

IN THE SUPREME COURT OF OHIO
CASE NO. 07-0306

On Appeal From The Court of Appeals
Eighth Judicial District
Cuyahoga County, Ohio
Case No. CA-06-86620

CHERITA RANKIN, et al.
Plaintiffs-Appellees

vs.

CUYAHOGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, et al.,
Defendants-Appellants

Trial Court No. 527785

AMICI CURIAE COUNTY COMMISSIONERS ASSOCIATION OF OHIO AND
COUNTY RISK SHARING AUTHORITY'S REPLY BRIEF

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I. LAW AND ARGUMENT

PROPOSITION OF LAW ONE: THERE IS NO SPECIAL RELATIONSHIP EXCEPTION TO CHAPTER 2744 IMMUNITY.

Amici Curiae County Commissioners Association of Ohio and the County Risk Sharing Authority reject Plaintiffs' incorrect and inappropriate characterizations of their position. Plaintiffs claim that Amici and Defendants are promoting "the rule of lawlessness," (Appellees' Merit's Br. at 2), or authorizing anyone to "violate the law with impunity," and endorsing a "so what" attitude to the sexual abuse of children (*Id.* at 1). Plaintiffs' opposition brief is wrong and levels serious charges against Amici and the Defendants that are wholly unjustified.

The Legislature expressly provided exceptions to immunity that leave ample room to hold alleged wrongdoers liable if the evidence supports such claim. R.C. § 2744.02(B)(1-5); R.C. § 2744.03. Plaintiffs did not put forth such evidence. Plaintiffs' failure to do so does not warrant the improper creation of judicial exceptions to Ohio's statutory immunity law that would be inimical to all of Ohio's political subdivisions and their employees. Plaintiffs' arguments run afoul of basic rules of statutory interpretation, long-standing notions of the Legislature's role as the final authority over policy, and the separation of powers doctrine.

Putting aside their rhetoric, Plaintiffs argue that this Court should: 1) deem Chapter 2744 unconstitutional for violating Section 16, Article 1 of the Ohio Constitution; 2) authorize a judicially created exception to Ohio's Political Subdivision Tort Liability Act; or 3) hold that the special relationship exception to the public duty defense voids political subdivision immunity.

Plaintiff's claims have no merit. Amici briefly addresses those claims.

A. Chapter 2744 is constitutional.

Plaintiffs' primary argument is that Ohio's Political Subdivision Tort Liability Act (R.C. §§ 2744.01 et seq.) violates Section 16, Article 1 of the Ohio Constitution. (Appellees' Br. at 9.) This Court did not accept a proposition for review regarding the constitutionality of Chapter 2744 and it is not properly before this Court. *See, Vance v. St. Vincent Hospital* (1980), 64 Ohio St. 2d 36, 42 (overruled on other grounds). At the trial court level, Plaintiffs waived the issue because they did not raise in their Complaint or argue in their opposition to summary judgment that the Act was unconstitutional. The law is fundamental that issues that were neither raised nor briefed in the court below are not properly subject for review in this Court. *See, e.g., Pugh v. Pugh* (1984), 15 Ohio St. 3d 136, at 139; *Zakany v. Zakany* (1984), 9 Ohio St. 3d 192 at 193; *Vance, supra*, at 42.

Despite Plaintiffs' arguments, this Court expressly held that the Act does not violate Section 16 of Article I of the Ohio Constitution. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351; *Fahnbulleh v. Straham* (1995), 73 Ohio St. 3d 666. No decision of this Court has ever held the Act unconstitutional for violating the right to remedy or right to bring suit against the state under the Ohio Constitution. Every decision of the Court of Appeals of Ohio that has entertained challenges to the Act has found the statute constitutional. *See, e.g., Nagel v. Horner* (4th Dist. 2005), 162 Ohio App.3d 221; *e.g., Thompson v. Bagley* (3rd Dist. 2005), 2005 WL 940872, at *3-5; *e.g., Bundy v. Five Rivers Metroparks* (2nd Dist. 2003), 152 Ohio App.3d 426. Further, all legislative enactments enjoy a presumption of validity and constitutionality. *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St.3d 360, 361. A statute is unconstitutionally void only when its unconstitutionality is shown beyond a reasonable doubt. *Fabrey, supra*. Plaintiffs failed to meet this burden.

B. No judicially created exceptions to immunity exist.

Plaintiffs next argue that this Court should create or authorize a judicially created exception to Ohio's Political Subdivision Tort Liability Act.

This Honorable Court last week reiterated that an unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language. Hubbell v. Xenia (2007), 873 N.E.2d 878, 2007-Ohio-4839, *citing* State ex rel. Burrows v. Indus. Comm. (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519. A court must first look to the plain language of the statute itself to determine the legislative intent. Burrows, 78 Ohio St.3d at 81, 676 N.E.2d 519.

This Court has been equally clear that a political subdivision is presumptively immune and may lose its immunity under R.C. § 2744.02(A), only if one of the R.C. § 2744.02(B)(1-5) exceptions apply. Cater v. City of Cleveland (1998), 83 Ohio St.3d 24. Like the eighth district court of appeals, the Plaintiffs failed to demonstrate a statutory exception exists or engage in a statutory analysis of the exceptions. Rather, Plaintiffs invite this Court to authorize an exception to immunity not contained in the statute. Under fundamental rules of statutory interpretation and this Court's recent precedent, this Court should reject Plaintiffs' invitation.

Furthermore, this Honorable Court in Hubbell also expressly rejected that judicial policy preferences supersede the Ohio Legislature. "[J]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy." Hubbell, 2007-Ohio-4839 *supra* at ¶ 22. Plaintiffs vigorously disagree with the very premise of governmental immunity and believe that additional exceptions to immunity should be created. Plaintiffs want this Court to authorize the Eighth District Court of Appeals policy decision to expand the exceptions to immunity. In sum, Plaintiffs argue for a change in the

Legislature's policy of the scope of immunity. But, as this Court recently held in Hubbell, *supra*, "judicial policy preferences may not be used to override valid legislative enactments."

As put forth in the merits brief of Amici, the judicial creation of a sixth exception to statutory immunity is also an improper overlapping of judicial and legislative authority. (Brief of Amici at 13-14.)

C. The Public Duty Defense does not otherwise constitute an exception to immunity.

Amici refers this Court to its primary brief addressing the eighth district's and the Plaintiffs' misunderstanding of the Public Duty Defense. *See* Merits Br. of Amici at 6-13. But, Amici point out that Plaintiffs improperly rely on this Court's decision in Yates and on the eighth district's decision in State Auto Mut. Ins. Co. v. Titanium Metals Corp. (8th Dist. 2004), 159 Ohio App.3d 338.

Citing to Yates v. Mansfield Bd. of Edn. (2004), 102 Ohio St.3d 205, 2004-Ohio-2491, Plaintiffs argue that, "this Court previously noted that a governmental entity's sovereign immunity is destroyed when an individual established a 'special relationship' with the governmental entity." (Appellees' Br. at 14.) Plaintiffs are simply wrong about the Yates holding; Yates does not support Plaintiffs' argument. Plaintiffs rely on the Yates court's statement that "the public-duty rule remains viable as applied to actions brought against political subdivisions pursuant to R.C. Chapter 2744." Id. at 212, fn 2. The plain meaning of this phrase indicates that the public duty defense may be used where R.C. Chapter 2744 permits a cause of action to be brought. Where none of the statutory exceptions apply, however, R.C. Chapter 2744 unequivocally precludes any cause of action. R.C. 2744.02(A)(1); R.C. 2744.03(A)(6). Taking

the Yates footnote in context, this Court recognized the public duty rule as a defense negating the duty element in tort. Yates, 102 Ohio St.3d at 212.

Plaintiffs, like the eighth district court of appeals, rely on Titanium Metals Corp. (8th Dist. 2004), 159 Ohio App.3d at 343 – a case that this Court vacated. State Auto Mut. Ins. Co. v. Titanium Metals Corp., 108 Ohio St.3d 540, 2006-Ohio-1713, at ¶ 12, *reversing* Titanium Metals (8th Dist. 2004). The eighth district Titanium Metals case had been vacated and should not be relied upon as precedent, as demonstrated in the main Brief of Amici. (See Br. Of Amici at 6-13.)

PROPOSITION OF LAW TWO: A POLITICAL SUBDIVISION EMPLOYEE’S ACT OR OMISSION MUST BE CONSCIOUS AND INTENTIONAL TO ESTABLISH AN EXCEPTION TO IMMUNITY FOR RECKLESS CONDUCT UNDER R.C. § 2744.03(A)(6)(B).

Amici refer this Court to their primary brief addressing this Proposition in response to Plaintiffs’ arguments. (See Br. Of Amici at 15-19.)

II. CONCLUSION

Amici Curiae on behalf of County Commissioners Association of Ohio and the County Risk Sharing Authority respectfully ask this Court to reverse the intermediate appellate court.

Respectfully submitted,

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