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## ARGUMENT

### **I. Appellee's claim that *Coolidge* created a *Greeley* claim of public policy wrongful discharge ignores the underlying facts, procedural posture, and analysis of *Coolidge*.**

Contrary to Appellee's first proposition of law, *Coolidge v. Riverdale Loc. Sch. Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, 797 N.E.2d 61, did not create a new theory of wrongful discharge in violation of public policy, because the facts and procedural posture of the case gave the Court no occasion to do so. In *Coolidge*, the plaintiff Cheryl Coolidge was a public school teacher whose employment was governed by R.C. 3319.16, a statute protecting her against termination without "good and just cause." When Coolidge was terminated for absenteeism due to a work-related injury, she challenged her termination as a violation of the "good and just cause" requirements of R.C. 3319.16. *Id.* at ¶12.

Significantly, Coolidge did not pursue a common law wrongful discharge claim, presumably because she was not an at-will employee, and was therefore ineligible for a common law wrongful discharge claim. *Haynes v. Zoological Soc. of Cincinnati* (1995), 73 Ohio St.3d 254, 652 N.E.2d 948, syllabus ("In order for an employee to bring a cause of action pursuant to *Greeley v. Miami Valley Maintenance Contractors, Inc.*, that employee must have been an employee at will."). Thus, in evaluating Coolidge's appeal, the Court simply considered whether Coolidge's termination was for "good and just cause." It had no reason to consider whether the facts as alleged by Coolidge properly stated a claim for wrongful discharge in violation of public policy.

Despite the limited scope of the issues before the Court in *Coolidge*, Appellee Shelly Bickers and Amicus Curiae Ohio Employment Lawyers Association (hereinafter "Appellee" and "Amicus") nevertheless insist that *Coolidge* created a new common law cause of action for wrongful discharge in violation of public policy. This argument must be rejected as an

unsupported interpretation of *Coolidge* that defies principles of judicial restraint. It is well-established that a court should not decide matters that are beyond the scope of the case pending before it. As this Court recently observed, it is a cardinal principle of judicial restraint that “if it is not necessary to decide more, it is necessary *not* to decide more.” *State ex rel. Ohio Democratic Party v. Blackwell*, 2006-Ohio-5202, at ¶50 (emphasis added). Given this “cardinal principle of judicial restraint,” and the fact that *Coolidge* was in no way eligible for a common law wrongful discharge cause of action, there is no basis for interpreting this Court’s holding in *Coolidge* as creating any claim for common law wrongful discharge in violation of public policy.

Recognizing that *Coolidge*’s own ineligibility for a public policy wrongful discharge claim defeats the argument that the Court created such a claim in *Coolidge*, Amicus leaps to stretch *Coolidge* even further. Testing the limits of the adage that the “best defense is a good offense,” Amicus makes the incredible assertion that *Coolidge* not only created a new claim of public policy wrongful discharge, but also created an *exception* to the at-will limitation of *Haynes*. (Amicus’ Brief, pp. 3–4.) Such a stretch is the only way that the facts of *Coolidge* can be reconciled with prior law.

Amicus’ argument is entirely without merit. First, the outcome of *Coolidge* demonstrates that the Court did not bestow *Coolidge* with a new common law cause of action, as the Court merely held that *Coolidge*’s discharge was “without ‘good and just cause’ under R.C. 3319.16,” and restored *Coolidge*’s teaching contract to its previous effective status. *Coolidge* at ¶52, 53. Second, the assertion that *Coolidge* created an exception to the at-will requirement is undercut by the Court’s express observation that “[a] claim of wrongful discharge in violation of public policy, whether based on workers’ compensation or other law, originated, and is generally

conceived in Ohio and elsewhere, as an exception to the employment-at-will doctrine.” *Id.* at ¶19.

Finally, for *Coolidge* to have permitted a *Greeley* claim for a non-at-will employee would mean that the Court silently overturned its own precedent limiting *Greeley* causes of action solely to at-will employees. *Haynes*, 73 Ohio St.3d at syllabus. It is difficult to believe that the Court would make such a drastic departure from its holding in *Haynes* without even so much as citing (let alone discussing) *Haynes* and its progeny. Because *Coolidge* did not create an exception to the at-will requirement for *Greeley* claims, and *Coolidge* was therefore ineligible for these claims, the Court was without any occasion to create a new *Greeley* cause of action, and principles of judicial restraint prohibited the Court from doing so.<sup>1</sup>

**II. A limited reading of *Coolidge* does not violate equal protection because it does not require discriminatory application of the Workers’ Compensation Act.**

Appellee and Amicus argue that a narrow reading of *Coolidge* violates the Equal Protection Clauses of the U.S. and Ohio Constitutions because it unfairly interprets the Workers’ Compensation Act to provide job guarantees to public employees without affording the same protections to private employees. This argument is without merit. Despite Appellee’s and Amicus’ contention, *Coolidge* did not interpret the Workers’ Compensation Act to provide job guarantees to *any* employee, public or private, and therefore cannot be regarded as discriminatorily applying the protections of the Act on the basis of employment status.

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<sup>1</sup> Even if the Court had the opportunity to create a new *Greeley* claim in *Coolidge*, the absence of any analysis of the four elements of a public policy claim confirms that the Court chose not to do so. *See Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69–70, 652 N.E.2d 653, (adopting the four elements required for a *Greeley* claim). Indeed, the Court’s sole reference to *Collins* was to observe that *Coolidge* was not eligible for a *Greeley* claim because she was not an at-will employee. *Coolidge* at ¶19. Amicus’ effort to infer a four-step *Greeley* analysis from *Coolidge*’s broad discussion of workers’ compensation policy ignores the fact that the Court never even mentioned the four elements of a *Greeley* claim, and ultimately went no further than to find that *Coolidge*’s termination was without good cause as defined by R.C. 3319.16. *Id.* at ¶52–53. The creation of a new *Greeley* cause of action poses considerable liability for employers, and this Court should not infer the existence of such a claim without engaging in the four-step analysis as required by *Collins*.

As explained above, the Court in *Coolidge* was not faced with the issue of whether terminating an employee for absenteeism due to a work-related injury violated the Workers' Compensation Act or justified a *Greeley* cause of action based on the Act. Rather, the Court considered whether a termination under these circumstances constituted "good and just cause" under R.C. 3319.16, exploring the fairness and policy concerns attendant in that analysis. Thus, the claimed difference in treatment between public and private employees in *Coolidge* was merely the inevitable result of R.C. 3319.16, a statute that applies solely to public employees. As an employer, the State is permitted to offer benefits and protections to its own employees without mandating that private employers offer those same benefits and protections to private employees.

In light of the predominance of R.C. 3319.16 in the Court's decision in *Coolidge*, the cases cited by Amicus in support of its equal protection argument are readily distinguished. *State ex rel. Nyitray v. Indus. Comm. of Ohio* (1983), 2 Ohio St.3d 174, 443 N.E.2d 962, (striking down R.C. 4123.60, which provided for payment of benefits to dependents of a claimant only if his or her death was not caused by a work-related injury); *Kinney v. Kaiser Aluminum & Chemical Corp.* (1975), 41 Ohio St.2d 120, 322 N.E.2d 880 (rejecting R.C. 4123.59, which awarded death benefits only if the claimant's death was more than three years after the date of injury or the claimant had received (or was entitled to receive) workers' compensation benefits within one year of his death). Unlike *State ex rel. Nyitray* and *Kinney*, *Coolidge* did not construe any provision of the Workers' Compensation Act to afford rights based on unfair distinctions between otherwise similar claimants. Thus, limiting *Coolidge* to its factual context does not violate the state or federal Equal Protection Clauses.

**III. The General Assembly's recent revisions to the Workers' Compensation Act are not an endorsement of Appellee's broad view of *Coolidge*.**

On March 8, 2006, the General Assembly passed Senate Bill 7, legislation intended to implement certain reforms to the Workers' Compensation Act. This legislation was signed by Governor Taft on March 28, 2006, and went into effect on June 30, 2006. The bill was the result of a negotiation between the labor and management communities completed before it was presented to the General Assembly for a vote. Senate Bill 7 revised certain aspects of the Workers' Compensation Act, but did not address claimant job security while receiving TTD benefits, or any other issue raised by *Coolidge* or this appeal.

Appellee and Amicus claim that Senate Bill 7's silence with respect to whether an employer may terminate an employee receiving TTD for absences due to a work-related injury endorses a broad interpretation of *Coolidge* and supports the creation of a *Greeley* cause of action for termination under these circumstances. Contrary to Appellee's and Amicus' argument, Senate Bill 7 does not support their interpretation of *Coolidge*, or the creation of a *Greeley* claim for wrongful discharge.

At the outset, the Court should always be reluctant to infer support from legislative silence. "The Supreme Court has long held that silence is rarely, if ever, an effective barometer of legislative intent." *Porter v. Saez*, Franklin App. No. 03AP-1026, 2004-Ohio-2498, ¶66 (quoting *Zuber v. Allen* (1969), 396 U.S. 168, 185 and *Girouard v. United States* (1946), 328 U.S. 61, 69). This principle is particularly applicable in this case, because Senate Bill 7 arose from negotiations between labor and management before being presented to the General Assembly for adoption into law; the legislature did not engage in the private debate of what should and should not be included in the legislation.

Moreover, even if *Coolidge* could be interpreted to create a *Greeley* claim for wrongful termination for absenteeism due to a work-related injury, this interpretation is unsettled at best. As Amicus notes, there is a split of authority among the district and appellate courts as to whether *Coolidge* created an independent *Greeley* claim for termination under these circumstances. (Amicus Brief, p. 10.) In light of this ambiguity as to the meaning of *Coolidge*, it is improper to interpret Senate Bill 7 as endorsing any interpretation of *Coolidge* with respect to public policy. Because *Coolidge* did not clearly establish a *Greeley* claim for terminating an employee for absenteeism due to a work-related injury, Senate Bill 7's silence with respect to *Coolidge* cannot be construed as an endorsement of any *Greeley* cause of action relating to the Workers' Compensation Act.

**IV. Appellee's overstated public policy considerations do not support an extension of *Coolidge* beyond its facts.**

**A. Appellee's broad interpretation of *Coolidge* seeks to disrupt the legislative compromise between the rights of injured workers and their employers.**

As explained in Appellant's Merit Brief, R.C. 4123.90 is part of a comprehensive workers' compensation scheme designed to balance the rights and responsibilities of employers and employees with respect to preventing and compensating for work-related injuries. *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, at ¶19 (recognizing the Act as a "mutual compromise between the interests of the employer and the employee"). Allowing employees to maintain *Greeley* claims against their employers for alleged violations of the workers' compensation statute will undermine this compromise, exposing employers to unlimited liability without the benefit of their bargain under the Act.

Amicus and Appellant argue that public policy warrants disruption of this careful legislative balance, as failure to do so wrongly places the employer's interests over that of the employee's. Contrary to Amicus' assertion, deference to the Workers' Compensation Act does

not require that the economic interests of the employer be “subjugated” to the interests of the employee, and refusal of a *Greeley* claim does not render the employer’s interests “paramount.” Rather, the Act requires only that employers and employees act within the statutory framework set forth by the General Assembly, which already accounts for the legislative intent to favor injured workers.

Amicus’ and Appellant’s efforts to establish the need for a *Greeley* cause of action overstate the potential harms to employees while trivializing the harms to employers. Amicus claims that employers can easily avoid a *Greeley* claim in these circumstances simply by temporarily suspending their attendance policies until injured employees return to work. Amicus goes on to state that such claims are necessarily limited in duration and scope, describing the harm to employers as a “temporary inconvenience.” (Amicus Brief, p. 16.) These assertions oversimplify and ignore the serious problems posed by a job guarantee for all employees receiving temporary total disability benefits.

Providing workers’ compensation claimants with an indefinite job guarantee is not simply an administrative matter of suspending an attendance policy. Employers who are forced to retain these employees indefinitely must operate their companies with reduced staffs and disrupted operations, often while continuing to pay benefits to employees without any certainty as to when the employees will return to work. While Amicus claims that such a *Greeley* action will not require indefinite job guarantees, this claim ignores the requirements of the Act. Contrary to Amicus’ contention, a *Greeley* action in these circumstances will not be limited in duration, as there is no limitation on the amount of time an employee could potentially receive TTD benefits. Indeed, it is not unusual for employees to receive these benefits for several

months, or even years, leaving employers with the struggle of operating their business short-handed indefinitely.

By contrast, the harm experienced by an employee who is terminated for excessive absenteeism while receiving temporary total compensation is significantly less than the harm that Amicus and Appellant seek to impose on employers. Even if terminated for excessive absenteeism, the injured worker will continue to receive temporary total compensation and medical treatment while recovering from her work-related injury. Once the employee recovers from the injury, he may pursue reinstatement with his former employer, or seek a new position with another employer. While this arrangement admittedly places some burden on the employee when he or she is ready to reenter the workforce, this burden is slight in comparison to the alternative of requiring an employer to indefinitely continue operations short-staffed while maintaining an open position for an employee who may never return to work.

Ultimately, any balancing of the rights and responsibilities of employers and employees with respect to absences caused by work-related injuries is for the legislature to undertake. The General Assembly has already crafted a compromise between employers and employees with respect to work-related injuries. This compromise recognizes that remedies available to employees under the Act will not amount to full compensation for employees, but that such a concession is necessary to a fair, equitable, and efficient workers' compensation system. Because a *Greeley* claim unfairly disrupts the legislative compromise, Appellant's and Amicus' arguments for a *Greeley* claim in this context must be rejected as a matter of law.

**B. Appellee's and Amicus' claim that a narrow reading of *Coolidge* will allow termination of TTD benefits due to "voluntary abandonment" is without merit.**

In order to inflate the public policy in support of a *Greeley* claim, Appellee and Amicus argue that a narrow reading of *Coolidge* will permit employers to prematurely terminate TTD

compensation under the doctrine of “voluntary abandonment.” This argument is a disingenuous threat without any support in law. Under the voluntary abandonment doctrine, an employee who is otherwise entitled to TTD benefits may forfeit those benefits if he or she engages in willful conduct that results in the termination of his or her employment. *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm. of Ohio* (1995), 72 Ohio St.3d 401, 650 N.E.2d 469. While such conduct typically includes job abandonment like resignation or retirement, this Court has also recognized that an employee’s willful violation of a written work rule warranting his or her termination may also constitute voluntary abandonment. *Id.* at 402–03.

Appellee and Amicus argue that unless *Coolidge* is read to provide indefinite job guarantees to injured workers, employees who exhaust their employer’s neutral attendance policies will be terminated pursuant to a written work rule, and will therefore be considered to have voluntarily abandoned their employment and forfeit their TTD benefits. Appellee’s and Amicus’ argument fails because it ignores a crucial element of the voluntary abandonment doctrine -- the employee’s conduct that leads to termination *must not be causally-related to the industrial injury*. *State ex rel. Pinson v. Indus. Comm. of Ohio*, 155 Ohio App.3d 270, 2003-Ohio-6074, 800 N.E.2d 766 at ¶38. “[T]he issue is whether the claimant voluntarily and knowingly relinquished her job in such a manner that her subsequent loss of wages was the result of her own choice, not the industrial injury.” *Id.* at ¶45.

Appellee and Amicus cite no cases to support their expansive interpretation of voluntary abandonment. Indeed, the cases cited in Appellee’s and Amicus’ briefs have nothing to do with whether violation of an attendance policy due to a work-related injury can constitute voluntary abandonment. *See State ex rel. Hammer v. Indus. Comm. of Ohio*, 99 Ohio St.3d 334, 2003-Ohio-3960, 792 N.E.2d 184 (holding that employee’s repeated sexual misconduct constituted

voluntary abandonment); *State ex rel. Smith v. Superior's Brand Meats, Inc.* (1996), 76 Ohio St.3d 408, 667 N.E.2d 1217 (holding that claimant voluntarily abandoned his employment when he falsified time records); *Wilson v. Farm Credit Services of Mid-America*, Wayne App. No. 05CA0086, 2006-Ohio-5046 (granting summary judgment on plaintiff's claim of wrongful discharge because plaintiff was terminated for poor work performance). Thus, Appellee's and Amicus' exaggerated and unprecedented interpretation of the voluntary abandonment doctrine as a basis for their expansive interpretation of *Coolidge* must be rejected.

**V. Appellee should not be permitted to use a *Greeley* claim to avoid the legislatively mandated rights, remedies, and requirements of R.C. 4123.90.**

**A. Appellee's objection to the remedies set forth in R.C. 4123.90 ignores *Wiles*' deference to the legislature's balance of rights and remedies.**

Pursuant to *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526, a plaintiff may state a *Greeley* claim based on a statutory public policy only if the statute in question fails to provide an adequate remedy. *Id.* at ¶15. Appellee seeks to minimize this requirement, claiming that a "majority" in *Kulch v. Structural Fibers* (1997), 78 Ohio St.3d 134, 677 N.E.2d 308, required a public policy claim if an employee would otherwise receive "less than full relief," and complaining that R.C. 4123.90 "does not provide a full panoply of remedies to Bickers." (Appellee's Brief, pp. 20, 21.)

As noted in *Wiles*, however, Appellee's argument has no "majority" support, as "the [*Kulch*] analysis upon which [Appellee] relies garnered the votes of only three justices." *Id.* at ¶20. As *Wiles* explained, "*Kulch* is not controlling authority on the question of whether the remedies provided in a statute are sufficiently comprehensive to render unnecessary the recognition of a separate common-law *Greeley* claim based solely on the same statute." *Id.* Instead, the Court must consider whether the remedies provided by R.C. 4123.90 (i.e., reinstatement, back pay, and reasonable attorney's fees) are sufficient to deter the wrongful

termination and provide the plaintiff with compensation to remedy any statutory violation. *Id.* at ¶21.

Contrary to Amicus' and Appellee's contention, the remedies of R.C. 4123.90 are sufficient to vindicate public policy because they provide Bickers with a "meaningful opportunity" to return to the same position she was in prior to the adverse action by the employer. *Id.* at ¶17. Furthermore, limiting Appellant to a statutory R.C. 4123.90 claim "does not 'seriously compromise' the statute's objectives of preventing employers from retaliating or discriminating against employees for filing workers' compensation claims." *Coon v. Tech. Constr. Specialties, Inc.*, Summit App. No. 22317, 2005-Ohio-4080, ¶26 (citing *Wiles*). "[T]he purpose of a remedy in a wrongful termination case is not the degree of monetary reward, but rather to deter the employer from violating the law and to place the employee in the position they would have been had the employer not violated the law." *Id.* A plaintiff who is terminated in violation of R.C. 4123.90 will be reinstated, provided with back pay lost as a result of his termination, and will recover the reasonable attorneys' fees expended to vindicate his rights under the Act. Pursuant to the reasoning of *Wiles*, this remedy is sufficient to protect the public policy expressed in R.C. 4123.90 and the Workers' Compensation Act.

Finally, even if the remedies provided by R.C. 4123.90 afforded less than the make-whole relief required by *Wiles*, Appellant still could not state a *Greeley* claim under the Workers' Compensation Act because the legislature intended the statutory remedies to be the exclusive means of vindicating the statute's policy. Specifically, *Greeley* claims are only available if "(1) the remedies provided by [the Act] were not sufficient to provide complete relief and (2) the legislature did not intend the statutory remedies to be the exclusive means of vindicating the statute's policy." *Wiles*. at n.4 (emphasis in original); *Kulch*, 78 Ohio St.3d at 157–60, 677

N.E.2d 308. In this case, the legislature could not have been clearer in identifying the remedies set forth in R.C. 4123.90 as the exclusive remedies for wrongful termination for pursuing rights under the Workers' Compensation Act:

No employer shall discharge . . . any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act. . . . Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted *shall be limited* to reinstatement with back pay . . . plus reasonable attorney fees.

R.C. 4123.90 (emphasis added). Thus, because the General Assembly expressly provided that employees who are terminated because they engaged in protected activity under the Act shall be limited to reinstatement, back pay, and reasonable attorney fees, the Court must defer to this judgment, regardless of its own view of the adequacy of these remedies.

**B. Appellee cannot use a *Greeley* cause of action to circumvent the statutory prerequisites of R.C. 4123.90.**

Even if this Court is to recognize a *Greeley* cause of action apart from R.C. 4123.90, plaintiffs cannot use such a claim to avoid the prerequisites set forth in that statute. R.C. 4123.90 requires that in order to state a claim for wrongful termination, a plaintiff must provide written notice of the alleged violation within ninety days of the adverse employment action, and must file a lawsuit within 180 days of the adverse action. When the statutory basis for a *Greeley* claim imposes procedural requirements, the Court will impose these requirements on the *Greeley* cause of action. *Kulch*, 78 Ohio St.3d at 153, 677 N.E.2d 308.

Amicus seeks to avoid imposing the statutory prerequisites of R.C. 4123.90 on a *Greeley* claim by distinguishing *Kulch* on the grounds that *Kulch* concerned a whistleblower statute, whereas the instant case concerns protected activity under the Workers' Compensation Act. Specifically, Amicus argues that when the wrongful termination is based on protected activity

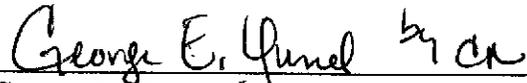
under the Workers' Compensation Act, the employer already has "notice" of the protected activity, thus obviating the need for the prerequisites of R.C. 4123.90.

Amicus' effort to distinguish *Kulch* substitutes its own judgment for that of the General Assembly, and wrongly limits the purposes of these statutory prerequisites. The General Assembly enacted R.C. 4123.90 to remedy the same harm addressed by Appellee's proposed *Greeley* claim, and concluded that the procedural requirements of R.C. 4123.90 were the appropriate means of protecting employer interests. Moreover, the purposes of R.C. 4123.90's prerequisites are not limited to providing the employer with notice of a possible violation of the Act. The ninety-day notice requirement and the 180-day filing requirement constitute a specific policy choice to expedite claims of wrongful discharge under the Act and provide the employer with an opportunity to correct any wrongful act without expensive and time-consuming litigation. Because these prerequisites are equally beneficial to *Greeley* claims based on the same wrongful conduct, Amicus' argument that they should not apply to a *Greeley* claim should be rejected.

### CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court reverse the decision of the First District Court of Appeals.

Respectfully submitted,

  
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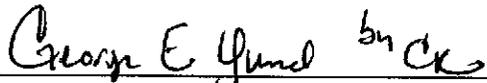
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**PROOF OF SERVICE**

I hereby certify that a copy of this Reply Brief of Appellant Western Southern Life Insurance Company, Inc. was served by ordinary U.S. mail, postage prepaid, on November 16, 2006 on the counsel listed below.

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