

IN THE SUPREME COURT OF OHIO

Cincinnati City School District :
Board of Education, : Case No. 08-1480
:
Appellee, :
:
v. : On Appeal from the Hamilton County
:
State Board of Education of Ohio, et al., : Court of Appeals, First Appellate District
:
Appellants. : Court of Appeals Case No. C-070494
:

MEMORANDUM OF APPELLEE IN RESPONSE
TO MEMORANDUM IN SUPPORT OF JURISDICTION

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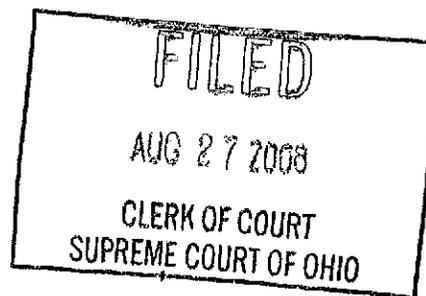


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
I. STATEMENT AS TO WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST	1
A. This Matter—Correctly Decided by a Unanimous Court of Appeals— Involves No Novel Legal Issues.....	1
B. This Case Involves a Unique Matter That Seldom Arises and, Accordingly, Invokes Little to No Public or Great General Interest.....	2
II. ARGUMENTS IN RESPONSE TO APPELLANTS’ PROPOSITION OF LAW.....	5
<u>Response to Appellants’ Proposition of Law:</u> Political subdivisions such as school districts are not “organizations” as such term is used in R.C. 2335.39(A)(2)(d); therefore, political subdivisions, large or small, are eligible to recover attorney fees against the state pursuant to R.C. 2335.39.	5
A. The state is expressly excluded from the definition of “eligible party,” and political subdivisions are expressly <i>not</i> included within the definition of “state,” therefore, political subdivisions such as school districts qualify as eligible parties under R.C. 2335.39(A)(2)(a).	5
B. A political subdivision is not an “organization” as such term is used in R.C. 2335.39(A)(2)(d) and is not one of the other private entities enumerated in R.C. 2335.39(A)(2)(d).	6
III. CONCLUSION.....	10
CERTIFICATE OF SERVICE	11

MEMORANDUM IN RESPONSE TO MEMORANDUM
IN SUPPORT OF JURISDICTION

I. STATEMENT AS TO WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

The State Board of Education of Ohio and the Ohio Department of Education (hereinafter the “State”) are attempting to invoke this Court’s discretionary jurisdiction over a unanimous decision of the First District Court of Appeals which held that a political subdivision—a governmental entity—is not a private “organization” as that term is used in R.C. 2335.39(A)(2). This decision was not only correct as a matter of law, it will produce neither the negative nor the far-reaching results claimed by the State. As such, this case does not involve matters of public or great general interest, and it should not be accepted for review.

A. This Matter—Correctly Decided by a Unanimous Court of Appeals—Involves No Novel Legal Issues.

The matter before the court of appeals was a basic statutory construction issue involving R.C. 2335.39. Under R.C. 2335.39, an “eligible party” that prevails in an action against the state is entitled to recover attorney fees if the state was not substantially justified in initiating the matter in controversy. “Eligible party” is defined in R.C. 2335.39 as “a party to an action or appeal involving the state, *other than* * * *”:

- (a) The state [and, the state does *not* include political subdivisions];
- (b) An individual whose net worth exceeded one million dollars * * *;
- (c) A sole owner of an unincorporated business that had, or a partnership, corporation, association, or organization that had, a net worth exceeding five million dollars * * *;
- (d) A sole owner of an unincorporated business that employed, or a partnership, corporation, association, or organization that employed more than five hundred persons * * *. [Emphasis added.]

The court of appeals rejected the State's argument that so-called "large" political subdivisions (those with over 500 employees) are excluded from the definition of "eligible party." The court of appeals correctly determined that the entities described in R.C. 2335.39(A)(2)(d)—unincorporated businesses, partnerships, corporations, associations and organizations—are *private* entities and not governmental entities. Because the Cincinnati City School District Board of Education ("Cincinnati") is not a private "organization" with over 500 employees, the court of appeals held that Cincinnati met the threshold requirement of being an eligible party under R.C. 2335.39.

The court of appeals reached this unremarkable determination using common rules of statutory construction. The State does not assert otherwise. The State simply disagrees with the court of appeals' decision and seeks another bite at the appellate apple, on the chance it might convince this Court to decide that R.C. 2335.39 means something other than what it says. But this Court's discretionary jurisdiction is not invoked every time a litigant disagrees with a court of appeals' ruling or challenges an appellate court's interpretation of a statute. The case must involve a matter of public or general interest that requires this Court's pronouncement of Ohio law. This case presents no such matter. Not only was it decided correctly and unanimously by the court of appeals, the decision will have little to no impact on the state, local governments, or the citizens of Ohio.

B. This Case Involves a Unique Matter That Seldom Arises and, Accordingly, Invokes Little to No Public or Great General Interest.

In attempting to invoke this Court's discretionary jurisdiction, the State has inflated both the import and the impact of the court of appeals' decision. The State would have this Court believe that the court of appeals determined that large political subdivisions *will* recover their attorney fees in cases against the state. The court of appeals' decision stands for nothing of the

sort. The court of appeals simply determined that political subdivisions—large or small—are not excluded from being *eligible* for attorney fees under R.C. 2335.39. Being an eligible party, however, is but one of many factors that must be met before a party may obtain attorney fees against the state.

First and foremost, the eligible party must prevail in the lawsuit. But even prevailing against the state will not necessarily result in an attorney fees award. The trial court must determine whether the state’s position in initiating the matter in controversy was “substantially justified” or whether special circumstances make an award unjust. See R.C. 2335.39(B)(2). It is only after *all* of these factors have been met that an eligible party may be entitled to attorney fees. Thus, any claim by the State that the court of appeals’ decision will open the floodgates to attorney-fee claims against the state is a gross overstatement.

For example, the State claims that the potential cost to the state as a result of the court of appeals’ decision is “staggering.” To buy in to this claim, however, one would have to accept that in the majority of disputes that may arise between the state and large political subdivisions, the state will be unsuccessful in litigation *and* take a position that is not substantially justified. But if this were truly the way the state does business, then the problem lies not in the statute that shifts attorney fees under such circumstances, but in the state’s own unjustified conduct.

Likewise, the State’s claim that this will lead to abusive and expensive litigation lacks logical foundation and completely ignores the statutory scheme. The instigator of an abusive lawsuit against the state will, by definition, not prevail in the lawsuit. Certainly, an abusive litigator against the state—even in the unlikely event of success—will not be rewarded with its attorney fees.

In reality, the state faces no problem or threat of a problem as a result of the court of appeals' decision. The State itself asserts that legal disputes between large political subdivisions and the state are "commonplace" and that, apparently, the issue of attorney fees is a significant factor for large political subdivisions when they are evaluating litigation against the state. Yet, in the twenty-plus years that R.C. 2335.39 has existed, not one court of appeals has addressed whether a "large" political subdivision is an eligible party under the statute. The want of authority on this issue has apparently not reduced or otherwise influenced the amount of litigation that occurs between the state and "large" political subdivisions. Simply put, the eligible party status of a political subdivision under R.C. 2335.39 has not been—and will not become—a significant issue for either large political subdivisions or the state because it involves a set of circumstances that seldom occurs.

To be sure, Cincinnati has met all of the factors required for an attorney fees award against the State *in this case*. But this case is unique, and it will not have any impact, negative or otherwise, on how the state and political subdivisions generally engage in litigation against each other. And, in those exceptional cases where a political subdivision is entitled to recover its attorney fees against the state, the costs of that litigation will be spread out over all of the state's taxpayers rather than the political subdivision's local tax base having to bear the cost of the state's unjustified conduct. Indeed, in including *all* political subdivisions as eligible parties—regardless of their size or the number of employees—the General Assembly was likely cognizant of the inherent inequity of forcing a smaller group of taxpayers (the political subdivision's citizens) to bear the cost of successful litigation involving unjustified state action. In the context of this case, it would be inequitable for Cincinnati to have to use local taxpayer dollars—dollars

specifically earmarked to educate its students—to finance litigation to recover funds that were unlawfully and unjustifiably withheld by the State.

In summary, this is a matter involving a special set of circumstances that—although certainly important for Cincinnati and, within the confines of this particular case, for the State—will have no significant general impact. Nor does it address an important legal issue that affects the general public or the way government does business. As such, this case does not involve a matter of public or great general interest, and it should not be accepted for review.

II. ARGUMENTS IN RESPONSE TO APPELLANTS' PROPOSITION OF LAW

Response to Appellants' Proposition of Law: Political subdivisions such as school districts are not “organizations” as such term is used in R.C. 2335.39(A)(2)(d); therefore, political subdivisions, large or small, are eligible to recover attorney fees against the state pursuant to R.C. 2335.39.

In a unanimous decision, the court of appeals interpreted R.C. 2335.39(A)(2) to include political subdivisions, regardless of the number of persons they employ, as parties that are eligible to recover attorney fees in civil lawsuits against the state. This decision was reached using common rules of statutory construction and correctly reflects the intent of the General Assembly. Indeed, if the legislature had intended to exclude so-called “large” political subdivisions from the definition of “eligible party,” it would have done so by including the term “political subdivision” in the listing of entities contained in R.C. 2335.39(A)(2)(d). It did not.

The court of appeals rightly rejected the State’s attempt to read one section—indeed, one word—in R.C. 2335.39 out of context. Construing R.C. 2335.39(A)(2) in its entirety, political subdivisions—local governmental entities—do not fall under the umbrella term “organization,” which is a term used in R.C. 2335.39(A)(2)(c) and (d) to describe *private* entities.

- A. **The state is expressly excluded from the definition of “eligible party,” and political subdivisions are expressly *not* included within the definition of “state,” therefore, political subdivisions such as school districts qualify as eligible parties under R.C. 2335.39(A)(2)(a).**

R.C. 2335.39(A)(2)(a) expressly excludes *the state* from the definition of “eligible party.” The state is expressly defined in R.C. 2335.39(A)(6) as having “the same meaning as in section 2743.01 of the Revised Code.” R.C. 2743.01(A) defines the state as “the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state. *‘State’ does not include political subdivisions.*” (Emphasis added.) A school district is a political subdivision. See R.C. 2743.01(B). Thus, under R.C. 2335.39(A)(2)(a), a political subdivision such as a school district is not the state and therefore—unlike the state—is *not* excluded from the definition of “eligible party.”

R.C. 2335.39(A)(2)(a) addresses those governmental entities that are excluded from the definition of eligible party. Only *state* governmental entities, such as the General Assembly and state agencies, are excluded. *Local* governmental entities are *not* excluded. The State completely ignores this subsection of the statute and relies, instead, on a different subsection for its flawed claim that political subdivisions are excluded as eligible parties. This other subsection, however, does not support the State’s position.

B. A political subdivision is not an “organization” as such term is used in R.C. 2335.39(A)(2)(d) and is not one of the other private entities enumerated in R.C. 2335.39(A)(2)(d).

The State’s entire proposition rests on its claim that a political subdivision is an “organization,” as such term is used in R.C. 2335.39(A)(2)(d). This argument, however, is based on reading the term “organization” in a vacuum, instead of viewing the term within the context of the entire statute. Such an exercise defies common rules of statutory construction. Indeed, a statute cannot be examined in a vacuum, and words and phrases must be viewed in their proper context. See *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-

4172, at ¶19. Thus, in reviewing a statute, a court cannot pick out one sentence and disassociate it from the context; instead, the court must look to the four corners of the statute in order to determine legislative intent. See *State v. Wilson* (1997), 77 Ohio St.3d 334, 336, citing *MacDonald v. Bernard* (1982), 1 Ohio St.3d 85, 89; see, also, R.C. 1.47(B).

The relevant sections of R.C. 2335.39 read as follows:

(A) As used in this section:

(2) “Eligible party” means a party to an action or appeal involving the state, *other than* * * *:

(a) The state [the state does *not* include political subdivisions];

* * *

(d) A sole owner of an unincorporated business that employed, or a partnership, corporation, association, or *organization* that employed more than five hundred persons * * *. [Emphasis added.]

The legislature used the general terms “association” and “organization” without further defining them. While it is true that undefined terms are to be given their plain and ordinary meaning, such meaning must be derived from—and cannot be disassociated from—the context of the statute as a whole. See *D.A.B.E., Inc.* at ¶19, 22. Thus, the word “organization” as used in R.C. 2335.39(A)(2)(d) must be construed in light of the existence of subsection (A)(2)(a).

Construing the subsections together, it is clear that the legislature addressed *governmental* entities in subsection (A)(2)(a) and addressed *private* entities in subsection (A)(2)(d). State and local governmental entities such as the General Assembly, the Ohio Supreme Court, Hamilton County, the Cincinnati Public School District, the village of North Bend, etc., are simply not addressed in subsection (A)(2)(d). Hence, governmental entities do not fall under the umbrella term “organization” as used in R.C. 2335.39(A)(2)(d). But even

construing R.C. 2335.39(A)(2)(d) without reference to subsection (A)(2)(a) leads to the conclusion that political subdivisions are not “organizations” under subsection (A)(2)(d).

The maxim *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of another—provides further support that the legislature did not intend to include political subdivisions under the umbrella term “organization.” This maxim prevents the addition of a statutory exclusion that is not expressly incorporated therein. See *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, at ¶20. R.C. 2335.39(A)(2)(d) contains a specific list of entities: “sole owner of an unincorporated business,” “partnership,” “corporation,” “association” and “organization.” To subliminally insert “political subdivision” into this list, especially when the term had just been used expressly in subsection (A)(2)(a), would be to amend the statute to include a category of entities not specifically enumerated. Such a judicial re-write is not permitted.

Further, as the court of appeals recognized, application of the canon of *ejusdem generis* yields the conclusion that political subdivisions, such as school districts, are not “organizations” or any of the other private entities enumerated in R.C. 2335.39(A)(2)(d). Under this rule, where terms first used in a statute are confined to a particular class of objects having well-known and definite features and characteristics and are then followed by a term having a broader signification, the latter term is considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms. *State v. Aspell* (1967), 10 Ohio St.2d 1, paragraph two of the syllabus.

Under this well established canon, the more expansive terms (“organization” and “association”) that follow the more specifically-named, private entities (“unincorporated business,” “partnership,” and “corporation”) must be given a similar meaning. The terms

“unincorporated business,” “partnership” and “corporation” describe private entities and not governmental entities. Thus, the term “organization” encompasses only those types of entities that are private in nature—not governmental in nature. A political subdivision is not a private entity; thus, it is not an “organization” as that term is used in R.C. 2335.39(A)(2)(d). *Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio*, 1st District No. C-070494, 2008-Ohio-2845, at ¶22-23.

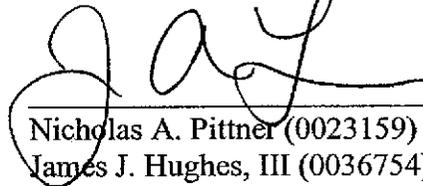
Finally, if the State were correct that “organization” should be given its broadest meaning, despite the existence of the other specifically enumerated entities, then there would have been no need to include those other specifically enumerated entities. In other words, if the term “organization” includes political subdivisions, then it certainly also includes unincorporated businesses, partnerships and corporations. If the legislature had desired to exclude *any* type of organization—private or governmental alike—with over 500 employees, it could have done so by using *only* the word “organization.” It did not and, instead, chose to first specify terms that describe *private* entities. This evidences the intent that the latter term, “organization,” encompasses private entities only—not governmental entities.

In summary, the court of appeals unanimously and correctly determined that a political subdivision, such as Cincinnati, is not an “organization” as that term is used in R.C. 2335.39(A)(2). Because Cincinnati is not an “organization,” the fact that it employs more than 500 persons did not preclude it from being an eligible party under the statute. The State is wrong in asserting that the General Assembly intended to lump political subdivisions in with private business entities. If the General Assembly wanted to equate so-called “large” political subdivisions with private business entities, it could have easily done so by inserting the words “political subdivisions” in R.C. 2335.39(A)(2)(d). It did not.

III. CONCLUSION

The First District Court of Appeals issued a well reasoned, unanimous decision based on established rules of statutory construction. This case involves no novel legal issues or matters that will affect the general public or state and local governments. Accordingly, this Court's discretionary jurisdiction is not invoked, and this appeal should not be accepted for review.

Respectfully submitted,



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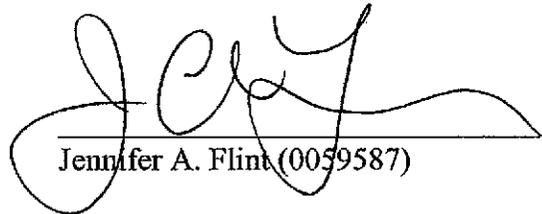
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Response was served upon the following, by regular United States mail, postage prepaid, this 27th day of August, 2008.

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