[Cite as *Buck v. Reminderville*, 2010-Ohio-6497.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

JEFFREY BUCK Appellee v. VILLAGE OF REMINDERVILLE, et al. Appellants	C. A. No. 25272 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2009-11-8465

DECISION AND JOURNAL ENTRY

Dated: December 30, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Jeffrey Buck, chief of police for the Village of Reminderville, sued the Village and Sergeant Michael Varga for defamation. He alleged that Sergeant Varga emailed a letter to Village council members that contained false and defamatory accusations regarding his performance as police chief. He alleged that the Village improperly allowed the letter to circulate to other Village officials, improperly allowed it to be read aloud during a human resources committee meeting, and improperly made it a public record. He further alleged that Sergeant Varga's publication and the Village's republication of the letter was done maliciously with the intent to interfere with his employment relationship. The Village moved for judgment on the pleadings under Rule 12(C) of the Ohio Rules of Civil Procedure, arguing that it has immunity under Chapter 2744 of the Ohio Revised Code. The trial court denied its motion

because it determined that "[t]here is an issue of fact as to whether the conduct in question arose out of the employment relationship." We affirm because the Village does not have immunity for an intentional tort arising out of its employment relationship with Mr. Buck and questions of fact exist regarding whether the intentional tort Mr. Buck alleged is causally connected to his employment.

POLITICAL SUBDIVISION IMMUNITY

{¶2} The Village's assignment of error is that the trial court incorrectly denied its motion for judgment on the pleadings. It has argued that it has immunity under Chapter 2744 of the Ohio Revised Code for intentional tort claims asserted by its employees. Mr. Buck has not disputed that his defamation claim is an intentional tort claim.

{¶3} Although motions under Rule 12(B)(6) and (C) of the Ohio Rules of Civil Procedure are similar, Rule 12(C) motions "are specifically for resolving questions of law . . . ." *State ex rel. Midwest Pride IV Inc. v. Pontious*, 75 Ohio St. 3d 565, 570 (1996). Under Civil Rule 12(C), "dismissal is appropriate [if] a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *Id.* The rule "requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law." *Id.* We review the trial court's decision de novo. *Pinkerton v. Thompson*, 174 Ohio App. 3d 229, 2007-Ohio-6546, at ¶18.

{¶4} Determining whether a political subdivision has immunity under Chapter 2744 of the Ohio Revised Code generally involves a three-tiered analysis. *Lambert v. Clancy*, 125 Ohio St. 3d 231, 2010-Ohio-1483, at ¶8. Section 2744.09, however, provides that Chapter 2744 "does

not apply to, and shall not be construed to apply to" certain actions. Under Section 2744.09(B), political subdivision immunity 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[.]" Mr. Buck has argued that the Village does not have immunity under Chapter 2744 because his defamation claim arises out of his employment relationship.

{¶5} The Village has argued that Mr. Buck's argument fails under this Court's decision in *Ellithorp v. Barberton City School District Board of Education*, 9th Dist. No. 18029, 1997 WL 416333 (July 9, 1997). In *Ellithorp*, we determined that Section 2944.09(B) does not apply to intentional torts committed by a political subdivision employer because "[a]n employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside of the scope of employment." *Id.* at *3; see also *Dolis v. City of Tallmadge*, 9th Dist. No. 21803, 2004-Ohio-4454, at *2 (Aug. 25, 2004) (quoting *Ellithorp*, 1997 WL 416333 at *3). In support of our decision, we cited *Brady v. Safety-Kleen Corp.*, 61 Ohio St. 3d 624 (1991), in which the Ohio Supreme Court held, in the context of a worker's compensation action, 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." *Id.* at paragraph one of the syllabus (approving and following *Blankenship v. Cincinnati Milacron Chems. Inc.*, 69 Ohio St. 2d 608, 613 (1982)); *Ellithorp*, 1997 WL 416333 at *3. In *Blankenship*, the Ohio Supreme Court reasoned that "[n]o reasonable individual would . . . contemplate the risk of an intentional tort as a natural risk of

employment." *Blankenship*, 69 Ohio St. 2d at 613. It, therefore, concluded that employers are not immune from liability for their intentional torts under Section 4123.74 of the Ohio Revised Code. *Id.*; see also *Brady*, 61 Ohio St. 3d at 634 ("When an employer intentionally harms his employee, that act effects a complete breach of the employment relationship, and for purposes of the legal remedy for such an injury, the two parties are not employer and employee, but intentional tortfeasor and victim.") (quoting *Taylor v. Acad. Iron & Metal Co.*, 36 Ohio St. 3d 149, 162 (1988) (Douglas, J., dissenting)).

{¶6} Mr. Buck has urged us to reconsider our holding in *Ellithorp* in light of the Ohio Supreme Court's decision in *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St. 3d 227, 2003-Ohio-3373. In *Penn Traffic*, Virginia Ramsey was injured when she fell off a loading dock while working for Penn Traffic. She sued Penn Traffic and obtained a judgment against it for intentional tort. Penn Traffic filed a declaratory judgment action seeking a determination of its right to indemnification from its insurers. Its commercial general liability policy contained an exclusion regarding "bodily injury to an employee of the insured 'arising out of and in the course of employment by the insured.'" *Id.* at ¶36. Penn Traffic argued that the exclusion did not apply because, under *Brady* and *Blankenship*, employer intentional torts occur outside the employment relationship. The Ohio Supreme Court disagreed, noting that, in *Blankenship*, "this court determined that the immunity bestowed upon employers under Ohio's workers' compensation laws does not reach intentional torts committed by an employer. The court reasoned that an employer's intentional tort occurs outside the employment relationship. . . . But in *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90, 15 OBR 246, 472 N.E.2d 1046, this court clarified that an injured worker may both recover under the workers' compensation system and pursue an action against his or her employer for intentional tort. Therefore, an injury that is the product of an

employer's intentional tort is one that also 'arises out of and in the course of' employment." *Penn Traffic Co.*, 2003-Ohio-3373, at ¶39.

{¶7} The Ohio Supreme Court explained: "*Blankenship* and *Jones* involve a common-law action for employer intentional tort as it relates to a workers' compensation claim. They do not involve analysis of the terms of a private insurance policy or the relationship between an employee and the employer's liability insurer. Although 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." *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St. 3d 227, 2003-Ohio-3373, at ¶40. The Supreme Court concluded that, "[f]or purposes of the employer's insurance coverage, language in a [commercial general liability] policy that excludes injuries that 'arise out of or in the course of employment' merely means that the injury is causally related to one's employment." *Id*. at ¶41.

{¶8} In *Penn Traffic*, the Ohio Supreme Court distinguished *Blankenship* by saying that *Blankenship* focused on the intentional conduct of the employer while the commercial general liability policy focused on the injury suffered by the employee. *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St. 3d 227, 2003-Ohio-3373, at ¶40. The distinction is difficult to see considering that both cases involved the interpretation of substantially similar language, the workers' compensation immunity statute at issue in *Blankenship* requiring the Court to determine whether the poisoning Mr. Blankenship suffered was an "injury . . . received . . . by any employee in the course of or arising out of his employment" and the commercial general liability insurance policy at issue in *Penn Traffic* requiring the Court to determine whether Ms. Ramsey's injury was "bodily injury to 'an employee of the insured arising out of and in the course of

employment by the insured.'" *Blankenship v. Cincinnati Milacron Chems. Inc.*, 69 Ohio St. 2d 608, 612 (1982) (quoting R.C. 4123.74); *Penn Traffic*, 2003-Ohio-3373, at ¶18. *Penn Traffic* established, however, that, just because an employer's intentional tort does not arise out of the employment relationship for purposes of evaluating the employer's immunity under Section 4123.74 of the Ohio Revised Code, does not mean that it does not arise out of the employment relationship in all contexts.

{¶9} It should be noted that, part of the Supreme Court's rationale in *Blankenship* was that the "workers' compensation Acts were designed to improve the plight of the injured worker, and to hold that intentional torts are covered under the Act would be tantamount to encouraging such conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act." *Blankenship v. Cincinnati Milacron Chems. Inc.*, 69 Ohio St. 2d 608, 614 (1982). "[O]ne of the avowed purposes of the Act is to promote a safe and injury-free work environment. . . . Affording an employer immunity for his intentional behavior certainly would not promote such an environment, for an employer could commit intentional acts with impunity with the knowledge that, at the very most, his workers' compensation premiums may rise slightly." *Id*. at 615.

{¶10} Section 2744.09(B) of the Ohio Revised Code provides that "[t]his chapter does not apply to, and shall not be construed to 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[.]" Its emphasis on the fact that Chapter 2744 not only "does not apply to," but "shall not be construed to apply to" demonstrates that the General Assembly intended Chapter 2744 to be construed liberally in regard to the civil action categories described by Section 2944.09(A)-(E). As the Supreme Court recognized in *Penn*

Traffic, an injury suffered by an employee because of his employer's intentionally tortious conduct "must arise out of or in the course of employment; otherwise, there can be no employer intentional tort." *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St. 3d 227, 2003-Ohio-3373, at ¶40. We, therefore, conclude that a claim by the employee of a political subdivision against the political subdivision for its intentionally tortious conduct may constitute a "civil action[ ] . . . relative to any matter that arises out of the employment relationship between the employee and the political subdivision" under Section 2744.09(B). See *Nagel v. Horner*, 162 Ohio App. 3d 221, 2005-Ohio-3574, at ¶19 ("[C]laims 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.'") (quoting R.C. 2744.09(B)).

{¶11} Section 2744.09(B) is designed to allow political subdivision employees to recover against their employers, who would otherwise be entitled to immunity under Chapter 2744 of the Ohio Revised Code. If intentional torts were not within the scope of Section 2744.09(B)'s immunity exclusion, it would be, as the Ohio Supreme Court explained in *Blankenship*, "tantamount to encouraging such [intentionally tortious] conduct." *Blankenship v. Cincinnati Milacron Chems. Inc.*, 69 Ohio St. 2d 608, 614 (1982). "Affording an employer immunity for his intentional behavior certainly would not promote [a safe work] environment, for an employer could commit intentional acts with impunity . . . ." *Id*. at 615.

{¶12} Our analysis is consistent with that of several other districts. Before *Penn Traffic*, most Ohio district courts, following *Blankenship* and *Brady*, concluded that employer intentional torts do not arise out of the employment relationship. *Terry v. Ottawa Bd. of Mental Retardation and Developmental Disabilities*, 151 Ohio App. 3d 234, 2002-Ohio-7299, at ¶21; *Chase v. Brooklyn City Sch. Dist.*, 141 Ohio App. 3d 9, 19 (2001); *Stanley v. City of Miamisburg*, 2d Dist.

No. 17912, 2000 WL 84645 at *7-8 (Jan. 28, 2000); *Sablusky v. Trumbull County*, 11th Dist. No. 2001-T-0084, 2002-Ohio-7275, at ¶18; *Fabian v. City of Steubenville*, 7th Dist. No. 00 JE 33, 2001 WL 1199061 at *3-4 (Sept. 28, 2001); *Engleman v. Cincinnati Bd. of Educ.*, 1st Dist. No. C-000597, 2001 WL 705575 at *4-5 (June 22, 2001). But see *Marcum v. Rice*, 10th Dist. Nos. 98AP-717, 98AP-721, 98AP-718, 98AP-719, 1999 WL 513813 at *6-7 (July 20, 1999). After *Penn Traffic*, however, some of those districts have reexamined the issue and have also concluded that *Blankenship* and *Brady* do not act as a per se bar to intentional tort claims by political subdivision employees against their employers. *Sampson v. Cuyahoga Metro. Hous. Auth.*, 188 Ohio App. 3d 250, 2010-Ohio-3415, at ¶33 (en banc); *Nagel v. Horner*, 162 Ohio App. 3d 221, 2005-Ohio-3574, at ¶18; *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 1st Dist. No. C-090015, 2009-Ohio-6801, at ¶11-13; *Fleming v. Ashtabula Area City Sch. Dist. Bd. of Educ.*, 11th Dist. No. 2006-A-0030, 2008-Ohio-1892, at ¶41. Other districts have continued to apply *Brady* and *Blankenship* to political subdivision immunity cases, but most of their decisions have not considered *Penn Traffic*, relying only on the cases resolved before it. See *Zieber v. Heffelfinger*, 5th Dist. No. 08CA0042, 2009-Ohio-1227, at ¶29 (no discussion of *Penn Traffic*); *Coats v. Columbus*, 10th Dist. No. 06AP-681, 2007-Ohio-761, at ¶15 (same); *Coolidge v. Riegle*, 3d Dist. No. 5-02-59, 2004-Ohio-347, at ¶30 (same). But see *Williams v. McFarland Props. LLC*, 177 Ohio App. 3d 490, 2008-Ohio-3594, at ¶18 (concluding that *Penn Traffic* is limited "to situations involving the applicability of recovery under a private insurance policy.") (quoting *Thayer v. W. Carrollton Bd. of Educ.*, 2d Dist. No. 20063, 2004-Ohio-3921, at ¶17).

{¶13} In *Engleman v. Cincinnati Board of Education*, 1st Dist. No. C-000597, 2001 WL 705575 (June 22, 2001), limited by *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 1st Dist. No. C-090015, 2009-Ohio-6801, the First District reasoned that, to include intentional torts

under Section 2744.09(B) "would frustrate the general statutory purpose of conferring immunity on political subdivisions . . . [because] [i]t would render meaningless R.C. 2744.02(B) and 2744.03(A)(2), which provide the exceptions and defenses to immunity for intentional acts committed by an employee of a political subdivision." We disagree with that analysis because it ignores the fact that Section 2744.02(B) and 2744.03(A)(2) apply to cases brought by non-employees of political subdivisions.

{¶14} Another concern that courts have had about intentional tort claims by political subdivision employees has to do with the interplay between Sections 2744.09(B) and 4123.74 of the Ohio Revised Code. *Hahn v. Groveport*, 10th Dist. No. 07AP-27, 2007-Ohio-5559, at ¶24; *Schmitz v. Xenia Bd. of Educ.*, 2d Dist. No. 2002-CA-69, 2003-Ohio-213, at ¶19. According to those courts, the statutes create a Catch-22. As described by the Tenth District, "[o]n the one hand, if [the employee's] injury does not arise out of her employment, R.C. 2744.09(B) is not available to remove plaintiffs' claim from the general grant of immunity afforded defendant as a political subdivision pursuant to R.C. 2744.02(A)(1). On the other hand, if [the] injury does arise out of her employment, defendant is immune from tort liability pursuant to R.C. 4123.74, which provides, in pertinent part, '[e]mployers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law . . . for any injury . . . received . . . by any employee in the course of or arising out of employment . . . occurring during the period covered by such premium so paid into the state insurance fund . . . .'" *Hahn*, 2007-Ohio-5559, at ¶24; *Schmitz*, 2003-Ohio-213, at ¶19 ("Considering the municipal immunity and workers' compensation immunity statutes together, there appear to be two mutually exclusive possibilities. Either an injury received by an employee arises out of his employment, in which event the employer is entitled to immunity under R.C. 4123.74, or the injury does not arise out of his

employment, in which event the exception to municipal immunity provided for in R.C. 2744.09(B) does not apply."). The Village has not argued that it is entitled to judgment on the pleadings under Section 4123.74 of the Ohio Revised Code if Mr. Buck's injuries arose out of his employment. We, therefore, do not have to address that issue at this time. We observe, however, that just because Sections 2744.09(B) and 4123.74 contain some similar language, does not mean they have the same meaning, especially in light of their different legislative purposes.

{¶15} Mr. Buck's complaint alleged that Sergeant Varga's letter made false and defamatory accusations about his performance as chief of police, damaged his reputation, and "injure[d] [him] in his trade or occupation." Viewing Mr. Buck's allegations in a light most favorable to him, we conclude that his intentional defamation claim may relate to his employment under Section 2744.09(B). See *Nagel v. Horner*, 162 Ohio App. 3d 221, 2005-Ohio-3574, at ¶19. The trial court, therefore, correctly concluded that the Village failed to establish that it has political subdivision immunity under Chapter 2744 of the Ohio Revised Code and was entitled to judgment on the pleadings under Rule 12(C) of the Ohio Rules of Civil Procedure. The Village's assignment of error is overruled.

CONCLUSION

{¶16} To the extent *Ellithorp v. Barberton City School District Board of Education*, 9th Dist. No. 18029, 1997 WL 416333 at *3 (July 9, 1997) and *Dolis v. City of Tallmadge*, 9th Dist. No. 21803, 2004-Ohio-4454, at *2 (Aug. 25, 2004), held that a political subdivision employer's intentional tort can never be subject to the political subdivision immunity exclusion under Section 2744.09(B) of the Ohio Revised Code, they are overruled. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶17} I concur in most of the majority opinion. I do not join in paragraphs 13 and 14, which I regard as unnecessary dicta.

CARR, J.
DISSENTS, SAYING:

{¶18} I respectfully dissent as I would continue to follow our prior precedent in *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), 9th Dist. No. 18029, and *Dolis v. Tallmadge*, 9th Dist. No. 21803, 2004-Ohio-4454, at ¶6.

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