

IN THE SUPREME COURT OF OHIO

Michael Dworning, ) On Appeal From the Cuyahoga County  
 ) Court of Appeals,  
 Plaintiff-Appellee, ) Eighth Appellate District  
 )  
 vs. ) Appellate Court Case No. 87757  
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 City of Euclid, et al., )  
 ) Supreme Court Case No. 2007-0307  
 Defendants-Appellants. )

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**PLAINTIFF-APPELLEE MICHAEL DWORNING'S MEMORANDUM IN  
RESPONSE TO DEFENDANTS-APPELLANTS CITY OF EUCLID, ET AL.'S,  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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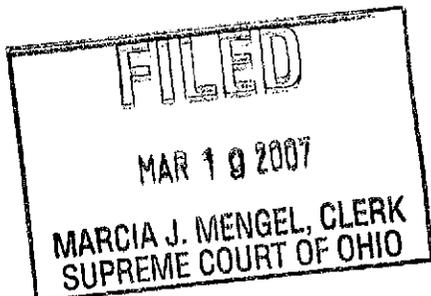
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## **I. Introduction**

Defendants-Appellants Thomas Cosgriff (“Cosgriff”) and James Slivers (“Slivers”) have no stake whatsoever in the outcome of these proceedings. Should the Ohio Supreme Court accept jurisdiction, the issue before it will be whether Plaintiff-Appellee Michael Dworning (“Dworning”) has the right to sue Defendant-Appellant the City of Euclid, Ohio (“Euclid”), pursuant to R.C. § 4112.99, without first exhausting his administrative remedies. The Euclid Civil Service Commission has neither jurisdiction over Slivers and Cosgriff, nor the ability to fashion any relief for Dworning’s claims against them.

Moreover, the Eighth District Court of Appeals’ decision in *Dworning v. City of Euclid et al.*<sup>1</sup> is very narrow; its simple acknowledgement of the limitations of a common law court-made principle to the facts of this case does not constitute a matter of public or great general interest. In *Dworning*, the Eighth District held that a civil service employee does not have to exhaust his or her administrative remedies prior to filing a lawsuit pursuant to R.C. § 4112.99. The Eighth District expressly limited its decision, noting:

We stress that **our holding does not apply to employment relationships defined by contract, whether private or by way of a collective bargaining agreement**, which set forth agreed upon disciplinary procedures, regardless of whether the right to invoke those procedures is couched in discretionary language.<sup>2</sup>

In short, the decision is expressly limited. Accordingly, Defendants-Appellants have not established that this appeal constitutes a matter of public or great general interest.

Separately, this Court should enter judgment summarily in favor of Dworning pursuant to Rule III, Section 6 (C)(2). Defendants-Appellants’ request that this Court exercise jurisdiction rests

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<sup>1</sup> 2006 Ohio 6772.

<sup>2</sup> *Id.* at \* 58 (emphasis added).

upon a lone decision that has never been cited. In fact, in the unanimous Eighth Appellate District opinion authored by Judge Michael Corrigan, the appellate court acknowledged that representatives of a wide array of interests, including the office of former Attorney General James Petro, shared the opinion that the precedent relied upon by Defendants-Appellants is simply and undeniably wrong. Accordingly, this Court should enter judgment summarily.

**II. Neither of the Individual Defendants-Appellants Has a Stake in The Outcome of This Appeal.**

The individual Defendants-Appellants in this case are not subject to the jurisdiction of the Euclid Civil Service Commission and its rules. Dworning did not have any obligation to exhaust administrative remedies before filing suit against either of the individual Defendants-Appellants.

It is well settled law in Ohio that “[i]f there is no administrative remedy available which can provide the relief sought, or if resort to administrative remedies would be wholly futile, exhaustion is not required.”<sup>3</sup> There are no administrative remedies to exhaust when a grievance procedure lacks authority to consider and redress the types of issues and complaints the aggrieved employee presents.<sup>4</sup>

The exhaustion of remedies doctrine does not apply to claims that an administrative body has no authority to redress.<sup>5</sup>

Dworning properly named Cosgriff and Slivers as defendants to his R.C. § 4112.99 defamation, invasion of privacy and civil conspiracy claims.<sup>6</sup> It is beyond dispute that the Euclid Civil

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<sup>3</sup> *Karches v. Cincinnati* (1988), 38 Ohio St. 3d 12, 17 (internal citations omitted).

<sup>4</sup> *East Cleveland Firefighters, Local 500 v. Civil Serv. Comm’n* (Dec 19, 2000), 8<sup>th</sup> Dist. No. 77367, 2000 Ohio App. LEXIS 6023, at \*23-34.

<sup>5</sup> *Salvation Army v. Blue Cross and Blue Shield of Northern Ohio* (8<sup>th</sup> Dist. 1993), 92 Ohio App. 3d 571, 579.

<sup>6</sup> See e.g., *Genaro v. Central Transport Inc., et al.* (1999), 84 Ohio St. 3d 293, 300 (“for purposes of R.C. Chapter 4112, a supervisor / manager may be held jointly and / or severally liable with her / her employer for discriminatory conduct of the supervisor / manager in violation of R.C. Chapter 4112”); *Cleveland Leader Printing Co. v. Nethersole* (1911), 84 Ohio St. 118, 133; *Sustin v. Fee* (1982), 69

Service Commission lacked any authority over either individual. The Euclid Civil Service Commission would have been powerless to redress Dworning's complaints.

In order to participate in this proceeding, Cosgriff and Slivers must demonstrate a present interest in the subject matter of the litigation.<sup>7</sup> Neither Cosgriff nor Slivers have anything to gain or lose from this Court's decision to accept or deny jurisdiction. For these reasons, even if this Court chooses to accept jurisdiction, it should only do so with respect to the narrow issues as applied to Defendant City of Euclid.

**III. Because the Appellate Court Limited its Holding, This Case Does Not Involve a Matter of Public or Great General Interest.**

A public employee's access to the court system to remedy discrimination is obviously a matter of great concern for public employees throughout the state. The Eighth District's decision, however, constitutes a limited holding in line with prior Ohio precedent and settled law.

It is established law in Ohio that the statutory language of R.C. 4122.99 permits municipal employees to commence civil actions for discrimination without first exhausting civil service remedies. This very Court has held that "under R.C. 4112.99, an individual may institute an **independent civil action** for discrimination on the basis of physical handicap **even though that individual has not invoked and exhausted his or her administrative remedies.**"<sup>8</sup> In a decision

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Ohio St. 2d 143, 145 ("one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person") (quoting Restatement of the Law 2d, Torts (1977) 378, Section 652B); *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St. 3d 415, 419 (quoting *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St. 3d 121, 126 ("Civil conspiracy," recognized in Ohio's common law, is defined as "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages").

<sup>7</sup> *Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24, 26.

<sup>8</sup> *Smith v. Friendship Village of Dublin* (2001), 92 Ohio St. 3d 503, 506 (discussing and following *Elek v. Huntington National Bank* (1991), 60 Ohio St. 3d 135) (emphasis added).

affirmed by this Court, the Tenth Appellate District noted “A **direct** civil action will undoubtedly serve R.C. Chapter 4112’s broader purpose of combating discrimination. Nothing in R.C. Chapter 4112 indicates that the legislature considers a first resort to ‘informal persuasion’ as the sole desirable method of enforcing civil rights laws.”<sup>9</sup>

As Dworning previously briefed in his Objection to Defendants-Appellants’ Notice of Filing an Order Certifying a Conflict,<sup>10</sup> Ohio courts that have held that public employees must first exhaust their administrative remedies prior to filing suit, issued such rulings because the employee was under a contractual obligation to exhaust his or her remedies.<sup>11</sup> It makes little sense for this Court to presently accept jurisdiction over an appellate decree that is simply another example of that long-standing judicial doctrine.

#### **IV. Defendants-Appellants’ Third Proposition of Law is Overbroad.**

Public employers and employees are free to draft their own civil service rules, city charters, standards and regulations. While the Ohio Supreme Court certainly has the power to interpret the language contained in statutes, rules and regulations presented for its review, it would be unfair for this Court to issue a statewide decree which applies to potentially hundreds of statutes, rules and regulations which are not before this Court.

In their third proposition of law, Defendants-Appellants ask this Court to issue a blanket

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<sup>9</sup> *Elek v. Huntington National Bank* (Aug. 24, 1989), 10<sup>th</sup> Dist. No. 88AP-1183, 1989 Ohio App. LEXIS 3299, at \* 11 (emphasis added), *aff’d* (1991), 60 Ohio St. 3d 135.

<sup>10</sup> *See* Supreme Court Case No. 2007-0308.

<sup>11</sup> *See Nemazee v. Mt. Sinai Medical Center* (1990), 56 Ohio St. 3d 109 (holding “we hold that appellee must exhaust all *internal* administrative remedies as provided for in his employment contract prior to seeking judicial review”); *Portis v. Metro Parks Serving Summit County*, 2005 Ohio 1820 (where the Ninth Appellate District held “We find that the internal appeal procedures for involuntary termination listed in employee handbooks, such as Appellant’s must be employed before an involuntarily terminated employee can pursue a suit in court.”); *McNea v. Cleveland* (1992), 78 Ohio App. 3d 123, 128-39 (holding a civil servant’s failure to exhaust his contractual grievance and civil

judicial rule holding that the use of the word “may,” in any statute, rule or regulation discussing administrative remedies across the state, does not excuse an employee’s failure to exhaust all of his or her administrative remedies prior to filing suit. Defendants-Appellants cannot reasonably expect this Court to accept jurisdiction over a proposition of law that would require it to interpret the language contained in hundreds of rules, statutes and charters which it will never have a chance to review.

**V. This Court Should Enter Judgment Summarily in Favor of Dworning.**

As this Court is aware, Rule III, Section 6 (C)(2) of the Rules of Practice of the Supreme Court of Ohio authorizes it to enter judgment summarily. The precedent relied upon by Defendants-Appellants should be rejected out of hand and without further consideration as inconsistent with the plain language of R.C. 4112 and this Court’s prior rulings. This Court already has decided that victims of discrimination may file a civil lawsuit without first exhausting administrative remedies.<sup>12</sup> As detailed in the Eighth Appellate District’s opinion below, the precedent relied upon by Defendants-Appellants simply failed to consider the scope of R.C. 4112 and this Court’s prior rulings.<sup>13</sup>

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service appeal rights barred his lawsuit).

<sup>12</sup> *Smith v. Friendship Village of Dublin* (2001), 92 Ohio St. 3d 503, 506; *Elek v. Huntington National Bank* (1991), 60 Ohio St. 3d 135, 137.

<sup>13</sup> *Dworning*, 2006 Ohio 6772 at 20.

**VI. Conclusion**

The Ohio Supreme Court has a long history of invoking its jurisdiction over parties and matters only in those circumstances in which the parties have a real stake in the outcome, and the holding itself will settle a long-standing and real conflict among the lower courts. This case presents neither of those concerns. Accordingly, Plaintiff-Appellee Dworning asks this Court to decline to exercise jurisdiction over this matter pursuant to Section 6, R. III of the Rules of Practice of the Supreme Court.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Plaintiff-Appellee Michael Dworning's Memorandum in Response to Defendants-Appellants' City of Euclid, et al.'s Memorandum in Support of Jurisdiction* was served via First Class United States mail, postage prepaid, this 16<sup>th</sup> day of March, 2007 upon:

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