

07-0705

No 2007-_____

In the Supreme Court of *Scan*

copy

KENNETH D. McFADDE

Plaintiff-A

v.

CLEVELAND STATE UNIVERSITY,

Defendant-Appellee.

CLAIMED APPEAL OF RIGHT AND DISCRETIONARY APPEAL FROM THE
COURT OF APPEALS, TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO
CASE No 06AP-638

MEMORANDUM IN SUPPORT OF JURISDICTION

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I.

**EXPLANATION OF WHY THE ISSUES RAISED IN THIS CASE
PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION AND
ARE OF PUBLIC OR GREAT GENERAL INTEREST**

Not since *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849¹ was decided has the Supreme Court of Ohio had such a great opportunity to further the development of appellate procedure and jurisprudence throughout the State of Ohio by deciding a case that will solidify stability, consistency and predictability in the development of the law, concepts embodied within the doctrine of stare decisis, recognized in *Galatis* as “the bedrock of the American judicial system.” *Id.*, at ¶1.

By accepting jurisdiction over this appeal, the Supreme Court can, once and for all, resolve an *inter-district* conflict that has developed between the Eighth and Tenth Appellate Districts on the issue of how *intra-district* conflicts can be resolved. It is an issue of constitutional proportion: whether the use by Ohio’s appellate courts of en banc proceedings to resolve conflicts within their respective districts is permitted by Section 3(A), Article IV of the Ohio Constitution, an issue not addressed or resolved in *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, decided last November.

This is an issue of great importance to the appellate bench and bar and all citizens of Ohio. While *In re J.J.* imposes a duty to conduct en banc rehearings, the Court did not prescribe specific rules to be applied. Hughes, *In re J.J. and “En Banc” Proceedings*, COLUMBUS BAR LAWYERS QUARTERLY, Spring 2007 at p. 10. So, efforts are under way

¹ In *Galatis*, the Supreme Court of Ohio first adopted a three-pronged standard by which to judge whether a past decision should be abandoned and overruled.

to propose amendments to the Ohio Rules of Appellate Procedure and local appellate rules to address the procedure for implementing the en banc process contemplated by *In re J.J.* See, O'Brien, *To En Banc or Not to En Banc, That Is the Question*, CLEVELAND BAR JOURNAL, April 2007 at p. 23. Before those rules are officially adopted, however, the constitutionality of the en banc procedure itself should be resolved by this Court. This is the case presenting the Court with the opportunity to do so. If the Ohio Constitution does not permit appeals to be decided by en banc courts, an amendment to the Ohio Constitution would have to be ratified in order to allow intra-district conflicts to be resolved. Rauzi, *The En Banc Split*, OHIO LAWYER, July/August 2006, at p. 22.

Finally, this Court can and should use this case to impress upon Ohio's appellate courts that when the Supreme Court of Ohio says that an appellate court is "duty-bound" to conduct itself in a particular way, the appellate courts must abide by the Supreme Court's unequivocal directive. In the *In re J.J.* case, the Supreme Court told all twelve appellate districts in Ohio that they are "duty-bound" to resolve intra-district conflicts through en banc proceedings. In the case at bar, the Tenth Appellate District has blatantly avoided adherence to that directive by sua sponte raising a constitutional road-block (i.e., Section 3(A), Article IV, Ohio Constitution) and creating an artificial justification for its refusal to convene an en banc proceeding.

Appellant Kenneth D. McFadden requests that this Court accept jurisdiction over this case as a claimed appeal of right given the constitutional issue involved. Appellant also urges the Court to exercise its discretionary jurisdiction over the case as the issues raised are of public and great general interest.

II.

STATEMENT OF THE CASE AND OPINIONS BELOW

This appeal arises out of lawsuit filed by Plaintiff-Appellant, Kenneth D. McFadden (“McFadden”), against Defendant-Appellee, Cleveland State University (“CSU”). McFadden had been an employee of CSU from January 8, 1998 until June 11, 2003. On October 26, 2005, McFadden filed a civil complaint against CSU claiming race discrimination pursuant to R.C. § 4112 et seq. This original lawsuit was filed in the Cuyahoga County Court of Common Pleas. On December 16, 2005 McFadden dismissed the Cuyahoga County case, without prejudice, pursuant to Ohio Civ.R. 41(A)(1)(a). Thereafter, on January 30, 2006, McFadden re-filed his race discrimination complaint in the Ohio Court of Claims, designated Case No. 2006-01637. Upon CSU’s motion for summary judgment, the Court of Claims dismissed McFadden’s case on the grounds that the race discrimination claim was time barred due to the expiration of the two-year statute of limitations period set forth in R.C. 2743.16.

In McFadden’s appeal from the Court of Claims’ summary judgment taken to the Tenth Appellate District, McFadden maintained that his filing of the complaint in the Cuyahoga County Court of Common Pleas and its re-filing in the Court of Claims were both timely filed within Ohio’s six (6) year statute of limitations for employment discrimination claims brought pursuant to R.C. 4112 et seq. See *Campbell v. Rockynol Retirement Community*, 71 Ohio St. 3d 144, 1994-Ohio-227 (R.C. 4112.99 is a remedial statute and is subject to R.C. 2305.07’s six-year limitations period in a race discrimination case). McFadden argued that the Court of Claims erred in dismissing his

complaint based upon the Tenth Appellate District decision in *Senegal v. Ohio Dept. of Rehab. & Corr.* (March 10, 1994), Franklin App. No. 93API08-1161, a decision that had never been expressly overruled by the Tenth Appellate District. *Senegal* involved claims of race discrimination, like McFadden's case, and age discrimination. As in the case bar, the claims in *Senegal* were initially brought in a County Common Pleas Court, were voluntarily dismissed without prejudice and then were re-filed in the Ohio Court of Claims. The *Senegal* court, a panel consisting of Judges Bowman, Whiteside, and Tyack, held that R.C. 2743.16's two (2) year statute of limitations did not apply based upon a previous Tenth Appellate District decision, *Harris v. Ohio Dept. Of Adm. Serv.* (1989), 63 Ohio App. 3d 115, 117, because the State of Ohio and its agencies were "employers" covered by R.C. Chapter 4112.

On January 25, 2007, the Tenth Appellate District rejected McFadden's arguments and affirmed the Court of Claims entry of summary judgment in favor of CSU. *McFadden v. Cleveland State Univ.*, Tenth Dist. No. 06AP-638, 2007-Ohio-298 (Apx. p. 7-12). In so doing, the *McFadden* court acknowledged that the parties had pointed out a conflict within the Tenth Appellate District on the issue of whether the two-year limitation period set forth in R.C. 2743.16(A) or the six-year statute set forth in R.C. 4112.99 should govern race-discrimination claims like McFadden's against CSU. *Id.* at ¶5 (Apx. p. 9-10). Dismissing the conflict, the *McFadden* court explained as follows:

* * * In the first, *Senegal v. Ohio Dept. of Rehab. & Corr.* (March 10, 1994), Franklin App. No. 93API08-1161, we held that the six-year statute of limitations applied. In the more recent case, we specifically declined to follow *Senegal* and held that the two-year statute of limitations applies. *McCoy v. Toledo Corr. Inst.*, Franklin App. No. 04AP-1098, 2005-Ohio-1848.

* * *

We believe *McCoy* more accurately reflects the law applicable to appellant's claim. Therefore, we reiterate the holding from *McCoy* that the two-year statute of limitations in R.C. 2743.16 applies to claims such as appellant's that seek monetary damages for discrimination against the state. To the extent that we did not explicitly overrule *Senegal* in our decision in *McCoy*, we do so now. Consequently, we find the Court of Claims correctly concluded that appellant's claim was not timely filed, and we overrule appellant's first assignment of error.

2007-Ohio-298, at ¶5, 10 (Apx. p. 10, 11-12)²

Due to the intra-district conflict on the issue of which statutory limitations period should govern claims of race-discrimination brought by public employees and in light of the Supreme Court of Ohio's directive in *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484 that appellate courts are "duty-bound" to resolve conflicts within their respective appellate districts through en banc proceedings, on February 2, 2007, McFadden filed an Application for Reconsideration *En Banc* pursuant to Ohio App.R. 26(A). CSU did not oppose McFadden's request for reconsideration.

On March 6, 2007, the Tenth Appellate District denied reconsideration. *McFadden v. Cleveland State Univ.*, Tenth Dist. No. 06AP-638, 2007-Ohio-939 (Apx. p. 1-6). Despite the clear directive from this Court in *In re J.J.*, the Tenth Appellate District declined to convene an en banc proceeding. The same three judge panel that had decided the merits of McFadden's appeal denied his Application for Reconsideration *En Banc* and held, sua sponte, that en banc proceedings are unconstitutional, the conflict between *Senegal* and *McCoy* did not present a conflict of the sort that was of concern to

² In an opinion announced subsequent to *McFadden*, the Tenth Appellate District again acknowledged that *McCoy* "did not explicitly overrule *Senegal*" and that the Tenth Appellate District had only "tacitly rejected *Senegal* in cases decided after it." See, *Anglen v. Ohio State Univ.*, Tenth Dist. No. 06AP-901, 2007-Ohio-935, at ¶16.

the Supreme Court in the *In re J.J.* decision, and because five of the eight sitting judges on the Tenth Appellate District have heard appeals which applied the two-year statute of limitations set forth in R.C. 2743.16 to discrimination claims, “[t]here is no reason to believe that more formal en banc proceedings would produce a different result.” *Id.*, at ¶8-10 (Apx. p. 5-6).

It is from the denial of his Application for Reconsideration *En Banc* that McFadden now brings this appeal to the Supreme Court of Ohio as a claimed appeal of right, pursuant to S. Ct. Prac. R. II, §1(A)(2), on the grounds that a substantial constitutional question is present and as a discretionary appeal, pursuant to S. Ct. Prac. R. II, §1(A)(3), since the case involves a question of public or great general interest.

III.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: An appellate courts convening of an en banc proceeding to resolve an intra-district conflict in the case law of that appellate district on an issue of law does not violate Section 3(A), Article IV of the Ohio Constitution.

This Court in the *In re J.J.* decision held that “[a]ppellate courts are duty-bound to resolve conflicts within their respective appellate districts through en banc proceedings.” 2006-Ohio-5484, syllabus paragraph two. The issue before the Supreme Court in *In re J.J.* was whether a juvenile court magistrate’s transfer of a permanent custody case to visiting judges deprived the juvenile court of subject-matter jurisdiction such that all subsequent proceedings, including the court’s final judgment awarding custody, were void ab initio or whether the transfer order constituted a procedural irregularity

rendering the final judgment voidable and thus subject to being waived. *Id.* at ¶7. The need for the Court to even address the issue of en banc proceedings was prompted by the confusion caused by the Eighth Appellate District's issuance of "two separate opinions in two different cases on this [subject-matter jurisdiction] issue on the same day, with separate panels of the Eighth District Court of Appeals each reaching a different result." 2006-Ohio-5484 at ¶17.

In denying reconsideration here, the Tenth Appellate District endeavored to distinguish *In re J.J.*'s clear directive regarding the duty of appellate court's to utilize en banc proceedings to resolve intra-district conflicts by pointing out the peculiarity that had happened when the Eighth Appellate District announced two conflicting appellate opinions on the same day. *McFadden*, supra, 2007-Ohio-939, at ¶5-6, 9 (Apx. p. 4, 5). However, as this Court has recently again made clear, its directive that appellate courts are "duty-bound" to convene en banc proceedings applies whenever a conflict develops within that respective appellate district. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, at ¶40.

However, the Tenth Appellate District was correct when it noted that, in deciding *In re J.J.*, the Supreme Court was not asked to address the question of whether the use of en banc proceedings by the courts of appeals is constitutional. 2007-Ohio-939 at ¶7 (Apx. p. 5). Despite the clarity and definitiveness of *In re J.J.*, again reaffirmed in *In re C.F.*, neither opinion can be viewed as supporting an implied conclusion that this Court has determined that en banc proceedings are constitutionally valid. See, e.g., *State v. Waller* (1976), 47 Ohio St.2d 52, 53, fn. 1 (constitutionality of Crim.R. 12(J) can not be

implied from fact that two Ohio Supreme Court decisions addressed the scope and applicability of that rule).

Here, the Tenth Appellate District has held that en banc proceedings are unconstitutional as a violation of Section 3(A), Article IV of the Ohio Constitution³ because “[u]se of en banc proceedings would appear to result in more than three judges on an appellate court participating in the hearing and disposition of a case.” 2007-Ohio-939 at ¶8, citing *Schwan v. Riverside Methodist Hosp.* (Feb. 25, 1982), Franklin App. No. 81AP-158, (Apx. p. 5). Yet, the Eighth Appellate District has employed the en banc procedure in *State v. Lett*, 161 Ohio App.3d 274, 2005-Ohio-2665⁴ and *State v. Atkins-Boozer*, Eighth Dist. No. 84151, 2005-Ohio-2666. Section 2(B)(2)(f) of Article IV to the Ohio Constitution confers exclusive jurisdiction upon this Court to resolve conflicting decisions between appellate districts. See, e.g., *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 1993-Ohio-223. Given the clear inter-district conflict that has developed on the issue presented here calling for the interpretation of the Ohio Constitution, this Court should accept jurisdiction over this case so that a uniform rule of law can be announced in order for Ohio’s appellate courts and practitioners to know

³ Section 3(A), Article IV of the Ohio Constitution provides in pertinent part:

The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. *In districts having additional judges, three judges shall participate in the hearing and disposition of each case.* (Emphasis added).

⁴ The competing views on the constitutionality of the en banc process employed in the Eighth Appellate District were vigorously debated in *Lett* as laid out in Judge Sean Gallagher’s concurring opinion and Judge Diane Karpinski’s dissenting opinion.

whether it is constitutionally permissible to convene en banc proceedings to resolve intra-district conflicts.

While Section 3(A), Article IV of the Ohio Constitution refers to “three judges” hearing and deciding appeals, this language should not be so narrowly construed to render en banc procedures unconstitutional because “[h]istorically, the number ‘three’ had more to do with the minimum requirement of a quorum than it did with a desire to limit important district decisions to less than a majority of the court.” *Lett*, supra, at ¶53 (Gallagher, J., concurring in part, dissenting in part). As Judge Gallagher noted in his concurring opinion in *Lett* in support of the en banc procedure:

The en banc process is embedded in American jurisprudence. “The en banc process now authorized for the district courts is designed to help the district courts avoid conflict, assure harmonious decisions within the courts’ geographic boundaries, and develop predictability of the law within their jurisdiction. Consistency of decisions within each district is essential to the credibility of the district courts.” *Chase Fed. Sav. & Loan Assn. v. Schreiber* (Fla. 1985), 479 So.2d 90.

* * *

For too long, trial court judges and litigants in this district have endured the prospect of having inconsistent decisions on similar issues affect determinations of law. Further, limiting the decision-making process on critical legal issues to three judges flies in the face of the long-established and significant principle of stare decisis. As a result, I believe the en banc process is constitutional and is supported by Ohio’s long judicial history. Last, consistency in our district is of paramount concern and is long overdue.

Id., at ¶54, 57 (Gallagher, J., concurring in part, dissenting in part).

Addressing this issue now, in the wake of the directive made by this Court in *In re J.J.*, is of great importance and interest to the appellate judiciary and practicing bar. It has been for quite some time. See, e.g., Rauzi, *The En Banc Split*, OHIO LAWYER, July/August 2006, at p. 18-22. Yet, only the Eighth Appellate District has adopted a

formal local rule addressing en banc proceedings. See, Article 8(b)(ii) of the Eighth District's Standing Resolution of the Rules for the Conducting of Court Work.⁵ In light of *In re J.J.*, calls have gone out for this Court's Commission on the Rules of Practice & Procedure to consider amending the Ohio Rules of Appellate Procedure to adopt rules governing the process for invoking and governing en banc proceedings.⁶ Hughes, *In re J.J. and "En Banc" Proceedings*, COLUMBUS BAR LAWYERS QUARTERLY, Spring 2007 at p. 10. The Cleveland Bar Association's Appellate Courts Committee is working on proposed language to amend the Eighth Appellate District's current local rules to clarify the process to be used when seeking en banc rehearing. O'Brien, *To En Banc or Not to En Banc, That Is the Question*, CLEVELAND BAR JOURNAL, April 2007 at p. 22-23.

As Mr. O'Brien's article forewarns, these rule amending efforts will forge ahead with the uncertainty of whether the en banc process itself is proper "until such time as the constitutional issue is properly raised and presented to the Supreme Court." *Id.*, at p. 23. That time is now and the case at bar presents this Court with the opportunity to do so. The constitutionality of en banc proceedings is an issue that this Court must address head-on in order to affirmatively address and conclusively decide whether en banc proceedings violate Section 3(A), Article IV of the Ohio Constitution, particularly in light of the competing views of the Eighth and Tenth Appellate Districts on the issue. Compare, *McFadden* and *Lett*. But even though the Eighth and Tenth Appellate

⁵ This rule can be found at pages 35-36 of the Eighth Appellate District's Local Rules on the court's website at: <http://appeals.cuyahogacounty.us/PDF/Localrules.pdf>.

⁶ In light of the *In re J.J.* case, the Commission's Appellate Rules Sub-Committee (chaired by Judge Brogan) has the issue of possible en banc rule amendments on its agenda. However, given the rule amending cycle, any amendments to the Ohio Rules of Appellate Procedure relating to the en banc process could not take effect until July 2008.

Districts are the only two appellate districts that have weighed in on the constitutionality of en banc proceedings, the issue is of importance to all twelve appellate districts in Ohio as all have more than the minimum of three judges. See, R.C. 2501.011 - 2501.013.

Proposition of Law No. II: An appellate court abuses its discretion by erroneously denying an App.R. 26(A) application for reconsideration seeking en banc review of a conflict on an issue of law in the case law of that appellate district.

The Ohio Supreme Court is the ultimate authority of law in the State of Ohio. *Hayes v. State Med. Bd. of Ohio* (2000), 138 Ohio App.3d 762, 769. As such, the courts of appeals in Ohio are required to follow the law as prescribed by the Supreme Court. *Mannion v. Sandel*, 91 Ohio St.3d 318, 322, 2001-Ohio-47; *Cooke v. Montgomery Cty.*, 158 Ohio App.3d 139, 2004-Ohio-378, at ¶39. When the Supreme Court has spoken on an issue, Ohio's courts of appeals do not enjoy the privilege of choosing which decisions of the Supreme Court are sufficiently well-reasoned to merit being followed. *Penn Traffic Co. v. Clark Cty. Bd. of Elections* (1999), 138 Ohio App.3d 1, 5. It is solely the province of the Supreme Court to correct judicially created doctrines if they are no longer sound or grounded in law. *Albritton v. Neighborhood Centers Assn.* (1984), 12 Ohio St.3d 210, 214 (abolishing the doctrine of charitable immunity). Even the Tenth Appellate District has noted that appellate courts are bound by the decisions of the Supreme Court even when such decisions are argued to be at odds with the Constitution of the United States or Ohio Constitution. *State v. Crago* (1994), 93 Ohio App.3d 621, 640.

Yet, in the case at bar, and despite the syllabus law of *In re J.J.* that appellate

courts are “duty-bound” to resolve intra-district conflicts through en banc proceedings, the Tenth Appellate District failed to abide by this unequivocal directive when McFadden requested reconsideration *en banc*. When a court completely misconstrues the law, even in circumstances when the court is vested with discretion in the decision to be made, this Court has found that the court has acted unreasonably and thereby abused its discretion. See, e.g., *Howland v. Purdue Pharma L.P.*, 104 Ohio St.3d 584, 2004-Ohio-6552, at ¶25. That is what happened in this case.

In the federal courts of appeals, one panel of judges from the circuit court cannot simply overrule the decision of another panel. *Violette v. P.A. Days, Inc.* (C.A.6, 2005), 427 F.3d 1015, 1019 (Fed. 6th Cir., 2005); *Goldmeier v. Allstate Ins. Co.* (C.A.6, 2003), 337 F.3d 629, 637, *cert.denied*, 540 U.S. 1106. In Ohio, as in the federal circuit, it should be established that prior decisions of appellate panels remain controlling authority in the circuit unless an inconsistent decision of the Supreme Court requires modification of the decision or the court, sitting en banc, overrules the prior decision. See, e.g., *Cupek v. Medtronic, Inc.* (C.A.6, 2005), 405 F.3d 421, 425, quoting *Salmi v. Sec'y of Health & Human Services* (C.A.6, 1985), 774 F.2d 685, 689.

The en banc process enables a majority of the full court to always control the development of the law in that appellate district and, when necessary, allows for the abandonment or overruling of prior precedent that can no longer be supported. En banc proceedings deter individual judges from advancing personal agendas and encourages the individual members to temper their own inclinations as to the law and requires that they apply legal precedents where applicable. On controversial matters, an opinion

joined in by a majority of all the judges on the court should carry greater authority than a decision requiring only two of three judges to agree upon. Finally, the en banc process will maintain the integrity of the court through the recognition and implementation of uniformity and continuity of decisions.

Frustration of these principles are demonstrated by precisely what happened in the case at bar. While the *Senegal* decision may have been described as an “aberration” and “tacitly rejected” in other Tenth Appellate District opinions, the Tenth Appellate District concedes that it was never overruled. The conflict with *McCoy*, as it existed in the Tenth District when McFadden filed his lawsuit, does not create stability and predictability in our legal system. *In re Estate of Holycross*, 112 Ohio St.3d 203, 2007-Ohio-1, at ¶22. By resolving conflicting appellate decisions, the en banc procedure encourages such stability and predictability by promoting the evenhanded and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. *Textile Mills Securities Corp. v. Commr. of Internal Revenue* (1941), 314 U.S. 326, 334-335.

The law cannot be said to be stable or predictable when the bench, bar and citizens must infer whether a case is still good law or has been completely abandoned when it has only been “tacitly rejected.” See, *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, at ¶27 (“As we stated in *Galatis*, whenever possible we must maintain and reconcile our prior decisions to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry.”) But that is what happened here. Departure from precedent should not be treated so casually. *Galatis*,

supra, at ¶1 (“It is only with great solemnity and with the assurance that the newly chosen course for the law is a significant improvement over the current course that we should depart from precedent.”)

While an appellate court’s adherence to its prior precedent is, of course, preferred, when an appellate decision is found to be wrongly decided, the opinion should be overruled in order to avoid any confusion or uncertainty as to its continued authoritative weight.⁷ See, e.g., *Allied Erecting & Dismantling Co. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, at ¶51. But when an appellate decision is to be abandoned, the judiciary and bar need to be told it is overruled and not merely “tacitly rejected.” With the conflicting opinions in both *Senegal* and *McCoy*, McFadden was left with uncertainty as to which limitations period applied to his discrimination claim against CSU. Requiring the Tenth Appellate District to address this conflict by way of the en banc procedure mandated by *In re J.J.* would avoid this problem in the future, a problem that has also plagued other appellate districts for far too long as well. *Lett*, at ¶57 (Gallagher, J., concurring in part, dissenting in part).

IV.

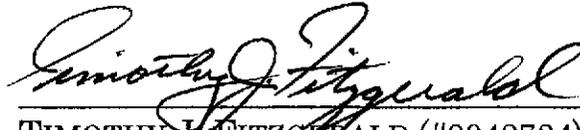
CONCLUSION

WHEREFORE, Appellant Kenneth D. McFadden respectfully requests and moves the Supreme Court of Ohio to accept jurisdiction over this appeal.

⁷ The potential for confusion is compounded by the fact that since May 1, 2002, all court of appeals opinions have legal authority and may be weighted as deemed appropriate by the courts throughout Ohio. See, S. Ct. R. Rep. Op. 4(B). So, until an appellate opinion is overruled, it can still be relied upon as competent legal authority.

Date: April 19, 2007.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction* was sent by regular U.S. Mail, postage pre-paid, this 19th day of April, 2007 to the following:

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APPENDIX

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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Kenneth D. McFadden,

Plaintiff-Appellant,

v.

Cleveland State University,

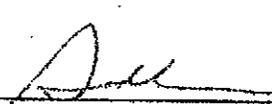
No. 06AP-638
(C.C. No. 2006-01637)

(REGULAR CALENDAR)

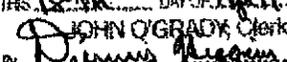
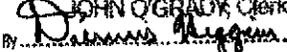
JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on March 6, 2007, appellant's application for reconsideration is denied. Costs to appellant.

SADLER, P.J., BRYANT & McGRATH, JJ.



Lisa L. Sadler, Presiding Judge

THE STATE OF OHIO Franklin County, ss	I, JOHN O'GRADY, Clerk OF THE COURT OF APPEALS WITHIN AND FOR SAID COUNTY, HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL NOW ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID COUNTY THIS 18th DAY OF April, A.D. 2007. By  John O'Grady, Clerk By  Debra A. Higgins, Deputy
--	--

ON COMPUTER 12

Therma
Atty

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COURT OF APPEALS
FRANKLIN CO. OHIO

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Kenneth D. McFadden, :
 :
 Plaintiff-Appellant, :
 :
 v. :
 :
 Cleveland State University, :
 :
 Defendant-Appellee. :

No. 06AP-638
(C.C. No. 2006-01637)
(REGULAR CALENDAR)

DECISION

Rendered on March 6, 2007

Dennis J. Niemann Co., LPA, and Dennis J. Niemann, for appellant.

Marc Dann, Attorney General, and Randall W. Knutti, for appellee.

ON APPLICATION FOR RECONSIDERATION

SADLER, P.J.

{¶1} Appellant, Kenneth D. McFadden (appellant), has filed an application pursuant to App.R. 26(A) seeking reconsideration of our decision rendered in this case.

Specifically, appellant argues that our decision cannot stand because we specifically overruled a prior decision of this court without employing en banc proceedings to do so.

Appellee, Cleveland State University, filed no response to the application. For the reasons that follow, we deny appellant's application for reconsideration.

{¶2} The proper standard for our review of an application for reconsideration is whether the application "calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 523 N.E.2d 515, citing *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 5 OBR 320, 450 N.E. 2d 278. However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1997), 112 Ohio App.3d 334, 336, 678 N.E.2d 956, dismissed, appeal not allowed, (1996), 77 Ohio St.3d 1487, 673 N.E.2d 146.

{¶3} Appellant's application does not point to any issue regarding the substantive merits of our decision. The issue in this case involved the statute of limitations to be applied to employment discrimination actions brought by state employees in the Court of Claims. Following our holding in *McCoy v. Toledo Corr. Inst.*, Franklin App. No. 04AP-1098, 2005-Ohio-1848, we held that the statute of limitations applicable to appellant's claim is the two-year period set forth in R.C. 2743.16. In doing so, we, like the panel in *McCoy*, declined to follow our earlier decision in *Senegal v. Ohio Dept. of Rehab. & Corr.* (March 10, 1994), Franklin App. No. 93 API08-1161, 1994 Ohio App. LEXIS 938, which applied the six-year statute of limitations set forth in R.C. 4112.99 to such claims. We then took the additional step taken only implicitly by the panel in *McCoy* and specifically overruled *Senegal*.

{¶4} Appellant does not argue that we failed to consider any issue related to the applicable statute of limitations. Instead, appellant argues that we failed to follow the proper procedure to resolve the conflict between *Senegal* and *McCoy* because the Ohio

Supreme Court has held that conflicts between cases from the same appellate district must be resolved through the use of en banc proceedings in *In re J.J.* (2006), 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851. We note that appellant recognized the conflict between the two conflicting cases in his briefing, but did not submit *In re J.J.* as supplemental authority when it was decided shortly before oral argument, and thus is raising the issue for the first time after we rendered our decision.

{15} *In re J.J.*, supra, involved the issue of whether the improper transfer of a case by a magistrate to a visiting judge caused the visiting judge to lack jurisdiction over the case such that all decisions rendered were void, even though no objection had been made to the transfer. The Eighth District Court of Appeals had held that the visiting judge's actions were void, even in the absence of an objection. On the same date the Eight District rendered its decision in *J.J.*, it also rendered a decision in a separate case reaching the opposite result, holding that that the failure to object to the transfer waived any jurisdictional issue.

{16} The Supreme Court resolved the merits of the jurisdictional question by holding that the magistrate's order transferring the case to a visiting judge, while improper, did not deprive the court of subject matter jurisdiction over the case. The court further held that the failure to object to the transfer order at the time it was made resulted in waiver of the objection. *Id.* at ¶16. The Supreme Court then added a discussion regarding the Eighth District's failure to have resolved the conflict between the two decisions that had been rendered on the same day, but reached opposite conclusions. The court stated that "[a]ppellate courts are duty-bound to resolve conflicts within their respective appellate districts through *en banc* proceedings." *Id.* at ¶2 of the syllabus.

{¶7} The court relied on the fact that the Eighth District has for several years followed a formally adopted procedure for the use of en banc proceedings. Art. 8(b)(ii) of the Eighth District's Standing Resolution of the Rules for the Conducting of Court Business. However, the court was not asked to address the question of whether the use of en banc proceedings by the District Courts of Appeals is constitutional.

{¶8} We have previously held that the use of en banc proceedings would violate the Ohio Constitution. *Schwan v. Riverside Methodist Hosp.* (Feb. 25, 1982), Franklin App. No. 81AP-158. Section 3(a), Article IV of the Ohio Constitution provides, in relevant part, "[t]he state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. * * * In districts having additional judges, three judges shall participate in the hearing and disposition of each case." Use of en banc proceedings would appear to result in more than three judges on an appellate court participating in the hearing and disposition of a case.

{¶9} It is also not clear that our decision in this case presents a conflict of the sort the Supreme Court was considering in the *In re J.J.* decision. In that case, the two conflicting decisions were released on the same date, giving rise to the legitimate concern that attorneys practicing in the Eighth District would have no way of knowing which of the two conflicting cases would be the controlling law to be applied in subsequent cases within that district. In this case, the two conflicting decisions, *Senegal* and *McCoy*, were decided in 1994 and 2005, respectively. Our decision to follow *McCoy* and apply the two year statute of limitations to claims such as appellant's creates no risk of confusion among the members of the bar practicing before us about which statute of limitations applies, thus eliminating the concern identified by the Supreme Court. Moreover, even if

we had not elected to specifically overrule *Senegal*, we would still have followed the *McCoy* decision, applying the general rule that the more recent decision on a specific issue is the controlling precedent. See, e.g., *Miller v. Lindsay-Green, Inc.*, Franklin App. No. 04AP-848, 2005-Ohio-6366.

{¶10} Finally, even assuming that the Supreme Court's decision in the *In re J.J.* case does impose a duty upon the Tenth District as a whole to resolve the conflict through some form of en banc proceedings, and that such proceedings would be constitutionally permissible, our decision in this case effectively resolved the conflict between *Senegal* and *McCoy* in the same manner that formal en banc proceedings would. Between our decision in this case and the decision of the panel in *McCoy*, five of the eight sitting judges on this court have held that claims such as appellant's are subject to the two-year statute of limitations set forth in R.C. 2743.16. There is no reason to believe that more formal en banc proceedings would produce a different result.

{¶11} Consequently, appellant's application for reconsideration is hereby denied.

Application for reconsideration denied.

BRYANT and McGRATH, JJ., concur.

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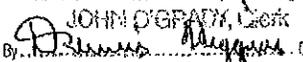
JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on January 25, 2007, appellant's assignments of error are overruled and it is the order and judgment of this court that the judgment of the Franklin County Ohio Court of Claims is affirmed. Costs to be assessed to appellant.

SADLER, P.J., BRYANT & McGRATH, JJ.



Lisa L. Sadler, Presiding Judge

THE STATE OF OHIO Franklin County, ss	I, JOHN O'GRADY, Clerk OF THE COURT OF APPEALS WITHIN AND FOR SAID COUNTY, HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL.
NOW ON FILE IN MY OFFICE WITNESS MY HAND AND SEAL OF SAID COUNTY THIS 10th DAY OF APRIL A.D. 2007	
JOHN O'GRADY, Clerk By: 	

ON COURT 19 92

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O P I N I O N

Rendered on January 25, 2007

Dennis J. Niermann Co., LPA, and Dennis J. Niermann, for appellant.

Marc Dann, Attorney General, and Randall W. Knutti, for appellee.

APPEAL from the Ohio Court of Claims.

SADLER, P.J.

{¶1} Appellant, Kenneth D. McFadden ("appellant"), filed this appeal seeking reversal of the decision by the Ohio Court of Claims granting summary judgment in favor of appellee, Cleveland State University ("appellee"), on appellant's claim of race discrimination. For the reasons that follow, we affirm the trial court's decision.

{¶2} Appellant was employed by appellee from January 8, 1998 until June 11, 2003. On October 26, 2005, appellant filed an action against appellee in the Cuyahoga County Court of Common Pleas alleging race discrimination. On December 16, 2005,

appellant dismissed the Cuyahoga County action without prejudice pursuant to Civ.R. 41(A). On January 30, 2006, appellant then re-filed this action in the Ohio Court of Claims. Upon appellee's motion for summary judgment, the trial court dismissed appellant's claim on the grounds that the claim was time barred due to the expiration of the two-year statute of limitations period set forth in R.C. 2743.16.

{¶3} Appellant filed this appeal, alleging two assignments of error:

(1) The trial court erred in dismissing Plaintiff-Appellant's claims brought under [R.C.] 4112 *et seq.* because it failed to apply the six (6) year statute of limitations contrary to this Court's decision in *Senegal v. Ohio Dept. of Rehab. & Corr.* (March 10, 1994), Franklin App. No. 93API08-1161.

(2) The trial court's application of [R.C.] 2743.16(A) is an Unconstitutional Denial of Equal Protection.

{¶4} We review the trial court's grant of summary judgment *de novo*. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 654 N.E.2d 1327. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the nonmoving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Rels. Bd.* (1997), 78 Ohio St.3d 181, 183, 677 N.E.2d 343.

{¶5} Appellant's first assignment of error involves the question of which statute of limitations applies to appellant's claims: the two-year statute set forth in R.C. 2743.16(A) or the six-year statute set forth in R.C. 4112.99. The parties have pointed to two

conflicting decisions issued by this court. In the first, *Senegal v. Ohio Dept. of Rehab. & Corr.* (March 10, 1994), Franklin App. No. 93API08-1161, we held that the six-year statute of limitations applied. In the more recent case, we specifically declined to follow *Senegal* and held that the two-year statute of limitations applies. *McCoy v. Toledo Corr. Inst.*, Franklin App. No. 04AP-1098, 2005-Ohio-1848.

{¶6} In both cases, resolution turned on an application of R.C. 2743.02(A)(1), in which the state waived its immunity from liability. The relevant language in that section states that, "To the extent that the state has previously consented to be sued, this chapter has no applicability." In *Senegal*, we concluded that the state was included within the definition of "employer" for purposes of the age discrimination statute, and therefore had consented to be sued prior to the enactment of Chapter 2743. Thus, the two-year statute of limitations in R.C. 2743.16 did not apply, and we concluded that the six-year limitation period for liability established by statute set forth in R.C. 2305.07 was the proper limitation period.

{¶7} In *McCoy*, we initially rejected an attempt to distinguish *Senegal* on the grounds that *Senegal* involved an age discrimination claim brought under R.C. 4101.17 (since renumbered as R.C. 4112.14) rather than race and gender discrimination claims under R.C.4112.02. In rejecting this argument, we stated that "our reading of *Senegal* suggests it is factually similar enough that, were it still good law, it would apply here." *McCoy, supra* at ¶5. We then pointed out that no other decisions had accepted the six-year statute of limitations and, in fact, a number of decisions had specifically applied the two-year statute of limitations. *Id.* at ¶6, citing *Ripley v. Ohio Bur. Of Emp. Serv.*, Franklin App. No. 04AP-313, 2004-Ohio-5577; *Hosseinipour v. State Med. Bd. Of Ohio*, Franklin

App. No. 03AP-512, 2004-Ohio-1220; *Obasuyi v. Wright State Univ.*, Franklin App. No. 02AP-300, 2002-Ohio-5521; *Schaub v. Div. Of State Hwy. Patrol*, (Mar. 5, 1996), Franklin App. No. 95APE08-1107.

{¶8} Finally, we noted that R.C. 4112.99 was amended to allow suits for money damages against the state for discrimination in 1987, well after the adoption of Chapter 2743 in 1975. Since no other statutory provisions or cases evidencing the state's consent to be sued for money damages prior to 1975 could be cited, we concluded that the two-year limitations period set forth in R.C. 2743.16 applied. *Id.* at ¶9.

{¶9} Appellant argues that we erred in *McCoy* by failing to recognize that from the time of its enactment in 1959, Chapter 4112 has included provisions for bringing discrimination claims against the state as an employer, and the state therefore did consent to be sued for discrimination prior to the enactment of Chapter 2743. However, this argument misses the point that, while a plaintiff claiming discrimination could bring an action against the state seeking a remedy other than money damages prior to creation of the Court of Claims, money damages were not available as a remedy until the 1987 amendment to R.C. 4112.99. The state could not have consented to waive its sovereign immunity for purposes of a remedy that was not available at the time of that waiver.

{¶10} We believe *McCoy* more accurately reflects the law applicable to appellant's claim. Therefore, we reiterate the holding from *McCoy* that the two-year statute of limitations in R.C. 2743.16 applies to claims such as appellant's that seek monetary damages for discrimination against the state. To the extent that we did not explicitly overrule *Senegal* in our decision in *McCoy*, we do so now. Consequently, we find the

Court of Claims correctly concluded that appellant's claim was not timely filed, and we overrule appellant's first assignment of error.

{¶11} In his second assignment of error, appellant argues that application of the two-year statute of limitations rather than the six-year statute of limitations constitutes a denial of equal protection in violation of the United States and Ohio Constitutions. Appellant claims this application creates two separate classes - private sector employees and public sector employees - and treats them differently for purposes of bringing discrimination claims. Appellant argues that this is a denial of access to the courts, a fundamental right that requires the state to show that creation of the classes is supported by a compelling governmental interest.

{¶12} Appellant failed to raise this issue before the trial court. Thus, appellant waived the issue, and we need not consider on appeal. *Abraham v. Natl. City Bank Corp.* (1990), 50 Ohio St.3d 175, 553 N.E.2d 619. Therefore, appellant's second assignment of error is overruled.

{¶13} Having overruled appellant's assignments of error, we affirm the decision of the trial court.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.
