND RONALD MORENZ IN NOT DISMISSING ALL CLAIMS AGAINST THEM ON SUMMARY JUDGMENT PURSUANT TO OHIO REVISED CODE CHAPTER 2744 BECAUSE THERE IS NO EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT TO EXCEPT THE INDIVIDUAL DEFENDANTS FROM IMMUNITY FOR INTENTIONAL TORTS AND INDIVIDUAL DEFENDANTS ARE IMMUNE FROM NEGLIGENCE CLAIMS AS A MATTER OF LAW."**

{¶ 33} Director Phillips, Chief Jackson, and Lieutenant Morenz argue that they are entitled to immunity against all of Sampson's claims. After a review of the record and applicable case law, we disagree.

{¶ 34} Plaintiff does not allege that R.C. 2744.09(B) applies to bar the defendants from attempting to raise immunity. By its express language, R.C.

2744.09(B), as discussed in the first assignment of error, only applies to political subdivisions, and not their employees. As all three individual defendants have asserted immunity pursuant to Chapter 2744, we must conduct a two-tiered immunity analysis to determine if summary judgment was appropriately denied. *State ex rel. Conroy v. Williams*, 7th Dist. No. 08 MA 60, 2009-Ohio-6040, at ¶17, citing *Knox v. Hetrick*, 8th Dist. No. 91102, 2009-Ohio-1359, ¶15.

{¶ 35} First, it is presumed that employees of a political subdivision are immune from suit. There is no dispute that Director Phillips, Chief Jackson, and Lieutenant Morenz are all employed by CMHA, and that CMHA is a political subdivision. *Fuller v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. No. 92270, 2009-Ohio-4716, at ¶9, citing *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606.

{¶ 36} Secondly, we must analyze whether any of the exceptions outlined in R.C. 2744.03(A)(6) apply to bar immunity. *State ex rel. Conroy* at ¶20, citing *Knox*, supra. Sampson specifically argues that R.C. 2744.03(A)(6)(b) applies, which states in pertinent part, "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶ 37} Sampson presented evidence that the relatively short investigation consisted merely of looking at employee time cards and interviewing one car dealership regarding gas tank capacity. (Deposition of Morenz 75-80.)

Director Phillips, Chief Jackson, and Lieutenant Morenz all orchestrated the plan to arrest 13 employees at the warehouse in front of approximately 200 fellow coworkers. They claim this was to protect the arrested employees from being arrested in front of their children. However, comments made in the subsequent press release indicate that the real motivation for arresting the employees at the warehouse was to use the arrested employees as an example for all CMHA employees that they will be arrested if they steal from CMHA. Chief Jackson helped draft the press release. (Deposition of Phillips 75.)

{¶ 38} In January 2005, Lieutenant Morenz drafted a report detailing problems with the investigation, such as, not all CMHA vehicles contained gas cards, employees shared their individual PIN numbers, and not all employees that needed to use the gas cards were issued PIN numbers. In March 2005, Lieutenant Morenz even noted that Sampson's explanation that he shared his PIN number was plausible. (Deposition of Morenz 145, 217-220.) Charges were ultimately dismissed against all of the plumbers.

{¶ 39} Factual determinations as to whether conduct has risen to the level of wanton or reckless is normally reserved for trial. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, 639 N.E.2d 31, citing *Matkovich v. Penn Cent. Transp. Co.* (1982), 69 Ohio St.2d 210, 431 N.E.2d 652. Therefore, we find that Sampson has presented evidence that creates a genuine issue of material fact as to whether the conduct of Director

Phillips, Chief Jackson, and Lieutenant Morenz was wanton or reckless pursuant to R.C. 2744.03.

{¶ 40} Consequently, summary judgment was appropriately denied with respect to the claims against the individual employees. This assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellee recover from appellants 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR