

[Cite as *Coolidge v. Riegler*, 2004-Ohio-347.]

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

CHERYL M. AND DAVID COOLIDGE CASE NUMBER 5-02-59

PLAINTIFFS-APPELLANTS

v.

O P I N I O N

**LARRY RIEGLE, INDIVIDUALLY
AND AS FATHER AND NEXT FRIEND
OF ADAM RIEGLE, A MINOR; BARBARA
RIEGLE, INDIVIDUALLY AND AS MOTHER
AND NEXT FRIEND OF ADAM RIEGLE, A
MINOR; AND RIVERDALE LOCAL SCHOOLS,
ALSO KNOWN AS RIVERDALE LOCAL SCHOOL
DISTRICT**

DEFENDANTS-APPELLEES

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court.**

JUDGMENT: Judgment affirmed in part and reversed in part.

DATE OF JUDGMENT ENTRY: January 29, 2004

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CUPP, J.

{¶1} Plaintiffs-appellants, Cheryl and David Coolidge, appeal a judgment of the Hancock County Common Pleas Court granting summary judgment in favor of defendants-appellees, Larry and Barbara Riegle, and Riverdale Local School District (“Riverdale”). The Coolidges assert that summary judgment in favor of the Riegles was inappropriate because material issues of fact remain concerning the violent propensities of the Riegles’ son, Adam Riegle. Additionally, they claim the trial court erred by finding that Riverdale’s political subdivision immunity under R.C. 2744 extended to employer intentional torts. Having reviewed the entire record, we find that material issues of fact do remain regarding Adam’s violent propensities and the Riegles’ liability. However, we do not find that the trial court erred in granting summary judgment in favor of Riverdale. Accordingly, we sustain Appellants’ first assignment of error, overrule their second and third assignments of error, and reverse in part the judgment of the trial court.

{¶2} Around the age of three, Adam Riegle was diagnosed with autism and pervasive disability disorder. As a result of his diagnosis, Adam was eligible for services under the Individuals with Disabilities Education Act (“IDEA”). IDEA is a federal law requiring states to provide a full educational opportunity to all children with disabilities. Section 1412(a)(2), Title 20, U.S.Code. One of the goals of IDEA is to educate disabled children in the least restrictive environment possible. This goal is stated as:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Section 1412(a)(5)(A), Title 20, U.S.Code.

{¶3} The primary means of implementing congressional goals through IDEA is through the Individualized Education Program (“IEP”). Section 1401(11), Title 20, U.S.Code; *Austintown Lcl. Sch. Dist. Bd. of Edn. v. Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities* (1998), 131 Ohio App.3d 711, 715. An IEP is developed through meetings between a local school district

representative, the child's teacher, the parents or guardians of the child, and when appropriate the disabled child. Section 1414(d)(1)(B), Title 20, U.S. Code. In part, an IEP is a written statement of a child's present levels of educational performance; measurable annual goals, including benchmarks or short-term objectives; special education, including related services and supplementary aids and services to be provided the child; and a statement of the program modifications or supports for school personnel that will be provided for the child. Section 1414(d)(1)(A), Title 20, U.S. Code.

{¶4} Prior to enrolling Adam in kindergarten, the Riegles and Riverdale personnel developed an IEP for Adam. Riverdale wanted to place Adam in a more restricted setting designed specifically for handicapped students, while the Riegles wanted to place Adam in a regular kindergarten classroom fulltime. Eventually, the IEP resulted in a plan in which Adam was placed in a regular kindergarten class for five out of ten days. On the other days, Adam attended a kindergarten class for multi-handicapped children. Although Adam exhibited violent and disruptive behavior during class, he was promoted by Riverdale to the first grade.

{¶5} Together, Barbara Riegle and Riverdale personnel developed an IEP for Adam's first grade year that placed Adam in a regular classroom with the

assistance of a full-time aid. Again, Adam exhibited disruptive and violent behavior, yet was promoted to the second grade.

{¶6} In May of 1998, an IEP for Adam's second grade year was completed. The IEP team set forth the following recommendation:

Typical 2nd grade classroom, including PE, with full-time aide and the exception of speech/language therapy and OT, full-time aide.

{¶7} In accordance with the IEP, Adam was placed in Cheryl Coolidge's mainstream second grade classroom with the assistance of a full-time aide, Linda Strader. On October 19, 1998, a periodic review of Adam's IEP was held. As a result of increased violent and disruptive behavior on the part of Adam, the team modified the previous plan and recommended:

Typical 2nd grade classroom, including PE, with full-time aide – with the exception of speech/language therapy and OT services pull out to separate location as necessary, full-time aide, behavior plan.

{¶8} On October 22, 1998, Cheryl Coolidge's second grade class was taking a math test. Adam refused to take part in the test. Instead, Adam's attention was focused on a clock which sat on his desk. Adam's aide, Linda Strader, made an effort to take the clock away. Strader's efforts were unsuccessful, so she sought Coolidge's assistance. Coolidge also attempted to

take the clock away, but Adam refused to let go. Adam proceeded to fly into a rage, screaming at Coolidge and striking her repeatedly on the chest, arms, and shins. Adam's disruptive behavior prompted Coolidge to remove him to the hallway. There, Coolidge took Adam to the floor and restrained him. She told him that when he calmed down, they would go back into the classroom. After a time, when Adam appeared to relax, Coolidge began to let him get up, and Adam kicked her in the face and neck area.

{¶9} Based on the attack, the Coolidges filed a negligence claim against the Riegles and an employment intentional tort claim against Riverdale. Both the Riegles and Riverdale moved for summary judgment, and the trial court granted both parties' motions. From this judgment, the Coolidges appeal presenting three assignments of error for our review.

Standard of Review

{¶10} An appellate court reviews a summary judgment order de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.* (1999), 131 Ohio App.3d 172, 175. Accordingly, a reviewing court will not reverse an otherwise correct judgment merely because the lower court utilized different or erroneous reasons as the basis for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distr.*

Co., 148 Ohio App.3d 596, 2002-Ohio-3932, at ¶ 25, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 222. Summary judgment is appropriate when, looking at the evidence as a whole: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C); *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686-687. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359.

{¶11} The party moving for the summary judgment has the initial burden of producing some evidence which affirmatively demonstrates the lack of a genuine issue of material fact. *State ex rel. Burnes v. Athens City Clerk of Courts* (1998), 83 Ohio St.3d 523, 524; see, also, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; they may not rest on the mere allegations or denials of their pleadings. *Id.*

Assignments of Error

Assignment of Error I

As a matter of law, the Trial Court committed error prejudicial to the plaintiffs-appellants, by entering a summary judgment in favor of the parents of a school-age child and against the child's teacher when it determined that the behavioral history of the child did not support an inference that he displayed violent or dangerous propensities and that it was not foreseeable that the teacher, other school employees or other students could be injured by the child.

{¶12} In their first assignment of error, the Coolidges maintain that the trial court erred by granting summary judgment to the Riegles. They claim that a material issue of fact remains regarding the Riegles prior knowledge of Adam's violent propensities and likelihood to harm people. Specifically, they allege that the Riegles were aware or reasonably should have been aware that Adam suffered from conditions that would result in fits of rage and physical violence towards others. Given the Riegles' awareness of their son's propensity for violence, the Coolidges assert that the Riegles acted negligently by insisting that Adam be placed in a regular classroom and, as a result of this negligence, the appellants suffered injuries and damages.

{¶13} First we must consider whether the Riegles can be held liable for Coolidge's injuries. To overcome a motion for summary judgment on a negligence claim, the plaintiff must identify a duty owed to him by the defendant.

Nearor v. Davis (1997), 118 Ohio App.3d 806, 812, citing *Keister v. Park Centre Lanes* (1981), 3 Ohio App.3d 19, 22-23. In tort law, whether a defendant owes a duty to a plaintiff depends upon the relationship between the parties. *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217. The existence of a duty depends upon the foreseeability of injury. *Id.* An injury is foreseeable if a defendant knew or should have known that his actions were likely to result in harm to another. *Id.* Once a duty is found to exist, a defendant must exercise that degree of care which an ordinarily careful and prudent person would exercise in the same or similar circumstances. *Id.*

{¶14} Ordinarily at common law, a parent is not liable for damages caused by their child's wrongful conduct. *Elms v. Flick* (1919), 100 Ohio St.186, paragraph four of the syllabus; *Huston*, 52 Ohio St.3d at 217. However, liability may arise based upon the parent's conduct "when the injury committed by the child is the foreseeable consequence of a parent's negligent act." *Huston*, 52 Ohio St.3d at 217. Ohio courts have recognized the following three situations in which parents will be held liable for their children's conduct: (1) "Parents may incur liability when they negligently entrust their child with an instrumentality (such as a gun or car) which, because of the child's immaturity or lack of experience, may

become a source of danger to others;” (2) “A parent may also be held responsible for failure to exercise reasonable control over the child when the parent knows, or should know, that injury to another is a probable consequence;” and (3) parents may be held responsible when they know of a child’s wrongdoing and consent, direct, or sanction it. *Id.* at 217-218; *Nearor*, 118 Ohio App.3d at 812.

{¶15} It is the second situation delineated above that is arguably applicable to this case. “To establish foreseeability of the act or injury * * *, plaintiff must prove that specific instances of prior conduct were sufficient to put a reasonable person on notice that the act complained of was likely to occur.” *Nearor*, 118 Ohio App.3d at 813, quoting *Haefle v. Phillips* (Apr. 23, 1991), Franklin App. No. 90AP-1331, unreported. Thus, in a traditional parental negligence case, whether the Riegles owed Coolidge a duty would depend on whether a reasonably prudent person would have been put on notice by Adam’s prior acts that he was likely to injure his teachers.

{¶16} The trial court found no conflict between the federal preference for educating disabled children in a regular classroom and a parent’s obligation to ensure that their disabled child does not cause harm to others. Thus, the trial court focused on the question of foreseeability and found “nothing in Adam’s history of

school attendance that could substantiate a finding that he would cause injuries of the magnitude alleged by [the Coolidges].”

{¶17} It is clear that Adam has had problems with hitting and kicking others--be they teachers, aides, or fellow students--since first being enrolled in kindergarten at Riverdale. These incidents of lashing out occurred most often when Adam would become frustrated with a classroom activity or when he would be bumped or touched by another student. The evidence that bears this out comes from deposition testimony of Adam’s parents and teachers, multiple IEP plans, minutes from meetings between the parents and Riverdale staff, and daily notes that were exchanged between the Riegles and Adam’s teachers.

{¶18} Upon our review of the record and the applicable law, we are unable to agree with the trial court’s finding that, based upon Adam’s past actions, injury to another was not a foreseeable risk.

{¶19} Furthermore, we find that material issues of fact also remain concerning the proximate cause. The purposes and procedures of IDEA complicate the circumstances of the case herein. Because the express terms of IDEA entitle Adam to be educated, to the maximum extent appropriate, with children who do not have disabilities, merely advocating that their son be placed in

a normal educational setting pursuant to Adam's right under IDEA cannot, without more, make the Riegles' conduct liable. And, while the Riegles, as Adam's parents, are part of the IEP team which made the decisions regarding Adam's placement, the final placement decision was not one the Riegles could make alone. Instead, the final decision as to Adam's placement, and the conditions thereof, was committed to the entire IEP team of which the Riegles were only a part. Section 1414(d), Title 20, U.S.Code. However, there was evidence presented that the Riegles' aggressive participation and pressure at the IEP meetings was a major factor in the IEP team's final decision.

{¶20} Having found that unresolved material issues of fact remain, we sustain the Coolidges' first assignment of error and overrule the decision of the trial court granting summary judgment in favor of the Riegles.

Assignment of Error II

As a matter of law, the Trial Court committed error prejudicial to the plaintiffs-appellants, when it granted summary judgment in favor of a school district and against its teacher-employee by determining that the school district was immune from suit for an intentional injury suffered by the teacher as a result of the sovereign immunity provisions contained in Revised Code Chapter 2744.

{¶21} In their second assignment of error, the Coolidges assert that the trial court erred by granting summary judgment in favor of Riverdale. They claim that it was error for the trial court to find that the school district was entitled to political subdivision immunity under R.C. 2744.02(A)(1).

{¶22} As a general rule, R.C. 2744.02(A) provides that political subdivisions are not liable in damages for, among other things, injuries to persons. R.C. 2744.01(F) defines a “political” subdivision as a “municipal corporation, township, county, *school district*, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state.” (Emphasis added.) Riverdale is clearly a political subdivision under this provision. R.C. 2744.02(B), however, creates a number of exceptions to that general rule of nonliability. The Coolidges claim that the exception to political subdivision immunity found in R.C. 2744.02(B)(5) is applicable to the case herein. R.C. 2744.02(B)(5) states that:

* * * *[A] political subdivision is liable for injury, death, or loss to person or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political*

subdivision, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term “shall” in a provision pertaining to a political subdivision. (Emphasis added.)

{¶23} The Coolidges assert that the provisions of R.C. 4101.11 and 4101.12, which they claim expressly impose an affirmative duty on Riverdale to furnish a safe environment for employees and/or frequenters, satisfy the conditions set forth in R.C. 2744.02(B)(5) necessary to eliminate Riverdale’s immunity defense. R.C. 4101.11 states that:

Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish employment which shall be safe for the employees therein and for frequenters thereof, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees and frequenters.

{¶24} R.C. 4101.12 provides:

No employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every other thing reasonably necessary

to protect the life, health, safety, and welfare of such employees or frequenters.

{¶25} The appellants assert that R.C. 4101.11 and 4101.12 provide protection for employees and frequenters of political subdivisions. This Court has previously considered a similar argument and held that R.C. 4101.11 and 4101.12 do not abrogate a political subdivision's immunity to a negligence claim. *Blanton v. Marion* (May 20, 1998), 3rd Dist. No. 9-97-88, unreported. R.C. 2744.02(B)(5) clearly states that a political subdivision only incurs liability when the Revised Code *expressly* imposes such liability upon the political subdivision. Both R.C. 4101.11 and 4101.12 impose general liability on all employers without expressly imposing such liability with specificity upon political subdivisions. Because the legislature has failed to expressly include political subdivisions in the language of R.C. 4101.11 and 4101.12, it would be improper for this court to invade the province of the legislature by reading such language into the statutes. See *Tinsley v. Cincinnati* (1957), 146 N.E.2d 336, 339. Accordingly, we find no merit in the Coolidges' first argument that Riverdale's political subdivision immunity is void.

{¶26} Additionally, the Coolidges argue that R.C. 2744.09(C) removes their claim of employer intentional tort against Riverdale from the ambit of the immunity statute. R.C. 2744.09(C) provides:

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

(C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment. (Emphasis added.)

{¶27} The Coolidges maintain that the conditions of Cheryl’s employment were affected with the placement of Adam in her classroom.

{¶28} Several of our sister appellate courts have determined that the term “conditions” in this statute refers to “those conditions that employees must satisfy in order to maintain his or her employment rather than actual physical conditions in the workplace.” *Terry v. Ottawa Cty. Bd. of Mental Retardation & Dev. Disabilities*, 151 Ohio App.3d 234, 2002-Ohio-7299, at ¶ 24, citing *Fabian v. Steubenville* (Sept. 28, 2001), 7th Dist. No. 00-JE-33, unreported.

{¶29} Specifically, the Sixth District has noted that:

*** * * R.C. 2744.09(C) tracks the language used in the Ohio Public Employees Collective Bargaining Act, R.C. Chapter 4117, which covers all subjects that “affect wages, hours,**

terms and conditions of employment. * * * [T]he word “conditions” should be given its technical meaning as developed in the context of collective-bargaining law.

Terry, at ¶ 24.

{¶30} We find the reasoning in *Terry* to be persuasive and hold that R.C. 2744.09(C) does not remove the Coolidges’ claim of employer intentional tort from the general grant of immunity provided to Riverdale under R.C. Chapter 2744. See, also, *Schmidt v. Xenia Bd. of Edn.*, 2nd Dist. No. 2002-CA-69, 2003-Ohio-213, at ¶ 15-23; *Engleman v. Cincinnati Bd. of Edn.* (June 21, 2001), Hamilton App. No. C000597, unreported; *Chase v. Brooklyn City School Dist.* (2001), 141 Ohio App.3d 9, 18-19.

{¶31} Although, the Ohio Supreme Court has struck down statutory immunity for employer intentional torts committed by private entities resulting in workplace injuries, the Supreme Court has never done so with respect to the statutory immunity granted to political subdivisions performing governmental functions. We likewise decline to do so. Therefore, we overrule the Coolidges’ second assignment of error.

Assignment of Error III

As a matter of law, the Trial Court committed error prejudicial to the plaintiffs-appellants, when it determined, in this case, that the provisions of Revised Code Chapter 2744 were

constitutional, since such provisions operated to deprive a teacher of her common law right to sue her school district employer for an intentional tort.

{¶32} In their final assignment of error, the Coolidges contend that R.C. 2744 is unconstitutional because it violates Section 16, Article I, of the Ohio Constitution, which provides for open access to the courts and for suits against the state as provided by law. The appellants assert that R.C. 2744 cannot withstand constitutional challenge to the extent that it operates to remove an employee's right to a remedy for an employer intentional tort.

{¶33} Numerous other courts, including the Ohio Supreme Court, have heard constitutional challenges to R.C. 2744 based on Section 16, Article I of the Ohio Constitution. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 354-355; *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 669; *Eischen v. Stark Cty. Bd. of Commrs.s*, 5th Dist. No. 2002CA00090, 2002-Ohio-7005, at ¶ 18; *Terry*, at ¶ 26. In each of these cases the court upheld the political subdivision immunity. *Id.* We find the reasoning and precedent of these cases to be persuasive.

{¶34} Plaintiff asserts, however, that this case is different because it presents the specific issue of whether R.C. 2744 may grant immunity to a political

subdivision against an employer intentional tort action. Plaintiff claims that the authority of *Brady v. Saftey-Kleen Corp.* (1991), 61 Ohio St.3d 624 and *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 304 is controlling. However, this argument presents a distinction without a difference. Although the Ohio Supreme Court has held that a claim for employer intentional tort against a private employer may not be abrogated by statute, Riverdale is not a private employer. Limiting tort actions against a political subdivision for acts made in the performance of governmental functions has repeatedly withstood constitutional challenge in a variety of contexts. Nothing in this case before us either compels or permits a different result. Therefore, we hold that R.C. 2744 is constitutional as to an employer intentional tort. The third assignment of error is overruled.

Conclusion

{¶35} After reviewing the entire record, we hold that the trial court erred in granting summary judgment in favor of the Riegles. Particularly, we find that material issues of fact remain concerning Adam’s likelihood to commit violent acts and the liability of the Riegles. With Respect to Riverdale, we hold that the trial court did not err in granting summary judgment in their favor. Accordingly, we affirm in part and overrule in part the judgment of the trial court.

{¶36} Having found error prejudicial to the appellant herein, in the particulars assigned and argued, we reverse in part the judgment of the trial court and remand the matter for further proceedings consistent with this opinion.

Judgment affirmed in part
and reversed in part.

WALTERS, P.J., concurs.

SHAW, J., concurs in part and dissents in part.

SHAW, J., concurring in part and dissenting in part.

{¶37} While concurring with the majority's analysis and conclusion as to the first assignment of error, I must respectfully dissent from the majority's disposition of the second and third assignments of error. I would hold that Riverdale is not immune from civil liability in this case pursuant to R.C. 2744.09(B), and, therefore, sustain the second assignment of error which would render the third assignment of error moot.

{¶38} Pursuant to R.C. 2744.09(B), a political subdivision's immunity "does not apply to, and shall not be construed to apply to, the following:

(B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision

relative to any matter that arises out of the employment relationship between the employee and the political subdivision[.]

{¶39} Several appellate courts and the trial court in this case have determined that an intentional tort committed by an employer does not “arise out of the employment relationship” and, therefore, the R.C. 2744.09(B) exception to immunity is not applicable to employer intentional tort cases. See *Schmitz v. Xenia Bd. of Edn.*, 2nd Dist. No. 2002-CA-69, 2003-Ohio-213, at ¶ 15-23; *Fabien v. Steubenville*, 7th Dist. No. 00 JE 33, 2001-Ohio-3522; *Ventura v. Independence* (May 7, 1998), 8th Dist. No. 72526; *Ellithorp v. Barberton City School Dist Bd. of Ed.* (July 9, 1997), 9th Dist. No. 18029; *Sabulsky v. Trumbull Cty.*, 11th Dist. No. 2001-T-0084, 2002-Ohio-7275; *Terry v. Ottawa Cty. Bd. of Mental Retardation & Dev. Disabilities*, 151 Ohio App. 3d 234, 2002-Ohio-7299, at ¶ 24; *Engleman v. Cincinnati Bd. of Edn.* (June 22, 2001), 1st Dist. No. C-000597. I find that this conclusion fails to accurately reflect the Ohio Supreme Court’s stance on this issue.

{¶40} The courts listed above rely primarily on *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608 and *Brady v. Safety-Kleen Corp.*(1991), 61 Ohio St.3d 624, which state that an employer intentional tort is

outside the scope of the employment relationship. While these cases involve the application for worker's compensation benefits based on an employer intentional tort, the appellate courts above use these cases to interpret the applicability of R.C. 2744.09(B) to a common law employer intentional tort claim.

{¶41} Since the briefs in this case were filed, the Ohio Supreme Court in *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227, 2003-Ohio-3373, addressed *Blankenship, Brady* and one of its subsequent decisions regarding employer intentional tort stating,

In *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608, 23 O.O.3d 504, 433 N.E.2d 572, 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. See, also, *Brady v. Safety-Kleen*, 61 Ohio St.3d 624, 576 N.E.2d 722, paragraph one of the syllabus. 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. * * *

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. * * *

‘[A]rise out of or in the course of employment’ merely means that the injury is causally related to one’s employment.’

{¶42} Based on the foregoing, if we were to continue to define terms in R.C. 2744.09(B) based upon the interpretations given in worker’s compensation cases, it is clear that a common law employer intentional tort claim “arises out of the employment relationship” and political subdivisions would not necessarily be immune from liability unless the matter complained of was not causally related to one’s employment.

{¶43} To further support the contention that a political subdivision will not always be immune to an employer intentional tort claim, I note that the Court in *Jones* affirmed a jury verdict ordering the city of Painesville to pay an employee of the city for committing an employer intentional tort resulting in his death which occurred while the employee was performing a function of his job. Furthermore, while the following cases do not involve a workplace injury resulting in an “employer intentional tort” claim, each instance involves an intentional claim against a political subdivision. In both *Nungester v. Cincinnati* (1995), 100 Ohio App.3d 561 and *Marsh v. Oney* (Mar. 1, 1993), 12th Dist. No. CA92-09-165, a

police officer filed an intentional tort claim against the city after being reprimanded for certain conduct, in *Nungester*, the officer was accused of theft of building supplies at a lumber store and in *Marsh*, the officer was accused of making harassing phone calls to a woman's home. In both of these cases, the courts found that R.C. 2744.09(B) did not apply because the officers were not acting in furtherance of their official duties as police officers, but solely to carry out purely personal transactions. However, in *Marcum v. Rice* (Nov. 3, 1998), 10th App. Nos. 98AP-717, 98AP-719, and 98AP-721, a commander of the Columbus Police Department filed a complaint against the city of Columbus alleging defamation and conspiracy to defame after he was accused of mishandling murder, prostitution and gambling investigations and intentionally interfering with an undercover narcotics investigation. Finding that the allegations alleged malfeasance and nonfeasance by the commander in carrying out his official duties, the court found that the commander's claims did relate to matters that arise out of the employment relationship and found that Columbus was not entitled to immunity pursuant to R.C. 2744.09(B).

{¶44} While *Marcum*, *Nungester* and *Marsh* do not involve employer intentional torts per se, I think the treatment of these cases is significant to our

analysis of employer intentional torts in the present case. If in the above cases, a political subdivision could be sued for a tort which did not produce a physical workplace injury, I fail to see why a political subdivision should be immune from suit which resulted in a physical work place injury. Moreover, the use of the phrase “arising out of the employment relationship” in the above cases is consistent with a finding of no immunity in the case before us.

{¶45} That said, in the present case, Coolidge was performing her duties as a teacher at Riverdale when she was assaulted. Therefore, I would hold that Riverdale is not protected by immunity from Coolidge’s employer intentional tort claim. As for the summary judgment, there is evidence in the record that Riverdale was aware of the child’s propensities for violent behavior over a three year period prior to the infliction of the present injuries, had on more than one occasion modified the IEP plan to accommodate those propensities and yet continued to promote the child to the next grade level each year within the mainstream class structure, possibly disregarding the objections of the plaintiff and other teachers in doing so, thereby subjecting classmates and teachers alike to a known and substantial risk of injury. This evidence is clearly sufficient to establish at least a genuine issue of material fact as to whether Riverdale has

committed an intentional tort within the requirements of *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115.

{¶46} For the foregoing reasons, I would reverse the judgment of the trial court in its entirety.