

**EXCEPTIONS TO POLITICAL SUBDIVISION IMMUNITY:
HOW IT WORKS IN THE REAL WORLD**

W. Charles Curley, Esq.
WESTON HURD, LLP
10. W. Broad Street, Ste. 2400
Columbus, Ohio 43215
(614) 280-0200

wcurley@westonhurd.com

Chapter 2744 of the Revised Code has been amended several times, with the most recent major substantive revision having been enacted in 2006. As a result, Ohio has an extensive body of case law interpreting the statutes providing immunity to political subdivision and the statutory exceptions to immunity.

What constitutes a "political subdivision?"

In general, Ohio political subdivisions are immune to many kinds of liability. To qualify for immunity, the Defendant must fall under the statutory definition of a political subdivision. R.C. 2744.01(F) defines a political subdivision as a municipal corporation "or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state." Certainly, that includes all Ohio municipalities. But the definition also specifically includes:

- the board of trustees of a municipal hospital
- port authorities
- joint emergency planning districts
- joint emergency medical services districts
- joint solid waste management districts
- community-based correctional facilities

But what about entities operating within a political subdivision, such as police or fire divisions, parks and recreation department, board of zoning appeals, planning commission or city council itself? These entities are not specifically enumerated in R.C. 2744.01(F). But administrative units operating within or as a department or division of a municipality are not entities that have the legal capacity to be sued in the first place and claims against such divisions or departments are subject to dismissal. *Friga v. City of East Cleveland*, 8th Dist., 2007-Ohio-

1716; *Richardson v. Grady*, 8th Dist., 2000 Ohio App. LEXIS 5960 (Dec. 18, 2000); *Ragan v. Akron Police Dept.*, 9th Dist., 1994 Ohio App. LEXIS 137 (Jan. 19, 1994); *McDade v. City of Cleveland*, 8th Dist., 2012-Ohio-5515 (Nov. 29, 2012); *Williams v. Dayton Police Dept.*, 680 F. Supp. 1075, 1080 (S.D. Ohio 1987); *Papp v. Snyder*, 81 F. Supp. 2d 852, 857 (N.D. Ohio 2000). As a result, in suits against departments, divisions, board or commissions, the courts simply do not need to rule on the issue of immunity.

General Rule of Immunity

In general, political subdivisions are entitled to immunity in certain cases. R.C. 2744.02(A). By the terms of the statute, political subdivisions are immune even for liability arising from the performance of proprietary functions,

Only tort cases qualify for political subdivision immunity

Although it is not included in the statute as a specific "exception" to immunity, R.C. 2744.02(B) provides immunity to political subdivision only in cases involving "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." Thus, immunity does not apply to claims for equitable relief. *Portage Cty. Bd. of Commrs. v. City of Akron*, 156 Ohio App.3d 657, 2004-Ohio-1665 (11th Dist.); *Mega Outdoor, LLC v. Dayton*, 173 Ohio App.3d 359, 2007-Ohio-5666 (2d Dist.); *State ex rel. Johnny Appleseed Metro. Park Dist. v. Delphos*, 141 Ohio App.3d 255, 258, 2001-Ohio-2353, (3d Dist.); *Rocky River v. Lakewood*, 8th Dist. 2008-Ohio-6484; *Parker v. Upper Arlington*, 10th Dist. 2006-Ohio-1649; *State ex rel. Fatur v. Eastlake*, 11th Dist., 2010-Ohio-1448; *City of Cincinnati v. City of Harrison*, 1st. Dist. 2014-Ohio-2844.

The three-tier analysis for determining immunity

Determining whether a political subdivision is immune from tort liability pursuant to

R.C. Chapter 2744 involves a three-tiered analysis:

- Tier 1 is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function.
- Tier 2 requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. If none of the exceptions apply, the analysis is over and the political subdivision is entitled to immunity.
- Tier 3. If any of the exceptions to immunity in R.C. 2744.02(B) apply, the third tier requires a determination of whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability.

Colbert v. City of Cleveland, 99 Ohio St.3d 215, 2003 Ohio 3319, 790 N.E.2d 781; *Greene Cty.*

Agricultural Soc. v. Liming (2000), 89 Ohio St.3d 551, 556-557, 2000-Ohio-486, 733 N.E.2d

1141; *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 28, 1998-Ohio-421, 697 N.E.2d 610.

R.C. 2744.02(B) -- the heart of exceptions to immunity

As a general rule, a political subdivision is not liable in an action for injury, death or loss to person or property caused by an act or omission of the political subdivision or by an employee of the political subdivision. R.C. 2744.02(B). But R.C. 2744.02(B) provides five exceptions to the general rule:

(1) political subdivision are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority.

NOTE: there are several exceptions to this exception having to do with the operation of motor vehicles by police officers, firefighters or EMS:

(a) a political subdivision is not liable for the negligent operation of a motor vehicle by a police officer while responding to an emergency call, as long as the operation of the vehicle did not constitute willful or wanton misconduct;

(b) a political subdivision is not liable for the negligent operation of a motor vehicle by a member of a municipal corporation fire department or any other firefighting agency while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm, as long as the operation of the vehicle did not constitute willful or wanton misconduct;

(c) a political subdivision is not liable for the negligent operation of a motor vehicle by a member of an emergency medical service owned or operated by a political subdivision while responding to or completing a call for emergency medical care or treatment, so long as the driver holds a valid commercial driver's license, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Municipalities are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the city.

(3) Municipalities are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads. Exception to this exception -- no liability for accidents involving a bridge within the municipality when the municipality has no responsibility for maintaining or inspecting the bridge.

(4) Political subdivisions are liable for injury, death, or loss to person or property caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility.

(5) Political subdivisions are liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by another section of the Revised Code. NOTE: this section also notes that "civil 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 that section provides for a criminal penalty, 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."

R.C. 2744.02(B)(1) - what constitutes a "motor vehicle?"

Two issues generally arise in analyzing this exception to immunity. Was a "motor vehicle" involved in the accident? If so, did an employee of the political subdivision negligently "operate" it?

For purposes of political subdivision immunity, a "motor vehicle" is defined as "every vehicle propelled or drawn by power * * * except * * * other equipment used in construction work and not designed for or employed in general highway transportation * * *." R.C. 4511.01(B). So unless the vehicle is "power driven," it does not qualify as a "motor vehicle." *Wingfield v. City of Cleveland*, 2014-Ohio-2772 (8th Dist.) (recognizing that a horse is not "power-driven").

Courts have developed a rule that, to qualify for this exception, the motor vehicle must be used in "general highway transportation." So what about construction equipment like a backhoe? If the backhoe is negligently operated by a city employee on a construction site, the exception for negligent operation of a motor vehicle does not apply and the municipality is not liable. But if the employee negligently drives a backhoe on a highway, the exception does not apply and the political subdivision is liable. *Muenchenbach v. Preble County*, 91 Ohio St. 3d 141, 144 (2001).

What about a chip spreader that is trailered to a construction site hitched to a truck, used at the site, then disengaged from the hitch of the truck and, while it is being pulled across the street (under power) to dispense aggregate at the construction site, is struck by a passing motorcycle? Plaintiff argued the exception applied because the chip spreader was: (1) traveling on the roadway when the accident happened; (2) employed in general highway transportation because it was hauling aggregate across the road. The Third District rejected those arguments in *Hopkins v. Porter*, 2014-Ohio-757 (3d Dist.):

We decline to ** hold that *** the chip spreader was "employed in general highway transportation." That defies common sense and practice. *** Reasonable minds, employing common sense, can only conclude that the chip spreader was engaged in construction work while moving aggregate within the work zone.

R.C. 2744.02(B)(1) - What constitutes "negligent operation" of a motor vehicle?

The R.C. 2744.02(B)(1) exception to immunity for negligent operation of a motor vehicle pertains only to negligence in actually operating a motor vehicle or "otherwise causing the vehicle to be moved." *Doe v. Marlinton Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 12, 2009-Ohio-1360, at ¶ 26. Thus, unless the alleged negligence occurs in the actual driving or moving of a vehicle, R.C. 2744.02(B)(1) does not apply.

Consistent with that, Ohio courts have refused to apply the R.C. 2744.01(B)(1) exception in cases involving:

- A bus driver's negligent supervision of student passengers on a bus lead to sexual molestation of a student. *Doe v. Marlinton Local Sch. Dist. Bd. of Educ.*, *supra*.
- The allegedly negligent decision of police officers to initiate and continue a high-speed chase. *Shalkhauser v. City of Medina*, 148 Ohio App.3d 41, 2002-Ohio-222 (9th Dist.) (noting that the exception "applies only where an employee negligently operates a motor vehicle; decisions concerning whether to pursue a suspect and the manner of pursuit are beyond the scope of the exception for negligent operation of a motor vehicle.")
- City EMS employees driving an ambulance notwithstanding knowledge that the vehicle had a significant history of mechanical issues and driving away from Plaintiff's vehicle after they knew that the ambulance had sprayed fluid on it. *Koeppe v. City of Columbus*, 2015-Ohio-4463 (10th Dist.).

R.C. 2744.02(B)(2) - Government Versus Proprietary Functions

R.C. 2744.01(C) contains two separate provisions defining a "governmental function." R.C. 2744.01(C)(1) defines a governmental function as one: (a) imposed upon the state as an obligation of sovereignty but which is performed by a political subdivision voluntarily or pursuant to legislative requirement; (b) for the common good of all citizens of the state; or (c) one that promotes or preserves the public peace, health, safety, or welfare; that involves activities

that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function. R.C. 2744.01(C)(2) contains an exhaustive list of activities that qualify as a "governmental function." Pertinent to municipalities, that list includes:

- provision or non-provision of police, fire, emergency medical, ambulance, and rescue services or protection;
- power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages;
- maintenance and repair of roads, streets, sidewalks, bridges and public grounds;
- construction, repair, renovation, maintenance, and operation of buildings used in connection with the performance of a governmental function, including office buildings and courthouses;
- design, construction, , renovation, repair, maintenance, and operation of jails and other detention facilities;
- enforcement or nonperformance of any law;
- regulation of traffic and the erection or non-erection of traffic signs, signals, or control devices;
- collection and disposal of solid and hazardous wastes;
- provision or non-provision, planning or design, construction, or reconstruction of a public improvement, including sewer systems;
- operation of a health department, including the provision of immunizations;
- provision or non-provision of building, sanitation and zoning inspection services, the approval of building and the issuance or revocation of building permits;
- Urban renewal projects and the elimination of slum conditions;
- design, construction, maintenance, and operation of recreational areas and facilities, including parks, playgrounds, zoos, swimming pools and other aquatic facilities, golf courses, bike and other recreational paths.

While considerably shorter, R.C. 2744.01(G) provides a list of "proprietary functions" and includes the operation of a hospital, the operation of a public cemetery other than a township cemetery, the maintenance and operation of a public utility or transit company, an airport, and a municipal water supply system; the maintenance, operation and upkeep of a sewer system; the operation of a stadium, auditorium, arts and crafts center, band or orchestra, the operation of an off-street parking facility. In most cases, whether the government activity that gave rise to a claim constitutes a governmental or proprietary function can easily be determined by reference to the statutory definitions found in R.C. 2744.01(C) and 2744.01(G).

The most frequently litigated issue under R.C. 2744.02(B) is the liability of a municipality for liability in connection with sewer systems. R.C. 2744.01(C)(2)(1) defines "government function" to include the "provision or non-provision, planning or design, construction, or reconstruction of a public improvement, including sewer systems. But R.C. 2744.01(G)(2)(d) includes in the definition of a "proprietary function" the "maintenance, destruction, operation, and upkeep of a sewer system." So in any case involving damages in connection with a faulty sewer system, the issue is whether the claim arises out of the "planning or design, construction, or reconstruction" of the system (immunity) or the "maintenance, destruction, operation, and upkeep" of a sewer system (no immunity). The third tier of the immunity analysis also plays an important role in determining the liability of a city for cases involving sewer issues.

Municipal decisions regarding the updating or upgrading of existing sewer and water systems constitute a governmental function to which immunity applies. *Essman v. City of Portsmouth*, 2010-Ohio-4837; *Smith, et al. v. Stormwater Management Division, City of Cincinnati*, 111 Ohio App.3d 502 (1996); *Matter v. City of Athens*, 2014-Ohio-4451, 21 N.E.3d

595 (4th Dist.). But cities do not have immunity for negligent failure to repair or maintain sewer systems. *Matter v. City of Athens*, 2014-Ohio-4451; 21 N.E.3d 595; (4th Dist.); *Murray v. City of Chillicothe*, 164 Ohio App. 3d 294 (2005). A complaint is characterized as a maintenance, operation, or upkeep issue when “remedying the sewer problem would involve little discretion but, instead, would be a matter of routine maintenance, inspection, repair, removal of obstructions, or general repair of deterioration.” But the complaint presents a design or construction issue if “remedying a problem would require a [political subdivision] to, in essence, redesign or reconstruct the sewer system.” *Coleman v. Portage County Eng'r*, 133 Ohio St. 3d 28, 2012-Ohio-3881, 975 N.E.2d 952.

R.C. 2744.02(B)(3) - The "negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads" exception to immunity.

The purpose of R.C. 2744.02(B)(3) is to ensure the safety of the public on roads. It is generally applicable only when a condition causes the road to become unsafe for travel. *Ivory v. Austintown Twp.*, 2011-Ohio-3171 (Mahoning App.). A prior version of R.C. 2744.02(B)(3) provided an exception to immunity when a political subdivision failed to keep roadways "free from nuisance." The General Assembly deleted that language from the most recent version of the statute, and the Ohio Supreme Court in *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008 Ohio 2792, 891 N.E.2d 311, recognized that the legislature had, by that amendment, intended to limit political subdivision liability for roadways.

R.C. 2744.01(H) defines "public roads" to include "public roads, highways, streets, avenues, alleys, and bridges but to exclude "berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices." Generally, R.C. 2744.03(B)(3) applies only to the traveled portion of the road.

See *Wooten v. CSX RR.* (2005), 164 Ohio App.3d 428, 443, 842 N.E.2d 603, 2005-Ohio-6252 ("the focus should be on whether a condition exists within the political subdivision's control that creates a danger for ordinary traffic on the regularly travelled portion of the road."); *Neudecker v. Butler Cty. Engineer's Office* (2001), 146 Ohio App.3d 614, 2001-Ohio-8663 (statute not applicable to a catch basin that was not part of the paved or traveled portion of the street); *Ivory v. Austintown Twp.*, 2011-Ohio-3171 (Mahoning App.) (statute not applicable to drainage ditches or catch basins used to prevent water from accumulating on the roadway). But courts have been reluctant to read into the definition of a "public road" something that is not specifically listed in this definition. See, for example, *Trader v. City of Cleveland*, 2006-Ohio-295 (Cuyahoga App.), (holding that a deteriorated traffic pole within the city's right-of-way did not constitute part of a "public road.")

What constitutes "in repair?" Citing *Heckert v. Patrick*, 15 Ohio St. 3d 402, 15 Ohio B. 516, 473 N.E.2d 1204 (1984), the 7th District concluded that "in repair" refers "in its ordinary sense . . . to maintaining a road's condition after construction or reconstruction, for instance by fixing holes and crumbling pavement. *Bonace v. Springfield Twp.*, 179 Ohio App. 3d 736, 2008-Ohio-6364, noting that the term deals with "repairs after deterioration of a road or disassembly of a bridge." Roads where there is ongoing construction are "in repair." *Baker v. Wayne County*, 2014-Ohio-3529 (Wayne App.). But see *Sanderbeck v. Medina County*, 2010-Ohio-3659 (Medina App.), appearing to hold that a road with too low of a co-efficient of friction which renders makes a skid more likely may constitute disrepair.

What constitutes an "obstruction?" The term is not statutorily defined. The leading case discussing what constitutes an "obstruction" is *Howard v. Miami Twp. Fire Div.*, 119 Ohio St. 3d 1, 2008-Ohio-1617, holding that an obstruction is "an obstacle that blocks or clogs the roadway

and not merely a thing or condition that hinders or impedes the use of the roadway or that may have the potential to do so." Consistent with that definition, Ohio courts have recognized that certain hazards may constitute obstructions. *Cosimi v. Koski Constr. Co.*, 2009-Ohio-5892 (Ashtabula App.) (manhole covers protruding above the surface in one lane of a two-lane road constitute an obstruction when their presence forces drivers to divert into the other lane when traffic is heavy); *Crabtree v. Cook*, 2011-Ohio-5612 (Franklin App.) (an obstruction may exist where potholes are in a narrow road and where mud, water and overhanging vegetation impede a bicyclist's ability to ride close to the curb); *Widen v. Pike County*, 187 Ohio App.3d 510, 2010-Ohio-2169 (a moving vehicle qualifies as an obstruction when it momentarily prevents another car from moving safely through an intersection); *Estate of Finley v. Cleveland Metroparks*, 189 Ohio App.3d 139, 2010-Ohio-4013 (Cuyahoga App.) (tree limb blocking the road)

Other courts have determined that, to qualify as an obstruction, an object or condition must truly impede the flow of traffic, not just make navigation of the road more difficult or more dangerous. *McNamara v. Marion Popcorn Festival, Inc.*, 2012-Ohio-5578 (Marion App.) (wooden beam in one section of a road is not an obstruction when traffic could easily navigate around it); *Mosler v. St. Joseph Twp. Bd. of Trustees*, 2008-Ohio-1963 (Williams App.) (loose gravel and stone in the road did not constitute an obstruction); *Repasky v. Gross*, 2013-Ohio-2516 (Franklin App.) (cut in the road did not constitute an obstruction because it did not block or clog the road).

R.C. 2744.02(B)(4) - Immunity for physical defects within or on the grounds of buildings that are used in connection with the performance of a governmental function

There are two components to this exception to immunity -- the incident must: (1) occur within or on the grounds of buildings used in connection with the performance of a governmental

function, including but not limited to office buildings and courthouses; and (2) be due to a physical defect on the property.

With respect to the first requirement, the phrase "including" denotes a non-exclusive list of buildings to which the exception may apply. *Moore v. Lorain Metro. Housing Auth.*, 121 Ohio St. 3d 455; 2009-Ohio-1250; 905 N.E.2d 606, holding that a unit of public housing is a building "used in connection with the performance of a governmental function" within the meaning of R.C. 2744.01(C)(2). In determining whether a building is used in connection with a governmental function, the building need not "house the actual, physical operations, maintenance, etc., of a governmental body," but instead the question is "whether the building is logically, not literally, connected to the performance of a governmental function." *Mathews v. City of Waverly*, 2010-Ohio-347 (Pike App.) (parking lot adjacent to city-operated park is connected with a governmental function).

Courts have defined a "physical defect" as "a perceivable imperfection that diminishes the worth or utility of the object at issue." *R.K. v. Little Miami Golf Ctr.*, 2013-Ohio-4939 (Hamilton App.). R.C. 2744.02(B)(4) applies if the instrumentality that caused the plaintiff's injury did not operate as intended due to a perceivable condition. *DeMartino v. Poland Loc. Sch. Dist.*, 2011-Ohio-1466 Mahoning App. (operation of a lawn mower without discharge chute); *Yeater v. Board of Ed., LaBrae Sch. Dist.*, 2010-Ohio-3684 (Trumbull App.) (volleyball equipment containing loose bolts); *Leasure v. Adena Local Sch. Dist.*, 2012-Ohio-3071 (Ross App.) (improperly installed bleachers); *R.K. v. Little Miami Golf Ctr.*, 2013-Ohio-4939 (Hamilton App.) (holding that improperly maintained storm sirens on a golf course may constitute a physical defect).

In contrast, when the instrumentality that caused the plaintiff's injury operated as intended, courts have generally ruled that there was no physical defect. *Hamrick v. Bryan City Sch. Dist.*, 2011-Ohio-2572 (Williams App.) (service pit in bus garage did not constitute a physical defect because it functioned as intended); *Duncan v. Cuyahoga Community College*, 2012-Ohio-1949 (Cuyahoga App.) (lack of mats on the floor of a classroom used for a self-defense class did not constitute a physical defect). But see *Jones v. Del. City Sch. Dist. Bd. of Educ.*, 2013-Ohio-3907 (Delaware App.) (recognizing that an orchestra pit was not inherently defective but holding that it could constitute a physical defect if reflective tape and lights were not used to warn of the presence of a drop-off).

R.C. 2744.02(B)(5) - liability imposed by another statute

Under this section, political subdivisions are potentially liable when civil liability is expressly imposed by another section of the Revised Code. Generally, the courts have interpreted this section just as it is written. Unless there is another statute that expressly and specifically imposes liability on a political subdivision, the § 2744.02(B)(5) exception has been found inapplicable. See *i.e. Butler v. Jordan*, 92 Ohio St. 3d 354, 2001-Ohio-204 ("within the meaning of R.C. 2744.02(B)(5), R.C. 5104.11 does not expressly impose liability on a political subdivision for failure to inspect or for the negligent certification of a type-B family day-care home even where the political subdivision has completely ignored the obligations imposed upon it by the statute."); *J.H. v. Hamilton City Sch. Dist.*, 1st. Dist., 2013-Ohio-2967 (exception inapplicable where a statute imposes liability on the State of Ohio as opposed to political subdivision); *City of Trotwood v. South Central Constr., LLC*, 192 Ohio App. 3d 69, 2011-Ohio-237, 2nd Dist. ("the exception does not apply, however, merely because a statute expressly

imposes a duty. Immunity continues to exist unless a statute expressly imposes liability as well.").

Consistent with that strict interpretation, I have found only one case where a court has applied § 2744.05(B)(5) to impose liability on a political subdivisions on the basis of another statute. See *Riffle v. Physicians & Surgeons Ambulance Serv.*, 135 Ohio St. 3d 357, 2013-Ohio-989, holding that R.C. 4765.49(B), which the city had argued operated as a limitation on the liability for the acts or omissions of emergency medical service employees, expressly imposed liability for injuries caused by willful or wanton misconduct of first responders.

Judicially-Created or Other Statutory Exceptions to Immunity

R.C. 2744.02(B) is not the only source of exceptions to immunity for political subdivisions. Other exceptions are found in R.C. 2744.09 or have been created by court decisions. But with two exceptions, these non-R.C. 2744.02 exceptions are consistent with the notion that the Act applies only to tort-type cases.

- Lawsuits alleging breach of contract. R.C. 2744.09(A). But to fall under this section, the Plaintiff must be a party to the contract upon which he or she seeks to recover damages for contractual liability. *Partin v. City of Norwood*, 1st Dist. 2015-Ohio-1616 (holding that a member of a municipal employees' union could not sue the City for breach of contract).
- Actions by an employee, or the collective bargaining representative of an employee, against his or her political subdivision relative to any matter that arises out of the employment relationship. R.C. 2744.09(B); *Sampson v. Cuyahoga Metro. Housing Authority*, 131 Ohio St. 3d 418; 2012-Ohio-570; 966 N.E.2d 247 (holding that an employee's "intentional tort" action against his political subdivision employer falls within this exception to immunity).
- Actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment. R.C. 2744.09(C). Note, however, that exclusive jurisdiction to resolve charges of unfair labor practices may be vested in SERB. *Ass'n of Cleveland Fire Fighters, Local 93 v. City of Cleveland*, 156 Ohio App. 3d 368; 2004-Ohio-994; 806 N.E.2d 170.
- Actions by sureties under fidelity or surety bonds. R.C. 2744.09(D).

- Actions based upon alleged violations of the federal constitution or federal statutes (i.e. claims brought under 42 U.S.C. § 1983).

There are two recognized exceptions to immunity not found in R.C. 2744.02 or R.C. 2744.09 that seem to apply to actions that some would consider "tort" cases. In *McNamara v. City of Rittman*, 107 Ohio St. 3d 243, 2005-Ohio-6433, the Ohio Supreme Court recognized the right of property owners to sue claim governmental interference with water rights. While phrased in terms of a "taking" that required a political subdivision to compensate the landowner ("Ohio recognizes that landowners have a property interest in the groundwater underlying their land and that governmental interference with that right can constitute an unconstitutional taking."), it is entirely possible that this holding could be extended to negligent acts of a political subdivision that result in an interference with riparian rights.

In *Sampson v. Cuyahoga Metro. Housing Auth.*, 131 Ohio St. 3d 418, 2012-Ohio-570; 966 N.E.2d 247, Plaintiff, an employee of CMHA, was arrested at work and charged with theft in office and misuse of agency-owned credit cards. After those charges were dismissed, Sampson sued CMHA for, among other things, intentional infliction of emotional distress and abuse of process. CMHA argued that the R.C. 2744.09(B) exception to immunity ("relative to any matter that arises out of the employment relationship") did not apply because the commission of an intentional tort against an employee in the workplace necessarily occurs outside the employment relationship and cannot arise from it. The Ohio Supreme Court disagreed, holding that:

*** when an employee of a political subdivision brings a civil action against the political subdivision alleging an intentional tort, that civil action may qualify as a "matter that arises out of the employment relationship" within the meaning of R.C. 2744.09(B). Further, we hold that an employee's action against his or her political subdivision employer arises out of the employment relationship between the employee and the political subdivision within the meaning of R.C. 2744.09(B) if there is a causal connection or a causal relationship between the claims raised by the employee and the employment relationship.