[Cite as *Jorek v. Cleveland*, 2010-Ohio-2356.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93793

DANIEL JOPEK, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-676565

BEFORE: Dyke, J., Gallagher, A.J., and Sweeney, J.

RELEASED: May 27, 2010

JOURNALIZED:

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ANN DYKE, J.:

{¶ 1} Plaintiffs Daniel and Rochelle Jopek appeal from the order of the trial court that awarded summary judgment to defendants the city of Cleveland and city of Cleveland Chief Prosecutor Anthony Jordan[1] in the Jopeks' action for false arrest and other claims. For the reasons set forth below, we affirm.

{¶ 2} This matter stems from the November 13, 2003, shooting death of Stanley Strnad by plaintiff Daniel Jopek, a Cleveland Police Officer. In their refiled complaint, plaintiffs alleged that the shooting occurred after Jopek and his partner, Martin Rudin, attempted to stop Strnad's vehicle. The officers pursued Strnad, who sped away, crashed the vehicle, then fled on foot. The complaint further alleged that during the foot chase, Officer Jopek believed that Strnad was reaching for a gun from his waistband, feared for his life, and discharged his weapon. Strnad was struck and later died from his injuries. The Cleveland Police "shoot team," the homicide department, and the Internal Affairs Divisions ruled the shooting to be justified. Thereafter, according to the complaint:

{¶ 3} "23. Prosecutor Jordan * * * decided to conduct his own investigation of the shooting.

{¶ 4} "24. Prosecutor Jordan went to the scene of the shooting, took measurements, interviewed witnesses and even questioned the Cuyahoga County Coroner's report concerning the bullet wounds that Strnad sustained.

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[1] Two "John Doe" employees of the Cleveland Prosecutor's Officer were also named in the action but they were not identified and served with process during the pendency of this matter.

{¶ 5} "25. At the end of Prosecutor Jordan's investigation he concluded that the shooting was not justified and that Jopek should be criminally charged."

{¶ 6} On August 25, 2004, the matter was presented to the grand jury. The grand jury returned a no-bill of indictment to the proffered charges of reckless homicide and negligent homicide.

{¶ 7} Plaintiffs set forth claims for false arrest, malicious prosecution, abuse of process, intentional infliction of emotional distress, and loss of consortium.

{¶ 8} On June 9, 2009, defendants jointly moved for summary judgment. Defendants presented evidence that all police shootings are investigated by the Use of Deadly Force Investigation Team ("UDFIT") and all police shootings that result in fatalities are investigated by the chief prosecutor for a determination of whether criminal charges are appropriate. The UDFIT file included the coroner's report that detailed gunshot wounds to Strnad's back and was therefore at odds with Officer Jopek's statement that Strnad was shot while turning toward the officer with his hand in his waistband. Thereafter, Jordan made two visits to the shooting scene. He viewed the area, spoke with the homeowner about divergent statements he had made to police, and ultimately concluded that there was probable cause to prosecute Officer Jopek for "recklessly [causing] the death of Stanley K. Strnad by shooting him with a gun from behind." The county prosecutor presented the matter to the grand jury, which returned a no-bill of indictment.

{¶ 9} Defendants argued that Chief Prosecutor Jordan's actions were undertaken within protected prosecutorial functions and that he was therefore entitled to absolute immunity under common law and R.C. 2744.03(A)(7). Defendants also argued that the city of Cleveland is also immune from plaintiffs' intentional tort claims under R.C. Chapter 2744 and that the derivative claims for loss of consortium could not be maintained.

{¶ 10} In opposition, plaintiffs presented evidence that, before attempting to stop Strnad's vehicle, the officers observed that Strnad had an angry, aggressive demeanor and bloodshot, glassy eyes. Strnad accelerated his vehicle at a very fast rate of speed, then cut in front of the police cruiser, nearly striking it. The officers activated their lights and sirens to stop the vehicle. Jopek exited the patrol car with his gun drawn, and instructed Strnad to turn off the ignition and keep his hands up. Strnad sped away, nearly striking Officer Jopek. The officers pursued, assisted by a police helicopter. At this time, Strnad accelerated at a high rate of speed, drove across a yard and struck parked cars before colliding with another motorist.

{¶ 11} Plaintiffs presented additional evidence that Strnad fled on foot. The officers pursued him on foot with their weapons drawn. Jopek caught up to Strnad and, according to plaintiffs, gave him loud verbal commands to stop and show his hands and instructed the homeowner to get back inside his house. Strnad refused to comply and removed his jacket. He attempted to climb a fence but could not do so, crouched down, got back up, then turned toward Jopek and

put his hand into his waistband as if to retrieve something. Jopek approached around a parked car and struck his right knee. He proceeded, then struck it a second time, after which Jopek's knee gave out.

{¶ 12} According to plaintiffs, as Officer Jopek was falling, Strnad turned toward Jopek, began to charge him, and yelled "I've got you now, mother f—." Jopek believed that he was in fear for his life, and fired at Strnad. John Farnsworth, who pursued Strnad in the police helicopter, believed that Strnad was about to hit or strike Jopek. Strnad continued to struggle as other officers arrested him. Officer Rudin indicated that he heard Jopek yelling commands to Strnad, that Strnad turned toward Jopek prior to the shots being fired. Plaintiffs' witnesses also established that the shots were fired in quick succession.

{¶ 13} Plaintiffs also presented evidence that Strnad was shot in the upper back, the right lateral pelvis, the right buttock, and the right posterior upper arm. Based upon his wounds, Strnad was not shot directly in the back but was shot at different angles going from left to right in a manner that is indicative of Strnad turning at the point of impact. He was under the influence of cocaine at the time of his death, and morphine, heroin, and other drugs were also found in his system. In addition, a U-shaped piece of metal was found nearby. The evidence also demonstrated that Strnad had an extensive criminal record

{¶ 14} With regard to Chief Prosecutor Jordan's conduct, plaintiffs assert that Jordan was not entitled to absolute immunity because he acted as an investigator, rather than a prosecutor. In support of this contention, plaintiffs

noted that Jordan visited the shooting scene and spoke to the homeowner, Travis Keys. At this time, Chief Prosecutor Jordan inserted a pen in a bullet hole in Keys's car to determine the angle from which the bullet was expelled. The chief prosecutor also made notes from the UDFIT panel, and independently discussed the concept of "drag shots" with an agent of the Ohio Bureau of Criminal Investigations. Plaintiffs further complain that Jordan impermissibly focused upon determining whether there had been a pause between the shots fired by Jopek and improperly disputed whether Strnad was in possession of the U-shaped piece of metal found nearby. Finally, plaintiffs maintained that the chief prosecutor conducted an investigation by disregarding evidence that tended to show that Strnad was in motion at the time of the shooting, and independently ascertaining that Strnad was shot to the back, and that Jopek was not in fear for his life.

{¶ 15} Finally, with regard to the liability of the city of Cleveland, plaintiffs maintained that their causes of action arise out of the employment relationship between Jopek and the city, so there was no statutory immunity by operation of R.C. 2744.09.

{¶ 16} The trial court subsequently granted defendants' joint motion for summary judgment. Plaintiffs now appeal and assign two errors for our review. For the sake of clarity we shall address them in reverse order.

Introduction

{¶ 17} With regard to procedure, we note that an appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 671 N.E.2d 241. The reviewing court applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the nonmoving party and resolving any doubt in favor of the nonmoving party. *Stoll v. Gardner,* 182 Ohio App.3d 214, 2009-Ohio-1865, 912 N.E.2d 165. Pursuant to Civ.R. 56(C), summary judgment is proper if:

{¶ 18} "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in the favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 19} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the nonmoving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293, 662 N.E.2d 264. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary

material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791.

{¶ 20} We further note that 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. *Cater v. Cleveland,* 83 Ohio St.3d 24, 1998-Ohio-421, 697 N.E.2d 610.

{¶ 21} First, R.C. 2744.02(A) sets forth the general rule of immunity, that political subdivisions are not liable in damages for the personal injuries or death of a person. R.C. 2744.02(A)(1) provides:

{¶ 22} "For purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

{¶ 23} The statutory definition of "governmental function" includes prosecutorial functions. R.C. 2744.01(C)(2)(f).

{¶ 24} Secondly, once immunity is established under R.C. 2744.02(A)(1), the second tier of analysis is whether any of the five exceptions to immunity in subsection (B) apply. *Cater v. Cleveland,* supra.

{¶ 25} R.C. 2744.02(B) removes the general statutory presumption of immunity for political subdivisions only under the following express conditions: (1)

the negligent operation of a motor vehicle by an employee, R.C. 2744.02(B)(1); (2) the negligent performance of proprietary functions, R.C. 2744.02(B)(2); (3) the negligent failure to keep public roads open and in repair, R.C. 2744.02(B)(3); (4) the negligence of employees occurring within or on the grounds of certain buildings used in connection with the performance of governmental functions, R.C. 2744.02(B)(4); (5) express imposition of liability by statute, R.C. 2744.02(B)(5).

{¶ 26} Finally, under the third tier of analysis, immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies. *Cater v. Cleveland,* supra.

Chief Prosecutor Jordan

{¶ 27} In their second assignment of error, plaintiffs assert that the trial court erred in determining that Chief Prosecutor Jordan is entitled to absolute immunity because the claims arise out of Jordan's investigation, rather than prosecution of this matter, and because he acted with malicious purpose or with reckless indifference to Jopek's rights, pursuant to R.C. 2744.03(A)(6)(b). With regard to the claim of absolute immunity, we note that R.C. 2744.03(A)(7) preserves common law immunity for political subdivisions and certain political subdivision employees. *Barstow v. Waller,* Hocking App. No. 04CA5, 2004-Ohio-5746. This statute provides:

{¶ 28} "The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant to such person, or a judge of a court of

this state is entitled to any defense or immunity available at common law or established by the Revised Code."

{¶ 29} Thus, R.C. 2744.03(A)(7) preserves the absolute immunity available to prosecutors at common law. See *Woodley v. Anderson* (April 21, 2000), Lucas App. No. L-99-1093.

{¶ 30} At common law, "quasi-judicial officers" are entitled to absolute immunity granted judges when their activities are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman* (1976), 424 U.S. 409, 430, 96 S.Ct. 984, 995, 47 L.Ed.2d 128. In *Imbler,* the court explained that activities that are intimately associated with the judicial phase of the criminal process include initiating a prosecution and presenting the State's case. Absolute immunity does not extend, however, to a prosecutor engaged in essentially investigative or administrative functions. *Van de Kamp v. Goldstein* (2009), ___ U.S. ___, 129 S.Ct. 855, 172 L.Ed.2d 706. In *Buckley v. Fitzsimmons* (1993), 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209, the Supreme Court delineated the two divergent sets of functions and stated:

{¶ 31} "There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand."

{¶ 32} The *Buckley* court cautioned, however, that the absolutely immune functions of initiating a prosecution and presenting the state's case "must include

the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." Id. It is also well-settled that the duties of the prosecutor in his role as advocate for the state involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. Id., citing *Imbler v. Pachtman,* supra. Accordingly, absolute immunity extends to the preparation necessary to present a case, and part of that decision involves an evaluation of the evidence present in each case. *Brand v. Geissbuhler* (Feb. 27, 1997), Cuyahoga App. No. 70565.

{¶ 33} Furthermore, as noted in *Hawk v. Am. Elec. Power Co.,* Allen App. No. 1-04-65, 2004-Ohio-7042:

{¶ 34} "'The decision to initiate, maintain, or dismiss criminal charges is at the core of the prosecutorial function.' *McGruder v. Necaise* (C.A.5, 1984), 733 F.2d 1146, 1148. Additionally, Ohio courts have held that prosecutors are entitled to these protections against allegations of malicious prosecution and false arrest. See *Hunter v. City of Middletown* (1986), 31 Ohio App.3d 109, 509 N.E.2d 93. Therefore, pursuant to R.C. 2744.03(A)(7), the appellees in this case are still afforded the protections that existed at common law. As such, appellant is not entitled to any relief for her claims of malicious prosecution."

{¶ 35} Applying all of the foregoing, we conclude that Chief Prosecutor Jordan is entitled to absolute immunity in this matter as the claims arose from his protected functions initiating a prosecution and presenting the prosecution's case.

We conclude that the challenged actions occurred within the advocate's role of evaluating evidence. Plaintiffs complain that Jordan visited the shooting scene and spoke to the homeowner, inserted a pen in a bullet hole in Keys's car to determine the angle from which the bullet was expelled, made notes from the UDFIT panel, and independently discussed the concept of "drag shots" with an expert. Plaintiffs further complain that Jordan considered whether there had been a pause between the shots fired by Jopek, the location of the shots to Strnad, and disregarded Strnad's movements and whether he was in possession of the U-shaped piece of metal. Our evaluation of this matter leads us to the conclusion, however, that the challenged conduct was undertaken in connection with his review and evaluation of the evidence and not as an investigation. In light of some of the divergent evidence uncovered in this matter, such a review was essential to Chief Prosecutor Jordan's responsibility to determine whether or not to initiate criminal charges. Therefore, he is entitled to the absolute immunity that is recognized pursuant to R.C. 2744.03(A)(7).

{¶ 36} With regard to the claim that Chief Prosecutor Jordan is not immune from liability because he acted with malicious purpose or with reckless indifference to Jopek's rights, we note that R.C. 2744.03(A)(6) sets forth qualified immunity, which is "in addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division." Thus, where absolute immunity has been established under R.C. 2744.03(A)(7), the immunity cannot be defeated by application of the "malicious purpose, bad faith" qualified immunity

provisions of R.C. 2744.03(A)(6). See *Friga v. E. Cleveland,* Cuyahoga App. No. 88262, 2007-Ohio-1716. Accordingly, because we have concluded that Jordan is entitled to absolute immunity as preserved in R.C. 2744.03(A)(7), plaintiffs' claims that he acted in bad faith cannot defeat this immunity. In any event, the R.C. 2744.03 defenses operate to reinstate immunity; they are applicable only where a plaintiff has shown that a specific exception to immunity under R.C. 2744.02(B) applies. *Harris v. Sutton,* 183 Ohio App.3d 616, 2009-Ohio-4033, 918 N.E.2d 181. Here, plaintiffs have not demonstrated that an exception to absolute immunity exists; therefore, it is unnecessary to address the statutory defenses available to reinstate sovereign immunity.

{¶ 37} In accordance with all of the foregoing, the second assignment of error is without merit.

City of Cleveland

{¶ 38} In their first assignment of error, plaintiffs assert that the statutory immunity set forth in 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:

{¶ 39} "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[.]"

{¶ 40} As noted in *Zieber v. Heffelfinger,* Richland App. No. 08CA0042, 2009-Ohio-1227:

{¶ 41} "[T]he majority of other appellate courts that have determined that an employer intentional tort is not excepted under R.C. 2744.09(B) from the statutory grant of immunity to political subdivisions. See *Williams* [*v. McFarland Properties,* 117 Ohio App.3d 490, 2008-Ohio-3594, 895 N.E.2d 208], supra; *Terry v. Ottawa Cty. Bd. Of MRDD,* 151 Ohio App.3d 234, 783 N.E.2d 959, 2002-Ohio-7299; *Chase v. Brooklyn City School Dist*. (2001), 141 Ohio App.3d 9, 749 N.E.2d 798; *Engleman v. Cincinnati Bd. of Edn*. (June 22, 2001), Hamilton App. No. C-000597; *Stanley v. Miamisburg* (Jan. 28, 2000), Montgomery App. No. 17912; *Ventura v. Independence* (May 7, 1998), Cuyahoga App. No. 72526; *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), Summit App. No. 18029. But see, *Nagel v. Horner*, 162 Ohio App.3d 221, 833 N.E.2d 300, 2005-Ohio-3574 and *Marcum v. Rice* (July 20, 1999), Franklin App. Nos. 98AP717, 98AP718, 98AP719 and 98AP721. The rationale underlying this finding is that an employer's intentional tort against an employee does not arise out of the employment relationship, but occurs outside of the scope of employment. *Terry,* supra; *Williams,* supra, citing *Brady v. Safety-Kleen Corp*. (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, paragraph one of the syllabus."

{¶ 42} See, also, *Young v. Genie Industries United States,* Cuyahoga App. No. 89665, 2008-Ohio-929; *Nielsen-Mayer v. Cuyahoga Metro. Housing Auth.* (Sep. 2, 1999), Cuyahoga App. No. 75969; *Hale v. Village of Madison* (May 23,

2006), N.D. Ohio No. 1:04CV1646 (although R.C. 2744.09 "might be regarded as removing the protections otherwise afforded by Ch. 2744 when liability is alleged to arise out of the employment relationship, * * * [t]he great weight of legal opinion, therefore, regards political subdivisions as immune from the intentional torts of their employees."). Accord *Villa v. Elmore,* Lucas App. No. L-05-1058, 2005-Ohio-6649; *Coolidge v. Riegle,* Hancok App. No 5-02-59, 2004-Ohio-347; *Schmitz v. Xenia Bd. of Edn.,* Greene App. No. 2002-CA-69, 2003-Ohio-213; *Fabien v. Steubenville,* Jefferson App. No. 00 JE 33, 2001-Ohio-3522.

{¶ 43} But, see, *Fleming v. Ashtabula Area City School Bd. of Edn.,* Ashtabula App. No. 2006-A-0030, 2008-Ohio-1892; *Ross v. Trumbull Cty. Child Support Enforcement Agency* (Feb. 09, 2001), Trumbull App. No. 2000-T-0025; *Marcum v. Rice* (July 20, 1999), Franklin App. Nos. 98AP-717, 98AP-721, 98AP-718, 98AP-719.

{¶ 44} Further, we do not believe that the outcome is changed even if we apply the rule set forth in *Fleming*, supra, that R.C. 2744.09(B) does not operate as "a per se bar to any intentional tort claim by a political subdivision employee against his or her employer." Under this approach, "[i]f 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)." Our analysis of the totality of the circumstances of this matter compels the conclusion that this matter does not arise out of Jopek's employment relationship. That is, plaintiffs alleged that after the "shoot team" of the homicide

department ruled that the shooting was justified, after the Internal Affairs Department ruled that the shooting was justified, Jordan commenced an investigation in which he determined that the shooting was not justified and that there was probable cause to charge Jopek with reckless homicide. The causes of action for false arrest, malicious prosecution, abuse of process, and intentional and negligent infliction of emotional distress all arise from this subsequent investigation and the arrest of Jopek. The claims stem from the alleged conduct that was unrelated to the employment relationship, as it was subsequent to and contrary to the prior police determinations. Moreover, once this investigation was complete, the shooting was deemed unjustified. Thereafter, a probable cause finding was made and the matter was presented to the grand jury as in the case of an ordinary shooting.

{¶ 45} We find *Marsh v. Oney* (Mar. 1, 1993), Butler App. No. CA92-09-165, instructive herein. In *Marsh,* a Middletown police sergeant was accused of making harassing phone calls to a dispatcher. During the investigation, an obscene call was traced to a telephone in the records department of the Middletown Police Department. The police sergeant was not disciplined and later sued the dispatcher and the city of Middletown for defamation and intentional infliction of emotional distress. The city was awarded summary judgment and the court of appeals affirmed. In rejecting the claim that R.C. 2744.09 barred the city from invoking statutory immunity, the appeals court stated:

{¶ 46} “Marsh's claim against the city is no different than that of any private individual who sues for defamation and intentional infliction of emotional distress after being investigated by the police for alleged criminal conduct. Accordingly, we conclude that R.C. 2744.09 does not apply.”

{¶ 47} We find this analysis applicable herein. Even applying R.C. 2744.09(B), we cannot say that this civil matter arises out of Jopek’s employment relationship. Rather, in our view the civil claims arose out of an investigation that was subsequent to and unrelated to the prior police inquiries. As set forth in the complaint, a probable cause finding was made and the matter was presented to the grand jury, as in the case of an ordinary shooting.

{¶ 48} In accordance with all of the foregoing, the first assignment of error is without merit.

{¶ 49} The trial court properly determined that there were no genuine issues of material fact and that defendants were entitled to judgment as a matter of law.

Affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

ANN DYKE, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY (SEE SEPARATE CONCURRING OPINION);
JAMES J. SWEENEY, J., CONCURS WITH MAJORITY AND WITH A SEPARATE CONCURRING OPINION (SEE SEPARATE CONCURRING OPINION)

SEAN C. GALLAGHER, A.J., CONCURRING IN JUDGMENT ONLY:

{¶ 50} I respectfully concur in judgment only with the majority opinion.

{¶ 51} The majority opinion aptly reflects a split among Ohio appellate cases concerning the issue of whether employer intentional tort claims are excepted under R.C. 2744.09(B) from the immunity afforded to political subdivisions. The Ohio Supreme Court has yet to address this issue.

{¶ 52} I do not believe that a political subdivision should retain immunity with respect to all employer intentional tort claims. I agree with those cases that have recognized that there may be instances where the conduct forming the basis of the intentional tort arises out of the employment relationship, which would except the claim from the statutory grant of immunity pursuant to R.C. 2744.09(B). See, e.g., *Sampson v. Cuyahoga Metro. Housing Auth.*, Cuyahoga App. No. 93441, 2010-Ohio-1214; *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).

{¶ 53} Nevertheless, I agree with the majority's conclusion that even if this approach were applied herein, under the totality of circumstances in this matter, Jopek's claim against the city did not arise out of the employment relationship.

{¶ 54} Additionally, while a full review of the file can arguably support the view by some that commencing a prosecution against Jopek was suspect, it does not change the applicability of the immunity provisions afforded both Jordan and the city of Cleveland.

JAMES J. SWEENEY, J., CONCURRING:

{¶ 55} I concur with the majority and the law as stated by Administrative Judge Gallagher. See *Sampson v. Cuyahoga Metro. Housing Auth.*, Cuyahoga App. No. 93441, 2010-Ohio-1214.