

IN THE SUPREME COURT OF OHIO

MARLENE LEININGER)	CASE NO. 2006-1304
)	
Plaintiff-Appellee,)	
)	
vs.)	
)	
PIONEER NATIONAL LATEX, et al.,)	ON APPEAL FROM THE
)	ASHLAND COUNTY COURT OF
Defendants-Appellants.)	APPEALS, FIFTH APPELLATE DISTRICT
)	CASE NO. 05-COA-048

**BRIEF OF AMICUS CURIAE
THE OHIO EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF APPELLEE AND URGING AFFIRMANCE**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Employment Lawyers Association (OELA) is the statewide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment, and civil rights matters. OELA is the only statewide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism and ethics.

As an organization focused on protecting the interests of workers who are subjected to unlawful discrimination, OELA has an abiding interest in ensuring the integrity of our system of civil adjudication of disputes. Our system needs to provide remedies that fairly compensate those subjected to discrimination; doing so can effectively deter such unlawful discrimination in the future. The aim of OELA's amicus participation is to cast light not only on the legal issues presented in a given case, but also on the practical effect and impact the decision in that case may have on access to the Courts for people who have been unlawfully treated in the workplace.

OELA has an interest in this case to preserve common-law tort remedies for discipline and discharge in the workplace which jeopardize the clearly established public policies of our State and national governments.

STATEMENT OF THE CASE AND FACTS

The Amicus Curiae adopts the Statement of the Case and the Statement of Facts contained in the brief of Plaintiff-Appellee Marlene Leininger.

ARGUMENT

I. PROPOSITION OF LAW NO. 1:

WHEN A COMMON-LAW CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY IS BASED ON A PUBLIC POLICY ARISING FROM MULTIPLE SOURCES, THE EXISTENCE OF A REMEDIAL SCHEME WITHIN A STATUTE THAT ALSO EMBODIES THAT PUBLIC POLICY IS NOT SUFFICIENT GROUNDS TO FIND, AS A MATTER OF LAW, THAT THE JEOPARDY ELEMENT OF THE COMMON-LAW CLAIM CANNOT BE SATISFIED. THE STATUTE THAT, IN PART, GIVES RISE TO THE PUBLIC POLICY WILL ONLY BE SUFFICIENT AS A MATTER OF LAW TO BAR SATISFYING THE JEOPARDY ELEMENT WHEN THERE IS CLEAR EVIDENCE THAT THE LEGISLATURE INTENDED THAT THE STATUTORY ENACTMENT PREEMPT ALL COMMON-LAW CLAIMS.

Although the common-law doctrine of employment at will is the general rule in Ohio, this Court has recognized exceptions to this doctrine where necessary, in order to mitigate its harsh or unfair effects. *See, e.g., Mers v. Dispatch Printing Co.* (1985), 19 Ohio St. 3d 100, 103 (stating that “exceptions to the general rule are recognized in the interest of justice”). One of the exceptions to the general rule of “employment at will” is a claim for wrongful discharge or discipline in violation of public policy. *See, e.g., Painter v. Graley*, 70 Ohio St. 3d 377, 383, 1994-Ohio-334.

This claim was first enunciated in the third paragraph of the syllabus in *Greeley v. Miami Valley Maintenance Contractors, Inc.* *See* (1990), 49 Ohio St. 3d 228, at paragraph three of the syllabus (“In Ohio, a cause of action for wrongful discharge in violation of public policy may be brought in tort.”). The gist of a “Greeley claim” is that an employer may not discipline or discharge an at-will employee under circumstances where the discharge violates the clear public policy of the State of Ohio. *E.g., Collins v. Rizkana*, 73 Ohio St. 3d 65, 68-69, 1995-Ohio-135. To prove wrongful discipline or discharge in violation of public policy, an employee must demonstrate four elements: (1.) clarity; (2.) jeopardy; (3.) causation; and (4.) lack of an overriding business justification. *See id.* at 69-70. The first two elements are issues of law for

the court to resolve. *Id.* at 70.

In this case, the sole issue presented is whether the existence of remedies for age discrimination in Chapter 4112 completely forecloses a *Greeley* claim based on Ohio's strong public policy against age discrimination in the workplace.

- A. Precedent from this Court has consistently held that the way to analyze the jeopardy element of a *Greeley* claim based on a *sole source* of public policy should be different from the way to analyze a *Greeley* claim based on *multiple sources* of public policy; and unless the Legislature intended to preempt a *Greeley* claim predicated on multiple sources of public policy, a statute containing a right and a remedy will not bar the *Greeley* claim.**

In *Collins v. Rizkana*, this Court first recognized that analyzing the “jeopardy” element of a *Greeley* claim may entail the issue of adequacy of remedies:

The issue that most often arises under the jeopardy analysis, and upon which the courts are split, is whether the public policy tort should be rejected where the statute expressing the public policy already provides adequate remedies to protect the public interest. This issue is oftentimes complicated by virtue of the fact that courts confuse it with the issue of preemption.

73 Ohio St. 3d 65, 73, 1995-Ohio-135 (internal citations omitted). In analyzing the jeopardy element in *Collins*'s case, where Chapter 4112 was the primary – but not the only – source of the public policy at issue, the *Collins* Court drew a key distinction between cases in which one statute forms the sole basis of the tort claim, and cases where there are multiple sources of the public policy at issue. *See id.*

In cases where a single statute is the basis for the public-policy claim, the issue of adequacy of remedies may arise and may serve to preclude a common-law claim sounding in tort. *See id.* (internal citation omitted) (discussing cases where “right and remedy are part of the same statute, which is the sole source of the public policy”). However, where a public-policy claim is predicated on **multiple** sources of public policy, one of which is a statute containing a remedial scheme, the statute:

... will not foreclose recognition of the tort on the basis of some other source of public policy, *unless it was the legislature's intent in enacting the statute to preempt common-law remedies.*

Id. (emphasis added) (internal citations omitted).

In turn, to determine whether the Legislature intended a statutory enactment to preempt common-law remedies, the following principle applies:

... an existing common-law remedy may not be extinguished by a statute except by direct enactment or necessary implication.

Helmick v. Cincinnati Word Processing, Inc. (1989), 45 Ohio St. 3d 131, 135. In addition, it is a well-recognized principle of statutory construction that the "General Assembly will not be presumed to have intended to abrogate a common-law rule unless the language used in the statute clearly shows that intent." *E.g., Carrel v. Allied Prods. Corp.*, 78 Ohio St. 3d 284, 287, 1997-Ohio-12 (internal citation omitted) ("Thus, in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force.").

In fact, the *Collins* Court provided the following example of statutory language that evidences clear intent to preempt common-law remedies:

"[t]he provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of this chapter * * *. *No other claim or request for relief based upon such acts may be entertained by a district court other than by the procedures specified in this chapter.*

73 Ohio St. 3d at 73, n.2 (citing MONT, CODE ANN. 49-2-509(7)) (emphasis added). Because nothing in the language of Chapter 4112, or its legislative history, demonstrated that the Ohio Legislature intended it to preempt common-law claims, the jeopardy element was established.

See id. at 73-74

This Court applied this analytical framework later in *Kulch*, where it again was faced with a *Greeley* claim premised on two sources: R.C. 4113.52 and the federal OSH Act. *See Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 154, 1997-Ohio-219 (“Having identified two separate and independent sources of clear public policy justifying an exception to the employment-at-will doctrine, we must now consider [the jeopardy element].”). The *Kulch* Court recognized that the existence of remedies in R.C. 4113.52 “does not, without more, operate to bar recognition of” the *Greeley* claim. *Id.* at 156.¹

The Court then focused its attention on the Legislature’s intent in enacting R.C. 4113.52, and whether it intended the statutory provision to be the exclusive remedy for the type of violation at issue. *See id.* at 158. Ultimately, based on the legislative history of R.C. 4113.52 itself, as well as cases construing similar statutory provisions – including Chapter 4112 – the Court concluded that R.C. 4113.52 was not intended to preempt a common-law public-policy claim based on a violation of the statute. *See id.* at 158; paragraph 2 of the syllabus (“R.C. 4113.52 *does not preempt a common-law cause of action* against an employer who discharges or disciplines an employee in violation of that statute.”) (emphasis added).

After *Collins* and *Kulch*, which involved multiple-source claims based on wrongful discharge in violation of public policy, this Court had the occasion to consider a public-policy claim in which a statute formed the *sole* basis of the public-policy claim. *See generally Wiles v. Medina Auto Parts, Inc.*, 96 Ohio St. 3d 240, 2002-Ohio-3994. In *Wiles*, a plurality of this Court found that a common-law public policy claim did not lie where the sole source of the public policy was the federal Family and Medical Leave Act. *See id.* at 249.

¹ Although the *Kulch* Court did discuss the remedies contained in R.C. 4113.52 and whether they were “adequate,” this portion of the opinion did not garner majority support and is not controlling on this point. *See Wiles v. Medina Auto Parts, Inc.*, 96 Ohio St. 3d 240, 247, 2002-Ohio-3994.

The *Wiles* plurality followed the jeopardy analysis set forth in *Collins*:

Where, as here, the *sole source of the public policy opposing the discharge is a statute that provides the substantive right and remedies for its breach*, the issue of adequacy of remedies becomes a particularly important component of the jeopardy analysis.

Id. at 244 (citing *Collins*) (emphasis added). The Court then went on to analyze the remedial scheme contained in the FMLA, and determined that the remedies were sufficient to vindicate the public policy contained in the statute, such that a public-policy claim was unnecessary. *See id.* at 244-47.

The *Wiles* plurality explicitly stated that it was “merely deciding that the statutory remedies in the FMLA adequately protect the public policy embedded in the Act.” *Id.* at 249 (citing *Collins*). *The plurality specifically stated that it was not determining that the FMLA preempted a claim of wrongful discharge in violation of public policy.* *Id.* Thus, the *Wiles* plurality clearly followed the analysis set forth in *Collins*: where a statutory enactment – there, the FMLA – is the sole source of the public policy at issue, the proper analysis of the jeopardy element requires the court to consider whether the remedies contained in the statute adequately protect the public policy at issue.

B. Because a *Greeley* claim based on Ohio’s strong public policy against age discrimination finds its genesis in multiple sources, and because the Ohio Legislature did not intend for Chapter 4112 to preempt common-law claims, this claim should be permitted to go forward in Ohio courts.

In this case, a *Greeley* claim premised on Ohio public policy against age discrimination is rooted in multiple sources of public policy. The Ohio Revised Code contains four separate provisions proscribing age discrimination: R.C. 4112.02(N), R.C. 4112.05, R.C. 4112.14, and R.C. 4112.99. *See* OHIO REV. CODE ANN. §§ 4112.02(N), 4112.05, 4112.14, 4112.99 (Anderson 2006). Other sources of law that are applicable in Ohio also prohibit age discrimination. For example, the federal Age Discrimination in Employment Act prohibits discrimination on the basis of age, and

applies to Ohio workers. *See generally* 29 U.S.C. §§ 621-634 (2006). Federal regulations also prohibit discrimination based on age. *See* 29 C.F.R. Part 1625 (2006).²

Because a wrongful-discharge claim based on Ohio public policy against age discrimination finds its basis in multiple sources, the presence of the jeopardy element does not turn on the adequacy of the remedies available under any of the statutory enactments that form the basis of the claim. Thus, the *Wiles* decision, by its own terms, does not apply to this case. Rather, under *Collins* and *Kulch*, the key consideration in determining whether the jeopardy element is present is whether the Ohio Legislature enacted Chapter 4112 with the intent to preempt such common-law remedies. If the Legislature did not intend that Chapter 4112 preempt common-law claims, then the jeopardy element of the *Greeley* claim may be satisfied.³

With respect to Chapter 4112, both this Court and the Ohio Legislature have recognized that the intent of the statutory provisions is to enhance, not take away from, the rights and remedies of victims of workplace discrimination. *See Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St. 3d 131, at paragraphs one and two of the syllabus; *Collins v. Rizkana*, 73 Ohio St. 3d 65, 74, 1995-Ohio-135 (citing *Helmick*); OHIO REV. CODE ANN. § 4112.08 (Anderson 2006). According to the Ohio Legislature:

[Chapter 4112] shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply. *Nothing*

² The *Painter* Court held that proper sources of public policy include the “Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law.” *Painter v. Graley*, 70 Ohio St. 3d 377, 384, 1994-Ohio-334.

³ It should be noted that this is not the only component of the jeopardy analysis. In *Himmel v. Ford Motor Company*, the Sixth Circuit cited to Professor Perritt’s article, and identified three steps of jeopardy analysis: (1) determine “what kind of conduct is necessary to further the public policy” at issue; (2) decide whether the employee’s actual conduct fell within the scope of conduct protected by this policy; and (3) consider whether employees would be discouraged from engaging in similar future conduct by the threat of dismissal. (6th Cir. 2003), 342 F.3d 593, 599 (citing Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self-interest Lie?*, 58 U. CIN. L. REV. 397, 408) (“Given the Ohio Supreme Court’s reliance on Professor Perritt’s articulation of the jeopardy element in *Collins* . . . , we believe that Perritt’s framework of jeopardy analysis provides guidance in our analysis of the facts at hand.”).

contained in this chapter shall be considered to repeal any of the provisions of the law of this state relating to discrimination because of . . . age

OHIO REV. CODE ANN. § 4112.08 (Anderson 2006) (emphasis added).

This legislative declaration mandates that Chapter 4112 be liberally construed to accomplish its purpose of eradicating discrimination, and even states that nothing in Chapter 4112 may be used as the basis to repeal any other anti-discrimination laws – which necessarily includes common-law claims based on a violation of public policy. In addition, this Court has previously held that it is without power to override the legislature with judicial policy preferences:

Where the General Assembly has spoken, and in so speaking violated no constitutional provision, the courts of this state must not contravene the legislature's expression of public policy. Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.

Painter v. Graley, 70 Ohio St.3d 377, 385, 1994-Ohio-334 (internal citation omitted). Thus, only the legislature can repeal the law of this state relating to age discrimination, including the existing law that provides a *Greeley* cause of action based on age discrimination.

Accordingly, because the remedial scheme in Chapter 4112 does not foreclose a finding that the jeopardy element is present in a *Greeley* claim based on Ohio's strong public policy against age discrimination, OELA urges this Court to affirm the decision of the Fifth District Court of Appeals.

C. Recognizing a *Greeley* claim premised on the multiple sources of Ohio's strong public policy against age discrimination adheres to this Court's prior precedent; maintains an appropriate balance in the employee-employer relationship; and upholds this Court's role as the ultimate arbiter of the common law in the State of Ohio.

1. This Court has long and consistently recognized that a *Greeley* claim based on a public policy found in multiple sources could independently coexist with a claim under a statute that contained a remedy for the same right.

In *Livingston v. Hillside Rehabilitation Hospitals*, this Court reversed the Eleventh District Court of Appeals decision rejecting a public-policy claim premised on Ohio's public

policy proscribing age discrimination in the workplace. *See* 79 Ohio St. 3d 249, 1997-Ohio-155. In *Livingston*, the trial court granted summary judgment, which the Court of Appeals affirmed. *Livingston v. Hillside Rehab. Hosp.* (Jan. 24, 1997), 11th Dist. App. No. 95-T-5360, 1997 WL 51413 at *2. But this Court reversed the Eleventh District's decision:

The judgment of the court of appeal is reversed, and the cause remanded to the trial court **on the authority of *Kulch v. Structural Fibers, Inc.*,**

Livingston, 79 Ohio St. 3d at 249 (emphasis added).

In *Kulch v. Structural Fibers, Inc.*, this Court held that a *Greeley* claim and a statutory claim may co-exist, even when a statute provides the same right and contains a remedial scheme. *See generally* 78 Ohio St. 3d 134, 1997-Ohio-219. In *Kulch*, the issue was whether a public-policy claim based on a violation of the Ohio Whistleblower Protection Act, R.C. 4113.52, could co-exist with a statutory claim. *See generally id.* Through the syllabus, the *Kulch* Court held that: R.C. 4113.52 does not preempt the *Greeley* claim; a *Greeley* claim based on a violation of the statute is cognizable; the statute provides a cumulative remedy, in conjunction with the common-law claim; and an employee may maintain both causes of action, but is not entitled to a double recovery. *See id.* at ¶¶ 1-5 of the syllabus.

This Court again allowed a statutory claim and a common-law claim based on R.C. 4113.52 in the 2002 case of *Pytlinski v. Brocar Products, Inc.* *See generally* 94 Ohio St. 3d 77, 79-81, 2002-Ohio-66 (applying the *Kulch* syllabus law). The *Pytlinski* Court recognized that a public-policy claim predicated on R.C. 4113.52 and a statutory claim under that provision were two separate and distinct claims, and ultimately held that they were subject to different limitations periods. *See id.* at 80 (“Therefore, *Pytlinski* is not bound by the statute of limitations set forth in R.C. 4113.52 *because his cause of action is not based upon that statute, but instead, based in common law for violation of public policy.*”) (emphasis added).

In this case, the Fifth District properly recognized that the *Livingston* decision allowed a *Greeley* claim based on age discrimination in the workplace. At the time *Livingston* was decided, in 1997, the age-discrimination provisions of Chapter 4112 were substantially the same as they are today.⁴ Because there has been no substantive change to the statutory language, there is no basis to distinguish *Livingston* or decline to apply it to this case.

In addition, recognizing a wrongful-discharge claim based on Ohio public policy against age discrimination is consistent with this Court's decisions in *Kulch* and *Pytlinski*, both of which allowed statutory and common-law claims to co-exist.

2. **In *Collins v. Rizkana*, this Court recognized a public-policy claim predicated on the anti-gender-discrimination policies articulated in Chapter 4112, from which it follows that a public-policy claim predicated on Chapter 4112 must lie, regardless of the type of discrimination involved.**

In *Collins v. Rizkana*, the plaintiff brought a wrongful-discharge claim based on the public policy of the State of Ohio against gender discrimination and harassment. *See generally* 73 Ohio St. 3d 65, at the syllabus, 1995-Ohio-135. First, the *Collins* Court determined that Chapter 4112 is a viable source of Ohio's "strong public policy" against sexual harassment and discrimination in the workplace. *Id.* at 72. As the Court acknowledged:

It is clear that a civil rights statute prohibiting employment discrimination . . . may provide the necessary expression of public policy on which to premise a cause of action for wrongful discharge based sexual harassment/discrimination.

Id. (internal citations omitted).

⁴ In particular, R.C. 4112.14, which was previously codified at R.C. 4101.17, was integrated into Chapter 4112 in 1995, prior to the time *Livingston* was decided. *See* OHIO REV. CODE ANN. § 4112.14, Ed. Note (Anderson 2006) (noting that this provision was recodified via Senate Bill 162, effective October 29, 1995). In fact, the statutory text of R.C. 4101.17(B), as it appeared in the 1995 version of the Ohio Revised Code, contains the same language relating to a cause of action for age discrimination as is contained in today's version of R.C. 4112.14(B). *Compare* OHIO REV. CODE ANN. § 4101.17(B) (Anderson 1995) *with* OHIO REV. CODE ANN. § 4112.14(B) (Anderson 2006). The 1995 version of R.C. 4101.17 also contained limitations with respect to claims under R.C. 4112.02(N), thus suggesting that R.C. 4112.02(N) and 4112.99 were substantially the same at the time of *Livingston* as they are now. *Cf. id.* § 4101.17(C) (Anderson 1995).

Next, the Court considered the jeopardy element of Collins's wrongful-discharge claim. *See generally id.* at 73. The Court specifically noted that the availability of remedies under Chapter 4112 would not defeat the public-policy claim. *Id.* ("In this case, however, . . . the availability of remedies under Chapter 4112 will not serve to defeat Collins's . . . tort claim . . ."). Thus, the *Collins* Court explicitly held that a "cause of action may be brought for wrongful discharge in violation of public policy based on sexual harassment/discrimination" premised, in primary part, on Chapter 4112. *Collins*, 73 Ohio St. 3d at 74.

In addition, although *Collins* involved a claim for sexual harassment/discrimination, this Court paid favorable attention to, and cited as authority, a decision from the Sixth District Court of Appeals allowing a public-policy claim based on the provisions of Chapter 4112 which prohibit disability discrimination. *Id.* at 72 (citing favorably *Clipson v. Schlessman* (1993), 89 Ohio App. 3d 230, 236).

Based on the holding of *Collins*, it logically follows that a public-policy claim predicated, at least in part, on the anti-age discrimination provisions of Chapter 4112 must be permitted to go forward. There is no meaningful distinction between the claims involved in *Collins* and claims based on age discrimination, and there is no question that there is a strong public policy in Ohio against workplace discrimination, regardless of its basis.

3. **This Court should decline to apply *Wiles* in this case, despite Appellant's urging; this Court has repeatedly recognized – even in *Wiles* itself – that the adequacy of statutory remedies is not the proper analysis where a *Greeley* claim is predicated on multiple sources of public policy.**

Despite the long-standing precedent contained in *Collins* and *Kulch*, and even despite the *Wiles* plurality's adherence to this precedent with respect to the jeopardy analysis of a *Greeley* claim, several lower courts have recently struggled and mistakenly adopted a common argument

offered by employers, generally, and by Appellant in this case: that the “adequacy of remedies” analysis will foreclose a *Greeley* claim that is predicated on multiple sources of public policy.

This mistaken premise appears to arise from the following portion of the *Wiles* decision:

[T]here is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society’s interests. . . . In that situation, the public policy expressed in the statute would not be jeopardized by the absence of a common-law wrongful-discharge action in tort because an aggrieved employee has an alternate means of vindicating his or her statutory rights and thereby discouraging an employer from engaging in the unlawful conduct.

96 Ohio St. 3d at 244 (internal citations omitted).

This portion of the *Wiles* opinion has been relied upon by courts and employers to justify eliminating any common-law rights for employees when the employee already has a statutory right and remedy available. *E.g.*, *James v. Delphi Automotive Sys.*, 10th Dist. App. No. AP04-25, 2004-Ohio-5493; *Lewis v. Fairview Hosp.*, 156 Ohio App. 3d 387, 2004-Ohio-1108; *but see Ferraro v. B.F. Goodrich Co.*, 149 Ohio App. 3d 301, 2002-Ohio-4398; *Jones v. Goodyear Tire & Rubber Co.*, 9th Dist. App. No. 21724, 2004-Ohio-2821.⁵ No court, however, has been able to either reconcile *Wiles* fully with the precedent before it, or state that the precedent before it has been overruled.

In this case, this Court has the opportunity to reconcile *Wiles* with the consistent body of law that preceded it in order to enunciate the proper analysis of the jeopardy element of a *Greeley* claim: where the source of the public policy is a single statutory enactment, whether the jeopardy element is present turns on whether the remedial scheme provided for in the statute

⁵ Although these cases address the viability of *Greeley* claims premised on the anti-discrimination provisions of Chapter 4112, lower courts and litigants have likewise misapplied the *Wiles* jeopardy analysis to other multiple-source public-policy claims. For example, courts have reached conflicting results in the context of *Greeley* claims and the workers’ compensation statutes. *See, e.g.*, *Bickers v. Western So. Life Ins. Co.*, 1st Dist. App. No. C-040342, 2006-Ohio-572 (finding that *Wiles* does not foreclose a *Greeley* claim); *but see, e.g.*, *Brooks v. QualChoice, Inc.*, 8th Dist. App. No. 85692, 2005-Ohio-5136 (disallowing a *Greeley* claim). Because the *Bickers* case is currently pending before this Court, (2006) 110 Ohio St. 3d 1409, it is crucial for this Court to resolve the misapplication of *Wiles* and provide appropriate guidance for lower courts in future cases.

itself adequately protects the public policy at issue. Conversely, where the public policy at issue is found in multiple sources, one of which is a statutory enactment that contains a remedial scheme, the presence of the jeopardy element depends on whether the Legislature intended that the statutory provision completely preempt common-law remedies.

Because the *Wiles* decision simply does not apply to a *Greeley* claim premised on the multiple sources of Ohio's strong public policy against age discrimination, there is no need for this Court to determine whether the age-discrimination provisions in Chapter 4112 contain adequate remedies.

4. This Court's decisions in *Greeley*, *Collins*, *Kulch*, *Livingston*, and *Pytlinski* remain good law that should be left intact under the principles of *stare decisis*.

This Court recently recognized the crucial role that *stare decisis* plays in a common-law legal system, characterizing this principle as “the bedrock of the American judicial system.” *Galatis v. Westfield Ins. Co.*, 100 Ohio St. 3d 216, 216, 2003-Ohio-5849 at ¶ 1 (O'Connor, J.). Because prior judicial opinions “become controlling precedent,” our legal system is fundamentally stable and predictable. *Id.* In fact, this Court recognized that “[t]hose affected by the law come to rely on its consistency,” and the purpose of adhering to the doctrine of *stare decisis* is to “thwart[...] the arbitrary administration of justice” and to “provide a clear rule of law by which the citizenry can organize their affairs.” *Id.* at 226; ¶ 43. Based on these key principles, a departure from precedent should occur only where the “newly chosen course for the law is a significant improvement over the current course.” *Id.* at 216; ¶ 1.

Among the cases that comprise the *Greeley* progeny, only the precedential value of *Kulch* has been called into question. But the questions have been limited to the plurality portions of *Kulch*, not its syllabus law. As has been recognized by at least two current, and one former,

Justice of this Court, the syllabus of *Kulch* should be given deference because of *stare decisis*.

In dissent to *Pytlinski*, then Justice Cook wrote:

If the issue of whether a common-law whistleblower cause of action exists were before this court for the first time today, I would decide this case in accordance with my dissenting view in *Kulch*. **But in deference to the doctrine of *stare decisis*, I begin my analysis of today's case recognizing the holding of *Kulch* that a limited common-law whistleblower cause of action exists based on the public policy evinced by R.C. 4113.52.**

Pytlinski v. Brocar Prods., Inc., 94 Ohio St. 3d at 81-82, 2002-Ohio-66 (Cook, J., dissenting) (emphasis added). Chief Justice Moyer concurred with Justice Cook's opinion. *See id.* Likewise, in a separate dissent to *Pytlinski*, Justice Lundberg Stratton wrote: "Like Justice Cook, I will defer to the doctrine of *stare decisis* and adhere to this court's syllabus law in *Kulch*." *Id.* at 84 (Lundberg Stratton, J., dissenting).

Unlike the *Kulch* and *Wiles* opinions, the opinions in *Greeley*, *Collins*, and their progeny – including *Livingston* – are all products of a majority of this Court. These opinions include the jeopardy analysis that distinguishes between "multi-source" *Greeley* claims and "single source" *Greeley* claims. Thus, the legal principles stated in these cases remain intact and merit adherence under the principles of *stare decisis*.

Reversing prior precedent on the *Greeley* claim would upset a careful balance that has been established for Ohio employees and employers. Both parties to the employment relationship have long understood that public-policy considerations will sometimes outweigh the right of employers to terminate employment relationships at will. As explained in *Collins*:

[I]t is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out.

Collins v. Rizkana, 73 Ohio St.3d 65, 68-69, 1995-Ohio-135 (internal citations omitted).

Limiting the protections that an employee has when acting in the best interest of public policy will limit the protection of society's interest in seeing its public policies carried out. The current law insures that the balance of interests is maintained.

5. Reversal of the decision below based on an adequacy of remedies analysis would not only violate *stare decisis*, but would also undermine this Court's role in developing the common law and protecting Ohio's citizens and public policies.

As this Court stated in *Kulch*:

Greeley and its progeny are intended to bolster the public policy of this state and to advance the rights of employees who are discharged or disciplined in contravention of clear public policy.

78 Ohio St. 3d 134, 155, 1997-Ohio-219. OELA urges this Court to remain guided by this unassailable principle. Although the Appellant argues for reversal of *Livingston*, doing so is not possible without diminishing the rights of employees who are discharged or disciplined in contravention of clear public policy.⁶ By deciding this case without disturbing *any* prior decision or opinion of this Court, the rights of employees and employers will remain balanced, Ohio's public policies will retain important protections, and the law will remain stable and predictable.

Following the arguments of the Appellant and Amicus Curiae, which urge reversal, would likely result in reversing the decision below on the grounds that an adequate remedy exists under the age discrimination statutes. The analysis would be not only contrary to the established precedent of the Court, but would also risk limiting common-law remedies without express authorization from the Legislature. This stands on its head the relationship between the common-law and statutory law.

⁶ Likewise, it would be impossible to overrule *Livingston* without overruling *Kulch* and *Collins*, for the reasons set forth in Section I(A), *supra*. Contrary to Appellant's argument, *Wiles* does not apply to the type of claim alleged in this case, and thus likewise cannot serve as a basis for overruling *Livingston*.

While the Legislature is unquestionably the decision-making authority with respect to Ohio's statutory enactments, it is axiomatic that the *judiciary* is the ultimate decision-making authority with respect to the common law in the State of Ohio. *E.g., Gallimore v. Children's Hosp. Med. Ctr.* (1993), 67 Ohio St. 3d 244, 253 ("After all, who presides over the common law but the courts?").⁷

Common-law tort remedies exist independent from statutory remedies to accomplish the interests of justice that the courts determine to be reasonable and necessary to make whole the victims of torts, and to deter wrongful behavior. The purpose of substantive tort law is not only to make the victim whole, but also to deter misconduct and prevent such harms in the first place. *See* AMERICAN BAR ASSOCIATION, *TOWARDS A JURISPRUDENCE OF INJURY*, 4-3 (1984) (deterrence of misconduct is "a strong thread running through tort law"); W. PAGE KEETON, ET AL., *PROSSER AND KEATON ON THE LAW OF TORTS* § 4 (5th ed. 1984); Clarence Morris, *Punitive Damages in Tort Cases*, 46 *HARV. L. REV.* 1173, 1177 (1931) (both compensatory and punitive damages serve tort law's "admonitory" function of deterring misconduct); Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 *SO. CAL. L. REV.* 79, 137 (1982) ("There is now a rich body of academic literature supporting the view that a primary purpose of tort liability rules is to discourage inappropriate behavior.").

Without question, unlawful discrimination "is a fundamental injury to the individual rights of a person," *Goodman v. Lukens Steel Co.* (1987), 482 U.S. 656, 661, that causes grave harm to its victims. *United States v. Burke* (1992), 504 U.S. 229, 238. The Ohio tort claim for wrongful discipline or discharge in violation of clearly established public policy serves the core public interests of eradicating wrongful conduct – including discrimination – and protecting the

⁷ Thus, the position taken by Amicus Curiae the Ohio Management Lawyers Association – that the creation of the public-policy tort at common law amounts to improper judicial legislation – is not consistent with the underlying

administration of justice. Thus, Ohio law deters employers from punishing workers for having child support orders; for reporting unsafe or unhealthy conditions; or for serving as a witness and testifying truthfully against their employers. *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228; *Pytlinski v. Brocar Prods., Inc.*, 94 Ohio St. 3d 77, 2002-Ohio-66; *Sabo v. Schott*, 70 Ohio St. 3d 527, 1994-Ohio-249. These are core values of our government: that people may participate in protected activities that further public administration, and that people may remain free from invidious discrimination based on the status of their birth.

In contrast to tort claims, statutory claims are the result of the political branches of government. The remedies provided by statutes may be the result of political compromises expedient in their day, but lacking in the full force of tort remedies to make victims whole and deter wrongful behavior. In determining the common-law claims for wrongful discharge, the judiciary plays a crucial role in establishing the remedies known to judges to be effective. The civil order of our state depends on the courts to define what conduct is wrongful, and to fashion the remedies that the judiciary deems adequate to compensate the victims of this conduct, and to deter the potential tortfeasors.

Civil tort remedies, therefore, serve an essential function to set the accounts right for victims of wrongful conduct, and to deter wrongful behavior that would be injurious to Ohioans and to Ohio's public policy. In the *Greeley* case itself, for example, Robert Greeley was terminated simply because his employer received an order to garnish his wages for child support. Because the Legislature enacted a statutory scheme without a remedy, the common-law remedy stepped in to provide a remedy, without which the employer's arbitrary conduct would have gone undeterred.

principles of our common-law legal system.

Similarly, without the public-policy claim, workers like Larry Pytlinski and James Kulch would remain subject to discipline and discharge for asserting their rights to a safe workplace. It would likewise be repugnant to Ohio public policy if employers could arbitrarily terminate employees, such as Timothy Sabo, for giving truthful testimony under oath during a deposition, simply because that testimony exposes the employer's own wrongdoing. Most importantly, without the public-policy claim at common law, workers in smaller workplaces that are not covered under the jurisdictional provisions of Chapter 4112 would be subject to unlawful discrimination – including the type of sexual harassment and abuse as occurred in the *Collins* case – without recourse.

Accordingly, overruling *Greeley* and its progeny would eliminate a common-law cause of action that has served an important role in defining the contours of the employment relationship between Ohio workers and their employers. Likewise, overruling *Greeley* now would undermine the consistency and predictability of long-standing precedent; would severely detriment Ohio workers; and would undermine, not enhance, the role of the judiciary in developing the common law in a manner that serves the interests of all Ohio citizens.

- 6. The Ohio General Assembly has not enacted legislation to eliminate, modify, or supersede *Greeley*, thereby recognizing, at least impliedly, the important role of common-law protections afforded to Ohio workers under this decision.**

While the judiciary presides over the common law in the State of Ohio, the Ohio General Assembly has the authority, within constitutional limitations, to change the common law by way of legislation. See, e.g., *Johnson v. BP Chemicals, Inc.*, 85 Ohio St. 3d 298, 304, 1999-Ohio-267 (applying this principle in the context of employer intentional torts and legislation that was

designed to supersede Supreme Court precedent); *see also Avellone v. St. John's Hosp.* (1956), 165 Ohio St. 467, 481.⁸

In the case of public-policy claims, it has been 17 years since this Court decided *Greeley*, yet the Ohio Legislature has not taken any action to modify, supersede, or abrogate the common-law cause of action set forth in paragraph three of the syllabus of that decision. In fact, it was not until 2003 that any legislation dealing with the public-policy tort was introduced in the Ohio House. In October of 2003, House Bill 300, which would have made sweeping changes to Chapter 4112, was introduced. H.B. 300, 125th Gen. Assem. (2003). One of the purposes of the bill was to:

Bar[. . .] a person from instituting a tort action based on the public policies embodied in the Civil Rights Law or in federal, state, or local fair employment laws and declare[. . .] the General Assembly's intent that a person cannot maintain a public policy tort action under the Ohio Supreme Court's holding in *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St. 3d 228.

LEGISLATIVE SERVICE COMMISSION, BILL ANALYSIS FOR H.B. 300 1; 6 (2003) (describing a proposed amendment to R.C. 4112.08). However, House Bill 300 never emerged from the Civil and Commercial Law Committee, where it went after introduction, and it never received a vote in either branch of the General Assembly.

Thus, even at the urging of the sponsors of House Bill 300, who were aware of the *Greeley* claim and who expressed a desire to limit it significantly, the Ohio General Assembly has, to date, declined to take any action to limit *Greeley* claims in any manner. From this legislative silence, it can be reasonably inferred that the Ohio Legislature does not desire to

⁸ In this case, the Court stated as follows:

More than fourteen years have passed since this court declared that a public charitable hospital is not liable unless it has failed to exercise due care in the selection of its nurses, etc. We may well suggest, . . . that our Legislature could, if it wished, change the law established by this court. It has not done so; it may not desire to do so.

Avellone, 165 Ohio St. at 481 (internal citation omitted).

“undo” the work of the *Greeley* Court or its successors. Because the Ohio General Assembly has not seen fit to overrule *Greeley* and its progeny by legislative fiat, this Court should likewise decline the Ohio Management Lawyers Association’s invitation to do so now, as urged in its brief as *Amicus Curiae*.

II. PROPOSITION OF LAW NO. 2:

THE STATUTE OF LIMITATIONS FOR A *GREELEY* CLAIM PREDICATED ON AN INDEPENDENT SOURCE OF PUBLIC POLICY IS FOUR YEARS UNDER R.C. 2305.09(D), AS ESTABLISHED BY THE SYLLABUS OF *PYTLINSKI V. BROCAR PRODUCTS, INC.*

Like the Appellants here, Brocar Products argued to the this Court in *Pytlinski v. Brocar Products, Inc.*, that a limitations period included in part of a statute that is one of the sources of the public policy giving rise to a *Greeley* claim should apply to the *Greeley* claim. *See generally* 94 Ohio St. 3d 77, 2002-Ohio-66. This Court rejected that argument. *See id.* at paragraph two of the syllabus. *Pytlinski* held that when a *Greeley* claim is based on at least one other source of public policy that is independent from a statute containing a right, remedy, and statute of limitations, the applicable statute of limitations for the common-law claim is four years under R.C. 2305.09(D):

Ohio public policy favoring workplace safety is an independent basis upon which a cause of action for wrongful discharge in violation of public policy may be prosecuted. Therefore, *Pytlinski* is not bound by the statute of limitations set forth in R.C. 4113.52 because his cause of action is not based upon that statute, but is, instead, based in common law for violation of public policy.

Having determined that the one-hundred-eighty-day limitations period set forth in R.C. 4113.52 does not apply to a common-law action for wrongful discharge in violation of public policy, we must determine what limitations period does apply. R.C. 2305.09(D) provides the general limitations period for tort actions not specifically covered by other statutory sections. An action for wrongful discharge in violation of public policy is not specifically covered by any statutory section. *Accordingly, we find that the limitations period for common law claims for wrongful discharge in violation of public policy is four years as set forth in R.C. 2305.09(D).*

Id. at 80 (emphasis added).

A *Greeley* claim predicated on Ohio's multiple sources of public policy against age discrimination presents even greater reason to find that the applicable statute of limitations is four years. Ohio has multiple statutes that embody its public policy against age discrimination. *See* OHIO REV. CODE ANN. §§ 4112.02(N); 4112.05; 4112.14; 4112.99 (Anderson 2006). The Congress has likewise enacted a statutory scheme that embodies this policy. *See* 29 U.S.C. §§ 621-634 (2006). And federal regulations reiterate that policy. *See* 29 C.F.R. Part 1625 (2006). Thus, Ohio's public policy against age discrimination is contained in several independent sources, not in any single source. Accordingly, the *Pytlinski* holding applies equally here.

Moreover, the statute of limitations should not be determined based upon any particular source statute when multiple statutory sources of the public policy at issue contain separate, and different, limitations periods. The Ohio statutes proscribing age discrimination have different statutes of limitations, and those statutes of limitations differ from the limitations periods applicable to claims brought under the federal ADEA. Thus, applying the four year statute of limitations set forth in R.C. 2305.09(D) eliminates any possible confusion over which limitations period in which statutory scheme should apply, and properly recognizes that *Greeley* claims exist at common law, separate from statutory claims, which is consistent with the holding in *Pytlinski*.

Accordingly, OELA, as *Amicus Curiae*, requests that this Court decline to overrule the holding in *Pytlinski*, and reiterate that the statute of limitations applicable to all *Greeley* claims is the four-year statute of limitations set forth in R.C. 2305.09(D).

CONCLUSION

For all of the foregoing reasons, the Ohio Employment Lawyers Association urges this Court to affirm the judgment and opinion of the Fifth District Court of Appeals.

Respectfully submitted,

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