

IN THE SUPREME COURT OF OHIO

ROBERT MEYER, : Case No. 08-0315
: :
Plaintiff-Appellee, : On appeal from the
: : Hamilton County Court of Appeals
v. : First Appellate District
: :
UNITED PARCEL SERVICE, INC., :
: :
Defendant-Appellant. :

COMBINED MEMORANDUM OF APPELLEE/CROSS-APPELLANT ROBERT MEYER IN OPPOSITION TO APPELLANT UNITED PARCEL SERVICE, INC.'S MEMORANDUM IN SUPPORT OF JURISDICTION AND IN SUPPORT OF JURISDICTION OF CROSS-APPEAL

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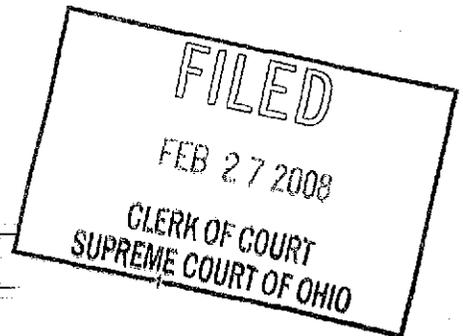


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I. INTRODUCTION

Appellee/Cross-Appellant Robert Meyer respectfully requests this Court: (1) deny UPS' request for jurisdiction; and (2) grant jurisdiction to consider his cross-appeal, which asks this Court to resolve the conflict between R.C. § 2311.04 and Civ. R. 39(C) in light of Article IV, Section 5(B) of the Ohio Constitution.

UPS' request for jurisdiction to consider whether an age discrimination claim brought under R.C. § 4112.99 is subject to the substantive requirements of R.C. §§ 4112.02(N) and 4112.14(B) should be denied for two reasons. First, the issue is moot. Regardless of whether or how this Court decides UPS' proposition of law, Mr. Meyer's age discrimination claim was timely filed. Second, this Court recently rejected the same argument raised by UPS in *Leininger v. Pioneer National Latex*. The *Leininger* Court found that a claim brought under R.C. § 4112.99 is **not** subject to the requirements of separate age discrimination statutes in R.C. Chapter 4112.

With regard to Mr. Meyer's cross-appeal, the Court should accept jurisdiction to resolve the conflict between Civ. R. 39(C) and R.C. § 2311.04 in light of Art. IV, § 5(B). In this case, the appeals court vacated the jury verdict solely because UPS did not consent to a jury trial on Mr. Meyer's retaliatory discharge claim under R.C. § 4123.90 – a claim for which no right to jury trial exists. While the appeals court's decision may be consistent with Civ. R. 39(C), it is contrary to R.C. § 2311.04, which provides that where no right to a jury trial exists, a trial court nevertheless has the power to submit the issue to a jury – regardless of whether of the parties consent. Under Art. IV, § 5(B), a statute controls over a procedural rule on substantive matters. Accordingly, this Court's guidance is needed to ensure that R.C. § 2311.04 controls over the consent requirement set forth in Civ. R. 39(C).

II. STATEMENT OF THE FACTS AND CASE

A. Statement of the Facts

Robert Meyer was employed by UPS as a package car driver for 25 years. (Trial transcript page (“T.p.”) 315). For the first 24 years of his career, Mr. Meyer performed his job satisfactorily and did not receive any significant discipline. (T.p. 319).

In 2002, new UPS manager Jim Murray warned Mr. Meyer, who during the course of his career had sustained several work-related injuries for which he had filed claims for workers compensation benefits, that he had better not get hurt on the job again. (T.p. 322-323, 401). UPS, which is self-insured for the purpose of workers compensation, had a formal “re-injury” program that targeted **only** those injured employees who filed workers compensation claims and rewarded managers who kept claims to a minimum. (T.p. 528-529). Mr. Murray later threatened Mr. Meyer more explicitly, saying that if Mr. Meyer wanted to retire from UPS, he had better not get hurt on the job again. (T.p. 336, 401; Plaintiff’s Exhibit 12). Testimony of three other UPS employees who had sustained work-related injuries established that such threats were a pattern and practice by UPS managers within Mr. Meyer’s district, including Mr. Murray. (T.p. 655, 671; Plaintiff’s Exhibits 66, 67).

Despite his best efforts, Mr. Meyer sustained another job-related injury in November 2002. This injury – an inguinal hernia – required surgery and a nearly six-week leave of absence. (T.p. 324-326; Plaintiff’s Exhibit 3). Mr. Meyer filed a workers compensation claim for medical benefits and wages relating to this injury. (*Id.*; Defendant’s Exhibit 54).

In response, Mr. Murray initiated a concerted effort to terminate Mr. Meyer’s employment. In 2003, Mr. Murray “fired” Mr. Meyer three times (twice Mr. Meyer was

reinstated through a grievance procedure). Mr. Meyer's first "offense" was driving the same route he had been trained to drive and had, in fact, driven for seven years. (T.p. 282-283; Plaintiff's Exhibit 9). Less than one month after Mr. Meyer's return from his injury, Mr. Murray determined this route was not expeditious and, without warning, fired Mr. Meyer for "inflating his route." (T.p. 561; Plaintiff's Exhibit 9). On the second occasion, Mr. Murray fired Mr. Meyer when one customer complained about his service. (Plaintiff's Exhibit 15; T.p. 294). Finally, Mr. Murray fired Mr. Meyer for the final time in November 2002 – notably, on the same day Mr. Meyer returned to work from a minor work-related injury – because, according to Mr. Murray, several weeks earlier Mr. Meyer made several errors in inputting information into a new computer system. (Plaintiff's Exhibits 38, 39; T.p. 346, 512).

On all three occasions, Mr. Murray characterized Mr. Meyer's conduct as "dishonest." (Plaintiff's Exhibits 9, 15, 38, 39). This was significant because, absent an allegation of dishonesty or a serious offense, UPS management was contractually required to progressively discipline employees. (T.p. 471). Mr. Murray made no attempt to progressively discipline Mr. Meyer; rather, his reaction to every perceived wrongdoing by Mr. Meyer was to designate it as "dishonesty" or a "serious offense" and fire him. (Plaintiff's Exhibits 9, 15, 38, 39).

After terminating the then 45-year-old Mr. Meyer in December 2003, UPS replaced him with a package car driver in his early twenties. (T.p. 428).

B. Statement of the Case

On May 7, 2004, Mr. Meyer filed suit against UPS alleging retaliatory discharge in violation of R.C. § 4123.90. Mr. Meyer amended his complaint in July 2005 to add a claim of age discrimination under R.C. § 4112.99.

After a six-day trial in August 2006, a jury entered a verdict in favor of Mr. Meyer on both his retaliatory discharge and age discrimination claims and awarded Mr. Meyer back pay, compensatory and punitive damages and attorneys' fees and costs. In a post-trial hearing, the trial court entered judgment on the verdict, determined an amount of reasonable attorneys' fees and costs, ordered Mr. Meyer reinstated to his employment, and awarded him prejudgment interest.

UPS appealed the judgment to the Ohio Court of Appeals for the First District, citing nine assignments of error including: (1) that Mr. Meyer's age discrimination claim was barred by the statute of limitations; and (2) that the trial court erred in submitting Mr. Meyer's retaliatory discharge claim to the jury.

The appeals court overruled UPS' argument that Mr. Meyer's age discrimination claim was barred by the statute of limitations, but sustained UPS' argument that the trial court erred by submitting Mr. Meyer's retaliatory discharge claim for jury trial. *Meyer v. United Parcel Svc.* (1st Dist. 2007), No. C06-0772, 2007-Ohio-7063 at ¶¶ 25, 40. The appeals court further found that while the retaliatory discharge and age discrimination claims were based upon a "seamless web of facts," the jury was nevertheless prejudiced by hearing evidence relating to Mr. Meyer's workers compensation claim. *Id.* at ¶¶ 45-46. The appeals court reversed the judgment, vacated the verdict entirely and remanded the case back to the trial court for two separate proceedings: a decision by the court on the merits of the retaliatory discharge claim and a new jury trial on the age discrimination claim. *Id.* at ¶ 46.

UPS appealed to this Court, seeking jurisdiction on a proposition of law relating to the applicable statute of limitations for Mr. Meyer's age discrimination claim. Mr. Meyer timely cross-appealed, requesting review of the appeals court's finding that the

trial court committed reversible error by submitting Mr. Meyer's retaliatory discharge claim to a jury – a question that requires resolution of the conflict between R.C. § 2311.04 and Civ. R. 39(C) in light of Art. IV, § 5(B).

III. APPELLEE ROBERT MEYER'S RESPONSE IN OPPOSITION TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

This Court should decline UPS' request for jurisdiction for two reasons: (1) UPS' proposition of law is moot; and (2) this Court expressly rejected the same argument in its recent decision in *Leininger v. Pioneer Nat'l Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36.

A. UPS' proposition of law is moot.

UPS argues that the appeals court erred in holding that the statute of limitations for an age discrimination claim brought under R.C. § 4112.99 was six years, arguing that the 180-day statute of limitations set forth in R.C. § 4112.02(N) should also control claims brought under R.C. § 4112.99. This argument is moot because Mr. Meyer's claim was timely filed **regardless** of which statute of limitations is applicable.

Although Mr. Meyer first raised his age discrimination claim in July 2005 in his Amended Complaint, under Civ. 15(C), the amendment related back to the May 7, 2004, date on which he filed his original complaint. *See Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 630, 635 N.E.2d 323. As such, Mr. Meyer's age discrimination claim was timely filed within 180 days of his December 2003 termination.

This Court should decline jurisdiction over this moot proposition of law.

B. This Court rejected UPS' argument in *Leininger*.

This Court recently rejected the same argument raised by UPS' proposition of law in its recent decision in *Leininger*. The *Leininger* Court expressly found that an age

discrimination claim brought under R.C. § 4112.99 is separate from and **not** subject to the substantive requirements of other age discrimination statutes set forth in R.C. Chapter 4112. *Leininger* at ¶ 31.

In *Leininger*, this Court held that Ohio does not recognize a public policy discharge claim for age discrimination because “the remedies in R.C. Chapter 4112 provide complete relief for a statutory claim for age discrimination.” *Id.* at syllabus. The *Leininger* Court, engaging in an analysis of the elements of a public policy claim set forth in *Painter v. Graley* (1994), 70 Ohio St.3d 377, 384, 639 N.E.2d 51, found that the General Assembly enacted “four **separate** statutes that provide remedies for age discrimination in R.C. Chapter 4112”: R.C. §§ 4112.02(N), 4112.08(G), 4112.14(B) and 4112.99. *Id.* at 317.

The *Leininger* Court paid special attention to R.C. § 4112.99. The Court found that like R.C. § 4112.02(N) – but notably *unlike* R.C. §§ 4112.08(G) and 4112.14(B) – R.C. § 4112.99 provides an employee with the “full panoply of pecuniary relief” and other remedies available at law and equity. *Leininger* at ¶ 30. Unlike R.C. § 4112.02(N), however, the Court found that a claim brought under R.C. § 4112.99 was **not** subject to the substantive requirements of other provisions of R.C. Chapter 4112, specifically the election of remedies requirement: “[i]n *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135, 573 N.E.2d 1056, we stated that R.C. 4112.99 provides **an independent civil action** to seek redress for **any** form of discrimination identified in the chapter. *Id.* at 136, 573 N.E.2d 1056. A violation of R.C. 4112.14 (formerly R.C. 4101.17), therefore, can also support a claim for damages, injunctive relief, or any other appropriate relief under R.C. 4112.99. **This fourth avenue of relief is not subject to the election of remedies.** *Id.* at ¶ 31. (emphasis added).”

The Court's decision in *Leininger* forecloses UPS' argument that an age claim brought under R.C. § 4112.99 is subject to the substantive requirements set forth in R.C. §§ 4112.02(N) or 4112.14(B). *Id.* at ¶¶ 29, 31. Quite simply, *Leininger* means that while a claim brought under R.C. § 4112.99 must be premised upon a **right** set forth in another provision(s) in Chapter 4112 (i.e., to be free from discrimination on the basis of age), it is not limited to the **remedies** set forth by that other provision. *Id.*

This is clearly illustrated by the *Leininger* Court's explanation of the relationship between R.C. §§ 4112.14(B) and 4112.99. The Court held that an individual who experiences a violation of R.C. § 4112.14 may **also** make a claim under R.C. § 4112.99, which would entitle him to the full range of remedies and a jury trial. *Id.* at ¶ 31. However, if UPS' proposition of law were accepted, this would not be true. Under UPS' argument, an individual who brought age discrimination claims under R.C. §§ 4112.14(B) and 4112.99 would be limited to recovering only the remedies available under R.C. § 4112.14(N), i.e., equitable relief. In other words, a plaintiff would be limited to the lowest common denominator of rights and remedies provided by R.C. Chapter 4112. This argument is not only contrary to *Leininger*, it is contradicted by the plain language of R.C. § 4112.99, which states in qualified terms that "[w]hoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief."

UPS' attempt to dismiss this Court's detailed findings in *Leininger* as "dicta" is misplaced. (Appellant's Memorandum at 12). "Dicta" is an "expression in [a] court's opinions which go beyond the facts before [the] court and therefore are * * * not binding in subsequent bases as legal precedent." *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 at ¶ 85 (Sweeney, J., dissenting), quoting Black's Law

Dictionary (6th Ed. 1990); see also *Easter v. Complete General Construction Co.*, 10th Dist. Case No. 06-AP-763, 2007-Ohio-1297 at ¶ 34. The *Leininger* Court's discussion of the remedies available under R.C. Chapter 4112 was necessary for its analysis of whether a public policy in Ohio against discrimination on the basis of age was in jeopardy. *Leininger* at syllabus. Accordingly, the *Leininger* Court's finding that a claim under R.C. § 4112.99 is **not** subject to the substantive provisions of other provisions of R.C. Chapter 4112 is binding. *Id.* at ¶ 31.

UPS' proposition does not ask this Court to adhere to the statutory scheme of R.C. Chapter 4112, but rather to rewrite it. Moreover, it requires this Court to abandon *Leininger* less than a year after it was decided. Because the Court has already rejected UPS' argument based upon the plain language of R.C. Chapter 4112, it should deny UPS' request for jurisdiction.

IV. CROSS-APPELLANT ROBERT MEYER'S MEMORANDUM IN SUPPORT OF JURISTICTION OF CROSS-APPEAL

PROPOSITION OF LAW NO. 1: To the extent a trial court's power to submit "any issue" to a jury under R.C. § 2311.04 is abridged by Civ. R. 39(C), Civ. R. 39(C) is invalid under Art. IV, § 5(B).

A. Art. IV, § 5(B) Standard

Article VI, Section 5(B) of the Ohio Constitution, otherwise known as the Modern Courts Amendment, empowers the Supreme Court of Ohio to create rules of practice and procedure for Ohio courts, including the Rules of Civil Procedure. However, the amendment expressly states that procedural rules "**shall not abridge, enlarge, or modify any substantive right.**" *Id.* Thus, where a rule created pursuant to Section 5(B), Article IV conflicts with a statute, the statute will control for matters of substantive law and the rule, to the extent it conflicts, is invalid. *Proctor v.*

Kardassilaris, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872 at ¶ 17; citing *Boyer v. Boyer* (1976), 46 Ohio St.2d 83, 86, 346 N.E.2d 286.

A matter is “substantive” if it “creates, defines and regulates the rights of the parties.” *Proctor* at ¶ 17; citing *Krause v. State* (1972), 31 Ohio St.2d 132, 145, 285 N.E.2d 736 (overruled on other grounds); *Schenkolewski v. Cleveland Metroparks Sys.* (1981), 67 Ohio St.2d 31, 426 N.E.2d 784, paragraph one of the syllabus. A matter is “procedural” where it addresses “rules of practice, courses of procedure and methods of review, but not the rights themselves.” *State v. Greer* (1988), 39 Ohio St.3d 236, 245, 530 N.E.2d 382 (emphasis in original).

B. To the extent the substantive provisions of R.C. § 2311.04 are abridged and/or modified by Civ. R. 39(C), R.C. § 2311.04 controls.

R.C. § 2311.04 provides that: “[i]ssues of law must be tried by the court, unless referred as provided in the Rules of Civil Procedure. Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial is waived or unless all parties consent to a reference under the Rules of Civil Procedure. All other issues of fact shall be tried by the court, **subject to its power to order any issue to be tried by a jury**, or referred.”

The plain and unambiguous language of the statute provides that in the absence of a right to a jury trial, a trial court has unqualified power to order **any** issue be tried to a jury. See *Csank v. Jaffe* (8th Dist. 1995), 107 Ohio App.3d 387, 668 N.E.2d 996; *Sabatino v. Capello* (Jan. 19, 1989), 8th Dist. No. 54943, unreported, 1989 WL 4174 at *1, jurisdiction motion overruled by 41 Ohio St.3d 729, 536 N.E.2d 385; *Nationwide Ins. Co. v. Gibbons* (Apr. 26, 1994), 10th Dist. No. 93APE09-1264, unreported, 1994 WL 158889 at *4.

Civ. R. 39(C), however, provides that: “[i]n all actions not triable of right by a jury (1) the court upon motion or on its own initiative may try any issue with an advisory jury or (2) the court, with the consent of both parties, may order a trial of any issue with a jury, whose verdict has the same effect as if trial by jury had been a matter of right.” As applied, Civ. R. 39(C) does not permit a trial court to submit “any” claim to a jury but rather, only where: (1) all parties consent; or (2) the jury is expressly designated as advisory.

Civ. R. 39(C), specifically its consent requirement, “creates, defines and regulates the rights of the parties” in two ways. First, Civ. R. 39(C) abridges the substantive power of a trial to try “any” issue to a jury set forth in R.C. § 2311.04. Second, Civ. R. 39(C) confers a substantive right upon parties – namely, the right to a bench trial – where no right to a jury trial exists. Indeed, the appeals court’s reversal of the judgment in this case was based solely upon its finding that because UPS did not consent to a jury trial, it was prejudiced – that is, that the trial court violated its “right” to a bench trial under Civ. R. 39(C). *Meyer* at ¶¶ 40, 42. Because Civ. R. 39(C)’s consent requirement is substantive, and because that substantive provision in the rule conflicts with R.C. § 2311.04, it is invalid under Article IV, Section 5(B).

C. Jurisdiction of this question of first impression is properly granted to correct a body of erroneous case law.

To date, neither this Court nor *any* Ohio appellate court has considered, much less resolved, the conflict between R.C. § 2311.04 and Civ. R. 39(C) in light of Art. IV, § 5(B). That is not, however, to say that Ohio courts have not considered scenarios where a trial court submitted a claim to a jury in the absence of a right to a jury trial and the consent of all parties. Indeed, Ohio courts – including this Court in *Porkony v. Local*

310 (1973), 38 Ohio St.2d 177, 311 N.E.2d 866 – have considered such cases. In each instance, however, the courts have failed to consider the issue in light of R.C. § 2311.04 or Art. IV, § 5(B). In this regard, the proposition of law presented by Mr. Meyer is a question of first impression.

In *Porkony*, this Court considered a case where a trial court submitted all issues relating to an apportionment action to a jury. The *Porkony* Court found that while the parties had a right to a jury trial on some of the issues, there was no right to a jury trial on the issue of distribution and therefore, “[a]llowing trial by a jury in this proceeding was erroneous, and that error was prejudicial to appellant.” *Id.* at 180-181.

Porkony is distinguishable from Mr. Meyer’s case for two reasons. First, the *Porkony* Court *never* considered R.C. § 2311.04, much less in light of Art. IV, § 5(B). Second, the statutory scheme at issue in *Porkony*, R.C. Chapter 163, **expressly specified** which issues should be submitted to a jury and which issues should be decided by “the court.” *Id.* at 179-180. R.C. § 4123.90 contains no such specifications.

Notwithstanding, several lower courts have applied *Porkony* as requiring a finding of prejudicial error in **every** case where a trial court submits an issue to a jury in conflict with Civ. R. 39(C). See e.g., *Gleason v. Gleason*, 64 Ohio App.3d 667, 671-672, 582 N.E.2d 657 (in dicta); *Black v. Phelis*, 6th Dist. No. WD-03-045, 2004-Ohio-4270 at ¶ 23; but see *Csank*, 107 Ohio App.3d at 387; *Sabatino*, 1989 WL 4174 at *1; and *Nationwide Ins. Co.*, 1994 WL 158889 at * 4. None of the cases applying *Porkony* in this manner – including the appeals court in this case to the extent its holding was consistent with these cases – provide *any* analysis as how one party is prejudiced where that party has no valid right to a bench trial.

Mr. Meyer does not ask this Court to reverse *Porkony*, but merely to apply the case consistent with R.C. § 2311.04. *Porkony* can be reconciled with R.C. § 2311.04 by limiting its application to those circumstances where the statute expressly requires an issue be decided by the trial court. In that event, a trial court's "power" under R.C. § 2311.04 to submit an issue to a jury has been expressly circumscribed by another statute. However, where, as here, the statute is silent, the "default" provision of R.C. § 2311.04 leaves the decision of whether to submit the claim to a jury to discretion of the trial court.

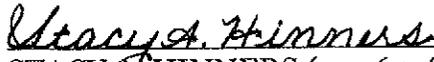
This Court's guidance is necessary to ensure that this conflict between R.C. § 2311.04 and Civ. R. 39(C) is resolved consistent with Art. IV, § 5(B). As applied to this case, the trial court properly exercised its power under R.C. § 2311.04 when it submitted Mr. Meyer's retaliatory discharge claim to a jury, particularly because that jury was *already* considering the very same facts as part of Mr. Meyer's age discrimination claim. To the extent that appeals court's decision overlooked R.C. § 2311.04, its decision should be reversed and the jury verdict reinstated in its entirety.

CONCLUSION

For these reasons, Mr. Meyer respectfully requests that this Court: (1) deny jurisdiction of the proposition of law presented by UPS; and (2) grant jurisdiction on his cross-appeal to resolve the conflict between R.C. § 2311.04 and Civ. R. 39(C).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Notice of Cross-Appeal of Appellee/Cross-Appellant Robert Meyer was served upon Kasey Bond and Eugene Droder, Counsel for Appellant/Cross-Appellee United Parcel Service, Inc., Frost Brown Todd, 2200 PNC Center, 201 E. 5th Street, Cincinnati, OH, by first-class mail on this 26th day of February 2008.


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