
In the Supreme Court of Ohio

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KENNETH D. McFADDEN,

Plaintiff-Appellant,

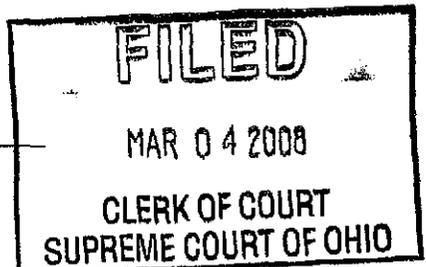
v.

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



APPELLANT'S REPLY BRIEF

◆

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I.

REBUTTAL ARGUMENT

A. Proposition of Law No. I: En Banc Review is Constitutional.

Without much hesitation and with even less fanfare, Defendant-Appellee, Cleveland State University (“CSU”) has finally been heard on the constitutional issue raised by this appeal.¹ In its Answer Brief, CSU has rightly concluded that “en banc review is constitutional.” (Answer Brief at p. 12) Because CSU acknowledges that “the Ohio Constitution permits en banc review,” (Answer Brief at p. 1), the first proposition of law advocated by Plaintiff-Appellee Kenneth D. McFadden (“McFadden”) can and should be adopted by the Supreme Court as the correct rule of law emanating from this appeal. There is no question that the convening of an en banc proceeding by Ohio’s appellate courts to address an intra-district conflict is permitted by Section 3(A), Art. IV, of the Ohio Constitution. With that being so, the mandate of *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, wherein this Court held that Ohio’s courts of appeals are “duty bound” to employ en banc review as the means to avoid or resolve intra-district conflicts, can now be effectuated and fully implemented in practice. That is what should have happened when McFadden sought en banc reconsideration of his case; but the Tenth Appellate District failed in its “duty” to engage in en banc review to address the conflicting law set forth in *Senegal v. Ohio Dept. Of Rehab. & Corr.* (Mar. 10, 1994),

¹ When this case was in the court of appeals, CSU did not oppose, on constitutional or any other grounds, McFadden’s request that the Tenth Appellate District conduct an *en banc* review. When the appeal was filed to the Supreme Court, CSU took no stand on whether this Court should grant jurisdiction to hear the appeal. When reconsideration was sought from the Court’s original denial of jurisdiction, CSU again remained silent.

Franklin App. No. 93API08-1161 and *McCoy v. Toledo Correctional Inst.*, Franklin App. No. 04AP-1098, 2005-Ohio-1848. That failing calls for a reversal in this case.

Despite the recognition that upholding the constitutionality of en banc review is "the better conclusion," (Answer Brief at p. 12), the Solicitor General relegates the significance of this case to a moot court exercise by "endeavor[ing] to develop the arguments on both sides" of the constitutional debate. (Answer Brief at p. 4) While the Solicitor General rejects those "countervailing arguments," McFadden does not want to leave any lingering doubt by the Supreme Court as to the correct resolution here, which calls for a reversal and remand of the case to the Tenth Appellate District. So, McFadden is compelled to rebut the "countervailing arguments" as well as the other procedural roadblocks thrown up by CSU in the hopes of avoiding that outcome here. Not only is "en banc review [] constitutional," (Answer Brief at p. 12), as a procedure to be employed to resolve future conflicts within the case law of an appellate district, it is mandated in McFadden's case.

1. "Countervailing arguments" should be rejected.²

The first "countervailing argument" against recognition of the constitutionality of en banc review is predicated upon Judge Diane Karpinski's dissenting opinion in *State v. Lett*, 161 Ohio App.3d 274, 2005-Ohio-2665, ¶¶74-97, *rev'd. on other grounds sub nom. In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313,

² CSU raised none of the "countervailing arguments" in the proceedings before the Tenth Appellate District. Arguments not raised in the appellate court are normally waived when a case is before the Supreme Court. *Shifflet v. Thomson Newspapers, Inc.* (1982), 69 Ohio St.2d 179, 186. This is true for constitutional arguments as well. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 598, 1995-Ohio-301.

2006-Ohio-2109. (Answer Brief at pp. 8-9) Focusing upon a unduly strict and narrow construction of Section 3(A), Art. IV of the Ohio Constitution, Judge Karpinski rejects en banc review in Ohio by positing that “[t]here is no authority for an appellate panel of more than three judges.” *Id.* at ¶76. Yet, there is authority that, while not from Ohio, is applicable to the issue raised here. That authority is from the Supreme Court of the United States. *Textile Mills Securities Corporation v. Commr. of Internal Revenue* (1941), 314 U.S. 326.

While acknowledging *Textile Mills*, Judge Karpinski rejects its reasoning by suggesting the all the United States Supreme Court was doing in recognizing the en banc procedure in the federal court system was addressing an “anomalous situation” that in Judge Karpinski’s view is not present in Ohio. *Let*, at ¶78-79. But, the “anomalous situation” confronting the Supreme Court in *Textile Mills* was and is analogous to what currently exists in Ohio. The “anomalous situation” in *Textile Mills* would be created only “if” the federal statute under consideration were to be interpreted by the Court to “mean[] that the circuit court of appeals would continue to be composed of only three, in face of the fact that there were more than three circuit judges in some circuits.” *Id.*, at ¶78, quoting *Textile Mills*, 314 U.S. at 329. Because all of Ohio’s twelve appellate districts currently have more than three judges, a similar “anomalous situation” as that recognized in *Textile Mills* would exist in Ohio “if” Section 3(A), Art. IV of the Ohio Constitution is construed so narrowly as to bar en banc review as a means of resolving intra-district conflicts.

With due respect for Judge Karpinski's views in her dissent in *Lett*,³ McFadden urges this Court to follow the well-reasoned lead of *Textile Mills* by employing a "more practicable interpretation" of Section 3(A), Art. IV of the Ohio Constitution, one that permits en banc review to address intra-district conflicts. See, *Textile Mills*, 314 U.S. 333-335. After all, that is the "better conclusion" ultimately reached by the state's Solicitor General in CSU's merit brief. (Answer Brief at p. 12)

The second "countervailing argument" put forth by CSU are characterized as "policy considerations" that are said to expose the "downsides in allowing the [en banc] procedure." (Answer Brief at pp. 10-12). Here, the issue before the Court is the interpretation of Section 3(A), Art. IV of the Ohio Constitution. "[P]olicy considerations" are not listed among the recognized rules of constitutional interpretation. (McFadden's Merit Brief at pp. 10-11) Nevertheless, CSU suggests that allowing en banc proceedings to be employed to resolve intra-district conflicts "may

³ It is peculiar that after Judge Karpinski asserts that en banc is unconstitutional in light of her literal reading of Section 3(A), Art. IV, of the Ohio Constitution, she proceeds to review and discuss the lack of legislative enactments or amendments for an en banc procedure. *Lett*, at ¶¶81-86. If, as Judge Karpinski suggests, Section 3(A), Art. IV, of the Ohio Constitution prohibits more than "three judges" from deciding any appeal, then the General Assembly could not enact a statute that would be in violation of the Ohio Constitution. *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824, at ¶35. Further, even if the General Assembly were to enact en banc legislation, it would likely run afoul of the Modern Courts Amendment of 1968 bestowing exclusive authority upon the Supreme Court to create rules of practice and procedure for the courts of this state. *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, at ¶17.

In her dissent, Judge Karpinski is unable to point to any legislative history that would confirm that the General Assembly failed to enact any law governing en banc courts due to a concern about the constitutionality of such a proceeding. It is just as likely that the General Assembly has exercised restraint in the area due to Section 5(B), Art. IV, of Ohio Constitution. The lack of legislative enactment of en banc procedures by the General Assembly should not be construed by this Court as having an bearing upon the issue of whether en banc review is or is not constitutionally permissible under Section 3(A), Art. IV, of the Ohio Constitution.

politicize the courts,” “might frustrate collegiality among judges,” and will “add[] another layer of court review and lengthen[] the litigation process” and “create administrative issues.” Whether these concerns are realistic or exaggerated,⁴ this Court has already made the determination that the deleterious effects of intra-district conflicts trump whatever “policy considerations” might weigh against the use of en banc review. This Court has already decided that because “conflicting rulings on the same legal issue create confusion for lawyers and litigants and do not promote public confidence in the judiciary,” “[a]ppellate courts are duty-bound to resolve conflicts within the district through en banc proceedings.” *In re J.J.*, at ¶18. This directive was restated and confirmed again in *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, at ¶40.

By advancing “policy considerations” against the use of en banc review, CSU is in effect advocating for a reversal of *In re J.J.* and *In re C.F.* However, this Court has established a bright line rule to be used before abandoning prior precedent. In *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, a three-step process must be used before the Court will consider reversing one of its own opinions. Per that test, a prior decision of the Supreme Court may be overruled when all three of the following circumstances are found to exist:

- (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision,
- (2) the decision defies practical workability, and,

⁴ Even CSU acknowledges that “some of the policy arguments against en banc review have been overstated.” (Answer Brief at p. 13) Despite CSU’s anecdotal reference to selective cases and articles that suggest aberrant experiences with en banc in the federal courts, there is support for the contrary point of view. See, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review* (1993), 54 U.Pitt.L.Rev. 805.

(3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Galatis, paragraph one of the syllabus. Simply arguing that a prior case was wrongly decided is not sufficient to justify overruling a prior decision. *State ex rel. Grimes Aerospace Co., Inc. v. Indus. Comm.*, 112 Ohio St.3d 85, 2006-Ohio-6504, ¶6. The litigant advocating for a change in Supreme Court precedent carries the burden of establishing all three prongs which is a burden that cannot be met simply with conclusory statements lacking factual or empirical support. *Cleveland Bar Assn. v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, at ¶¶15-21.

To be sure, CSU does not argue for the overruling of *In re J.J.* and *In re C.F.* But that would be the result if this Court were to accept the “policy considerations” put forth by CSU as support for declaring en banc unconstitutional. Because of the heavy burden imposed by the *Galatis* standard, CSU makes no effort in its Answer Brief to establish that the “policy considerations” fall within the parameters of any one of the three prongs of the *Galatis* test in order to justify this Court’s overruling of *In re J.J.* and *In re C.F.* Consequently, the “policy considerations” do not overcome the mandate that Ohio’s appellate courts are “duty bound” to use en banc review to avoid or resolve intra-district conflicts.⁵

With all that being said, McFadden agrees with CSU and the Solicitor General that “[d]espite the arguments against, the better conclusion is that en banc review is

⁵ When each of the three prongs of the *Galatis* test have not been established, this Court has refused to overrule prior case law. See, e.g., *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, ¶14; *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, ¶27; *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, ¶14.

constitutional.” (Answer Brief at p. 12) This Court is therefore urged to adopt “the better conclusion” in this case.

While McFadden agrees too with CSU that “Ohio district court judges should be trusted to follow * * * the Supreme Court rules regarding en banc proceedings,” (Answer Brief at p. 13), that is not what happened here. Ohio district court judges have been given a clear and definitive rule by this Court that they are “duty bound” to use en banc review to resolve intra-district conflicts. That did not happen here so this case must be reversed and remanded to the Tenth Appellate District to en banc this appeal.

2. Implementation of en banc review does not await adoption of a rule of practice.

Having recognized the constitutionality of en banc review, CSU submits that “this Court *may* constitutionally adopt a rule to allow for and regulate en banc proceedings.” (Answer Brief at p. 14)(emphasis in original). But, as merely permissive as CSU tries to make this authority seem, this Court has already adopted just such a rule. It did so in paragraph two of the syllabus in *In re J.J.* How much clearer of a rule could this Court have spelled out than to say that “[a]ppellate courts are duty-bound to resolve conflicts within their respective appellate districts through en banc proceedings.” This Court has not just “allow[ed]” en banc review, it compels it when there is an intra-district conflict. Having spoken on the issue, the Tenth Appellate District could not ignore that rule. But the Tenth Appellate District did ignore the en banc rule in *In re J.J.* That error requires reversal.

But to avoid reversal, CSU argues that the Tenth Appellate District couldn’t conduct an en banc review without a rule of practice because to do so would be ultra

vires. Courts do not act in ultra vires in the absence of a rule of procedure. The Modern Courts Amendment was not intended to constrain a court from acting in the absence of a particular rule. The case cited by CSU for this novel proposition, *State ex rel. Adams v. Gusweiler* (1972), 30 Ohio St.2d 326, does not support that conclusion.

If CSU's ultra vires argument were true, any appellate district court could avert the mandate of *In re J.J.* by simply not enacting a local rule of practice. Then, whenever en banc review was called for to resolve an intra-district conflict, the appellate district could simply avoid doing so because, without a specific rule governing en banc practice in that district, it would be acting ultra vires by conducting en banc review, even though that is precisely what this Court has told all of Ohio's appellate courts to do. Surely, the Modern Courts Amendment was not intended to allow the appellate courts to ignore a clear and direct mandate from this Court in one of its opinions. *Mannion v. Sandel*, 91 Ohio St.3d 318, 322, 2001-Ohio-47 (“[C]ourts of appeals are required to follow the law as it is interpreted by this court.”).

This Court's case law abounds with situations where this Court has set down a specific rule to be followed by the courts of Ohio without this Court or the courts below adopting a corresponding rule of practice to govern the particular situation addressed in this Court's opinion. For example, in *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, this Court set out the rule to be followed when a trial court is confronted with a conflicting affidavit in connection with a summary judgment motion. Civil Rule 56 has not been amended to incorporate this rule. Does this mean that if a trial court follows the rule articulated in *Byrd* in deciding whether to grant or deny a

motion for summary judgment, it is acting ultra vires? In *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 1997-Ohio-380, a rule was set down for how a trial court should go about resolving whether the parties have entered into an enforceable settlement agreement. No procedural rule has been enacted setting forth how the “evidentiary hearing” is to be conducted in practice. If a trial court holds such an “evidentiary hearing” and then enters judgment accordingly, has that court acted ultra vires? One final example. *Peyko v. Frederick* (1986), 25 Ohio St.3d 164 holds that, in connection with a prejudgment interest proceeding, “[i]f the defense asserts the attorney-client privilege with regard to the contents of the [insurer’s] ‘claims file,’ the trial court shall determine by in camera inspection which portions of the file, if any, are so privileged.” *Id.*, paragraph two of the syllabus. The Ohio Rules of Civil Procedure have not been amended to regulate how such an in camera proceeding is to be conducted. Nor has R.C. 1343.03(C) been amended. Have Ohio’s trial courts been acting ultra vires whenever they have conducted such in camera inspections to determine whether an insurance company’s claims file is privileged?

As with each of these few examples, the Tenth Appellate District would not have been acting ultra vires by conducting an en banc review upon McFadden’s motion for reconsideration en banc even though this Court and the Tenth Appellate District had not enacted a specific rule of practice.⁶ As with the cases cited above, *In re J.J.* told the

⁶ As argued by McFadden in his Merit Brief, the procedural mechanism for reconsideration of an appellate opinion is set forth in App.R. 26(A), and it was the appropriate rule available to McFadden when he sought en banc review. (Merit Brief at p. 28) Moreover, Ohio’s appellate courts have inherent authority to, “in the furtherance of justice,” reconsider a decision, even without resort to App.R. 26(A). *State ex rel. LTV Steel Company v. Gwin*, 64 (continued...)

Tenth Appellate District what it was required to do – hold an en banc review. Because it failed to do so, this case must be reversed and remanded.

B. Proposition of Law No. II: A Complete Failure to Conduct En Banc Review When Called Upon and as Contemplated by In re J.J. is an Abuse of Discretion.

1. A conflict on “the same legal issue” is a legal question.

CSU argues that an appellate court should have almost unbridled discretion to determine whether an intra-district conflict exists such that en banc review is required. (Answer Brief at pp. 16-17) But, as contemplated by *In re J.J.*, en banc review is mandated when there is a conflict on “the same legal issue,” just like in the inter-district conflict setting. *In re J.J.*, at ¶18. Whether there is such a conflict on “the same legal issue” is a matter of law because a conflict can only be found to exist in connection with a rule of law, not facts. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 1993-Ohio-223. In this case, there was a conflict in the Tenth Appellate District on “the same legal issue”: are employment discrimination claims brought against the state governed by the two-year statute of limitations (*McCoy*) or the six-year statute of limitations (*Senegal*)? The Tenth Appellate District’s failure to resolve such a legal conflict by way of an en banc review – as mandated by *In re J.J.* – was an abuse of discretion because no court has the discretion to ignore the law. *Howland v. Purdue Pharma L.P.*, 104 Ohio St.3d 584, 2004-Ohio-6552, at ¶26.

2. CSU’s futility argument eviscerates the use of en banc review.

CSU asks this Court to simply ignore the Tenth Appellate District’s failing here to

⁶(...continued)

Ohio St. 3d 245, 249, 1992-Ohio-20, citing *Tuck v. Chapple* (1926), 114 Ohio St. 155.

conduct en banc review because, according to CSU, taking the time for an en banc review would have been futile as six of the eight district court judges had already sat on panels adopting the two-year statute of limitations. (Answer Brief at pp. 17-18) But six of eight judges do not make up an en banc court. See, Black's Law Dictionary (5th Ed) at 472-473 (defining en banc as follows: "Full bench. Refers to a session where the entire membership of the court will participate in the decision rather than the regular quorum.") While it may be so that Judges Bryant, French, Klatt, McGrath, Petree and Sadler have sat on panels adopting the two-year statute of limitations, Judges Brown and Tyack have not. Their voices have not been heard.

The Tenth Appellate District consists of eight judges, not six. When en banc review is called for (as it was here), *all* active judges on the bench must be permitted to hear the arguments, consider the law and express their views on the legal issue in conflict. *All* appellate judges in the district, not just most or a majority, must have a say in determining the major doctrinal trends or changes that will dictate what the law is going to be in the particular district. *United States v. American-Foreign Steamship Corp.* (1960), 363 U.S. 685, 690. That did not happen here.

Admittedly, it is not known how Judges Brown or Tyack would have decided the legal issue presented in this case. While it may be premature to predict with any degree of certainty whether Judge Brown or Judge Tyack would have expressed a different view which would have possibly swayed the opinions of three or more of their colleagues on the issue, the outcome here requires that such possibility weigh in favor of reversal and a remand for en banc review by all judges of the Tenth Appellate

District. That is what *In re J.J.* demands. Otherwise, if CSU's futility argument were to prevail here, in future cases, other appellate courts will be able to simply avoid en banc review by using similar faulty logic. Doing so will disenfranchise other appellate judges.

Keeping in mind that how this case is resolved will influence future cases, under the Tenth Appellate District's reasoning here, some appellate districts will never have to conduct en banc review because a panel of only three judges will always constitute a majority of the sitting judges. For example, with only four judges, the Third, Fourth, Seventh and Twelfth Appellate Districts will always be able to justify not conducting en banc review (even if there is an intra-district conflict) because the three judge panel deciding the most recent case will always be decided by the majority of the then-sitting judges. The same will be true in the Second, Sixth, Ninth, and Eleventh Appellate Districts which have five sitting judges. The view of the two judges who were not sitting on the panel in those districts will be overlooked and ignored.

If the law as announced by this Court in *In re J.J.* compels en banc review when there truly is an intra-district conflict, that rule of law should apply equally to all twelve appellate districts, not just the four appellate districts with six or more sitting judges. While the risk of an intra-district conflict may be less in appellate districts with fewer judges, the en banc procedure contemplated, indeed mandated, by *In re J.J.* did not make exceptions for smaller districts and thus must apply uniformly and to all appellate districts, regardless of size.

3. *Senegal and McCoy* created an intra-district conflict as contemplated by *In re J.J.*

CSU tries to avoid application of *In re J.J.* by arguing that, despite the inconsistent holdings in *Senegal* and *McCoy*, the two decisions were “not the type of conflict considered by this Court in *In re J.J.*” (Answer Brief at p. 18) CSU tries to distinguish *In re J.J.* by pointing out that while the Eighth Appellate District had a local rule for en banc review, the Tenth Appellate District did not. As established above, the absence of a rule of practice governing en banc review cannot be used as an excuse for not abiding by the mandatory rule, set forth in the syllabus of *In re J.J.*, that “[a]ppellate courts are duty-bound to resolve conflicts within their respective appellate districts through en banc proceedings.”

Next, CSU tries to factually distinguish *In re J.J.* as being applicable to the peculiarity of “two panels * * * issu[ing] conflicting opinions on the *same day*.” (Answer Brief at p. 19) Because *Senegal* and *McCoy* were decisions announced eleven years apart, CSU suggests that there was no need to invoke en banc review. However, the proximity in time of the announcement of the conflicting opinions is not determinative of whether en banc review is called for to resolve an intra-district conflict. This was made clear in this Court’s en banc reminder in *In re C.F.*, at ¶40, where the conflicting appellate opinions were not announced on the *same day*.⁷

CSU argues next that en banc was unnecessary here because “*Senegal* was not

⁷ The underlying appellate opinion of *In re C.F.*, Cuyahoga App. No. 85716, 2006-Ohio-88 was announced on January 12, 2006, which was found to be in conflict with the appellate opinion of *In re Z.Y.*, Cuyahoga App. No. 86293, 2006-Ohio-300, which wasn’t announced until January 19, 2006.

controlling authority” pursuant to former Rule 2(G) of the Supreme Court Rules for the Reporting of Opinions.⁸ Until 2002, it is true that, with certain limited exceptions, unpublished appellate court opinions were not considered controlling authority in the judicial district in which they were decided. *State ex rel Graves v. State* (1983), 9 Ohio App.3d 260, 262, citing former Rep.R. 2(G)(1). That is not dispositive here. One must look at the law in the Tenth Appellate District at the time when McFadden cause of action accrued.

McFadden was terminated effective June 11, 2003. (Supp. p. 16-17 - Order of Removal dated 6/9/03). McFadden’s cause of action for discrimination against CSU accrued as of the date of his termination. *Oker v. Ameritech Corp.*, 89 Ohio St.3d 223, 2000-Ohio-139, syllabus. As of June 11, 2003, McFadden had a vested right to pursue his discrimination claim against CSU. *Groch v. Gen. Motors Corp.*, Slip Opinion No. 2008-Ohio-546, at ¶189. When McFadden’s cause of action accrued and was a vested right, *McCoy* had not yet been decided. In fact, when McFadden’s cause of action vested, there were only three appellate opinions in the Tenth Appellate District addressing the statute of limitations issue: *Senegal Schaub v. Div. of State Hwy. Patrol* (Mar. 5, 1996), Franklin App. No. 95APE08-1107; and *Obasuyi v. Wright State Univ.*, Franklin App. No. 02AP-300, 2002-Ohio-5521.

First, the holding in *Senegal* was not overruled (or even discussed) in either *Schaub* or *Obasuyi*. It wasn’t discussed in *Obasuyi* and *Schaub* for a very obvious reason. Neither case was an employment discrimination case. *Schaub* was an appeal from the

⁸ The former Supreme Court Rules for the Reporting of Opinions appear at 3 Ohio St.3d xxi-xxiii.

dismissal of a declaratory judgment action. *Obasuyi* was a case involving an alleged conversion of \$2,390.54 in student loan funds. 2002-Ohio-5521, at ¶2. Therefore, the court of appeals in *Schaub* and *Obasuyi* never discussed the issue of whether an employment discrimination claim, like McFadden's, is governed by R.C. 2743.16(A) or R.C. 2305.07.

Second, as far as the relative authoritativeness of the opinions, none of these opinions was "controlling." *Schaub*, like *Senegal*, is an unpublished opinion governed by former Rep.R. 2(G)(1). *Obasuyi* was not controlling authority, not because it was not officially published, but because under the current Supreme Court Rules for the Reporting of Opinions, which became effective on May 1, 2002, the distinction between "controlling" and "persuasive" opinions has been abolished. See, Rep.R. 4(A). Pursuant to Rep.R. 4(B), when McFadden discrimination claim vested on June 11, 2003, *Obasuyi* was no more authoritative on the statute of limitations governing his discrimination claim than was *Senegal*.

In other words, when McFadden's discrimination claim accrued, there was no conflict in the Tenth Appellate District on the legal issue as *Senegal* was the only case on point holding that the limitations period for a discrimination claim against the state was six years pursuant to R.C. 2305.07. The conflict didn't develop until 2004 when the Tenth Appellate District decided *Ripley v. Ohio Bur. of Emp. Serv.*, Franklin App. No. 04AP-313, 2004-Ohio-5577 and *Hosseini pour v. State Med. Bd. of Ohio*, Franklin App. No. 03AP-512, 2004-Ohio-1220. Again, like *Obasuyi*, neither *Ripley* nor *Hosseini pour* are "controlling" authority. Neither case cited *Senegal*, made any negative reference

to it or rejected *Senegal's* holding.

The Tenth Appellate District didn't squarely address the issue and the *Senegal* opinion until April 21, 2005, when *McCoy* was decided. To the extent that *McCoy* signaled a change in the law and rejected *Senegal* as an "aberration," McFadden was left with only 53 days to file his complaint. Such an unreasonably short period of time to file a lawsuit that had already accrued and vested deprived McFadden of his constitutional rights. *Groch*, at ¶198 (holding that a change in the law limiting a plaintiff to 34 days to commence a lawsuit involving a vested cause of action was unconstitutional).

The Tenth Appellate District could not have simply cured the conflict that it had created when it decided *McCoy* and, at the same time, disposed of the above dilemma for McFadden by simply overruling *Senegal* when it decided *McFadden v. Cleveland State Univ.*, Franklin App. No. 06AP-638, 2007-Ohio-298. En banc review was necessary to resolve that conflict in the Tenth Appellate District. Having failed to do so, the case must be reversed and remanded.

II.

CONCLUSION

WHEREFORE, Plaintiff-Appellant Kenneth D. McFadden respectfully requests the Supreme Court of Ohio declare en banc review to be constitutional pursuant to Section 3(A), Art. IV of the Ohio Constitution, and to reverse the judgment of the Tenth District Court of Appeals and remand this case so that en banc review of the legal issue

here can be addressed by that court of appeals.

Date: March 4, 2008.

Respectfully submitted,



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A copy of the foregoing *Appellant's Reply Brief* was sent by regular U.S. Mail, postage pre-paid, this 4th day of March, 2008 to the following:

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