

IN THE SUPREME COURT OF OHIO

CYNTHIA LAMBERT, : Case No. 08-2183
: :
Plaintiff-Appellee, : :
: :
v. : :
: :
GREG HARTMANN, Hamilton : :
County Clerk of Courts, : :
: :
Defendant-Appellant. : :

APPELLEE CYNTHIA LAMBERT'S MEMORANDUM IN OPPOSITION TO
MEMORANDUM IN SUPPORT OF JURISDICTION

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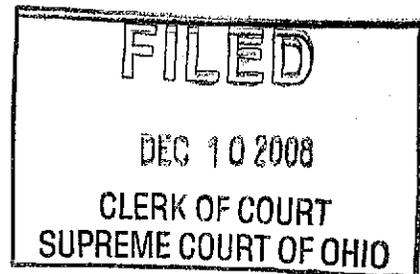


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I. EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST NOR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Mr. Hartmann's proposition of law that as an elected official of an Ohio county he is entitled to immunity under R.C. 2744.02 contradicts the plain language of the statute and this Court's established precedent. The General Assembly expressly distinguished between suits brought against political subdivisions and those brought against elected officials. While R.C. Chapter 2744 provides broad immunity to political subdivisions under R.C. 2744.02 and 2744.03(A)(1)-(5) and (7), an elected official such as Mr. Hartmann is limited to the immunity available under R.C. 2744.03(A)(6). The appellate court simply followed the plain language of the statute and this Court's precedent when it held that Mr. Hartmann was not entitled immunity under R.C. 2744.02.

Mr. Hartmann's alternative argument that Civ. R. 25(D) requires this Court to judicially expand R.C. 2744.02 to employees acting in their "official" capacity is equally meritless. It is well established that a statute prevails over a civil rule on a matter of substantive law such as immunity. Indeed, the Staff Notes to Civ. R. 25(D) expressly state that the rule "does not affect government immunity" and does not apply to this case.

Because the proposition of law is little other than a request for this Court to ignore the plain language of R.C. Chapter 2744 and immunize him from tort liability through pure judicial fiat, this Court should deny jurisdiction.

II. STATEMENT OF THE FACTS AND CASE

Appellee-Plaintiff Cynthia Lambert and at least 100 others became victims of identity theft after Hamilton County Clerk of Courts Greg Hartmann published traffic tickets containing their private identifying information – including names, addresses,

Social Security numbers, dates of birth, driver's license numbers, physical descriptions and signatures – on his public website. Mr. Hartmann had no legal duty to post the citations online. To the extent he voluntarily endeavored to do so, Ohio law required him to redact Social Security numbers from the citations prior to publicly disclosing them.¹ He did not. Instead, ignoring Ohio law and repeated warnings that his website was exposing individuals to grave risk of identity theft, Mr. Hartmann continued to provide unfettered online access to the unredacted tickets. Indeed, he provided identity thieves with all of the information they needed to incur over \$20,000 in fraudulent charges in Ms. Lambert's name.

On December 20, 2004, Ms. Lambert filed a motion for a temporary restraining order and claims under 42 U.S.C. 1983 and Ohio law against Mr. Hartmann and the Hamilton County Board of Commissioners in the United States District Court for the Southern District of Ohio. *See Cynthia M. Lambert v. Greg Hartmann, et al.*, Case No. 1:04-cv-00837. To avoid publicizing the existing risk, Ms. Lambert filed her lawsuit under seal. Two days later, after an in-chambers conference on the case, Mr. Hartmann publicly announced that he was temporarily suspending public access to his website after a sudden realization that it created privacy concerns.

On December 29, 2006, the district court dismissed Ms. Lambert's 1983 claim, finding that in the Sixth Circuit, a privacy violation that results purely in financial harm

¹ *See State ex rel. Mont. Cty. Public Def. v. Siroki*, 108 Ohio St.3d 207, 210, 842 N.E.2d 508 (2007) (“We have specifically held that public-records custodians should redact Social Security numbers from otherwise public records before disclosing them under R.C. 149.43.”); *citing State ex rel. Highlander v. Rudduck*, 103 Ohio St.3d 370, 374, 816 N.E.2d 213, (2004) and *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 53, 689 N.E.2d 25 (1998); *State ex rel. Beacon Journal v. Akron*, 70 Ohio St.3d 605, 610-611, 640 N.E.2d 164 (1994); *see also State ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365, 367, 725 N.E.2d 1114 (“To the extent that an item is not a public record and is ‘personal information,’ as defined in R.C. 1347.01(E), a public office ‘would be under an affirmative duty, pursuant to R.C. 1347.05(G), to prevent its disclosure”).

does not state a claim for relief because it does not implicate a fundamental liberty interest. *Id.*; citing *J.P. v. DeSanti* (6th Cir. 1981), 653 F.2d 1080.² The district court declined to exercise pendant jurisdiction over the remaining state law claims and dismissed them without prejudice. *Id.*

On January 25, 2007, Ms. Lambert refiled her state law claims in the Hamilton County Common Pleas Court. Specifically, she alleged statutory violations of R.C. 1347.10³ and common law claims of invasion of privacy and public nuisance against Greg Hartmann, Hamilton County Clerk of Courts.⁴ (Tr. R. 1). On April 13, 2007, Mr. Hartmann moved for judgment on the pleadings pursuant to Civ. R. 12(C). (Tr. R. 28). On August 2, 2007, the trial court granted Mr. Hartmann's motion without opinion. (Tr. R. 46).

Ms. Lambert filed a timely Notice of Appeal on August 23, 2007. (Tr. R. 46). On September 28, 2008, the First District reversed the trial court's decision. *Lambert v. Hartmann*, Hamilton Cty. App. No. C070600, 2008-Ohio-4905 at ¶31. The appellate court rejected Mr. Hartmann's argument that he was entitled to immunity under R.C. 2744.02, holding that "[2744.02] does not apply to elected officials or individual employees of a political subdivision." *Id.* at ¶11 (internal citations omitted).

² The Sixth Circuit is the **only** circuit in the country to require such a showing and is in conflict with every other circuit court that has considered the issue of informational privacy as well as the United States Supreme Court's holdings in *Whalen v. Roe* (1977), 429 U.S. 589, 97 S.Ct. 869 and *Nixon v. Adm'r of Gen. Svc.* (1977), 433 U.S. 465, 97 S.Ct. 2777. Ms. Lambert has petitioned the United States Supreme Court to resolve this conflict. *Lambert v. Hartmann*, U.S. Supreme Court Case No. 08-0500 (petition for certiorari currently pending).

³ Mr. Hartmann is not entitled to immunity on Ms. Lambert's R.C. 1347.10 claims as the statute expressly imposes liability upon an employee. See R.C. 2744.03(A)(6)(c).

⁴ Ms. Lambert named Greg Hartmann, Hamilton County Clerk of Courts, as the sole defendant in this case. (Tr. D. at 1). Notwithstanding, Mr. Hartmann argues that references in the body of Complaint to him as the "Clerk of Courts" should be treated as references to a different entity. (See Appellant's Memorandum in Support of Jurisdiction at 9-12). This argument is absurd. Whether the Complaint refers to him by his name or his title, it clearly identifies him as the defendant in this case.

III. ARGUMENT IN OPPOSITION TO JURISDICTION

APPELLANT'S PROPOSITION OF LAW: Immunity from suit pursuant to R.C. 2744.02 is available to elected officials sued in their official capacities.

A. R.C. 2744.02 does not apply to an elected official.

Mr. Hartmann's argument that for the purposes of tort immunity, a suit brought against him in his official capacity as Hamilton County Clerk of Courts "is, in fact, a complaint against a political subdivision" blatantly mischaracterizes R.C. Chapter 2744 in two ways. (See Appellant's Memorandum in Support of Jurisdiction (Nov. 12, 2008) at 6).

First, it incorrectly suggests that an elected official acting in his official capacity is the legal equivalent of a "political subdivision." That is not the case. R.C. 2744.01 plainly and unambiguously defines an elected or appointed official of a political subdivision as an "employee," not a "political subdivision." R.C. 2744.01(B); *compare with* R.C. 2744.01(F)(defining political subdivision). R.C. 2744.01(B) does not treat employees acting in their official capacity differently than those acting unofficially. R.C. 2744.03(A)(6)(a) does, however, excluding any employee who acts manifestly outside the scope of his employment from asserting an immunity defense.

Second, the proposition of law wrongly asserts that R.C. 2744.02 extends to employees. It plainly does not. R.C. 2744.02 – aptly entitled "Political subdivisions not liable for injury, death or loss; exceptions" – applies only to political subdivisions. It makes no mention of employees or elected officials. Indeed, only one provision of R.C. Chapter 2744 expressly confers immunity upon employees: R.C. 2744.03(A)(6). If the plain and unambiguous language of the statute leaves any doubt, this Court has repeatedly confirmed that employees of a political subdivision are not entitled to

immunity under R.C. 2744.02. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 865 N.E.2d 9, 2007-Ohio-1946 at ¶175; see also *O'Toole v. Denihan*, 118 Ohio St.3d 374, 889 N.E.2d 505, 2008-Ohio-2574 at ¶72; *Rankin v. Cuyahoga Cty. Dept. of Children and Family Svc.*, 118 Ohio St.3d 392, 889 N.E.2d 521, 2008-Ohio-2567 at ¶36.

The appellate court hardly “veer[ed] off course” as Mr. Hartmann contends. To the contrary, it simply followed the plain and unambiguous language of the statute and this Court’s explicit direction in holding that R.C. 2744.02 did not apply to him.⁶

B. Civ. R. 25(D) does not affect governmental immunity.

Mr. Hartmann alternatively argues – notably for the first time – that R.C. 2744.01(B)’s failure to distinguish between an elected official acting officially and unofficially “has the unintended consequent of vitiating Ohio R. Civ. R. 25(D)(sic).” (Appellant’s Memorandum in Support of Jurisdiction at 2). Mr. Hartmann suggests this Court should judicially expand R.C. 2744.02 to include elected officials acting in their official capacity so as to avoid conflict between R.C. Chapter 2744 and Civ. R. 25(D)’s provision governing the substitution of parties. Aside from being waived, Mr. Hartmann’s argument is unconstitutional.

⁵ Holding that “[f]or the individual employees of political subdivisions, the analysis of immunity differs. Instead of the three-tiered analysis described in *Colbert [v. Cleveland]*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781], R.C. 2744.03(A)(6) states that an employee is immune from liability unless the employee’s actions or omissions are manifestly outside the scope of employment or the employee’s official responsibilities, the employee’s acts or omissions were malicious, in bad faith, or wanton or reckless, or liability is expressly imposed upon the employee by a section of the Revised Code.”

⁶ Using a Civ. R. 12(C) analysis, the appellate court found that Ms. Lambert sufficiently pled facts that, if proven, could lead a reasonable jury to believe that Mr. Hartmann’s intentional publication of her personal information, including Social Security number, on his public website knowing that the website was being used by criminals to facilitate identity theft were reckless – and thus not subject to immunity under R.C. 2744.03(A)(6)(b). *Lambert* at ¶30. Mr. Hartmann has **not** sought this Court’s review on that aspect of the appellate court’s holding.

Article VI, Section 5(B) of the Ohio Constitution, the Modern Courts Amendment, states that procedural rules such as the Rules of Civil Procedure “shall not abridge, enlarge, or modify any substantive right.” Where a procedural rule conflicts with a statute, the statute controls for matters of substantive law. *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. The authors of Civ. R. 25(D) were clearly mindful of this, as the Staff Notes to Civ. R. 25(D) expressly state that “[t]he rule is procedural only” and “**does not affect governmental immunity.**” (emphasis added). Moreover, the notes provide that where, as here, an elected official can held “liable out of personal assets for wrongs committed in his official capacity,” Civ. R. 25(A) – not Civ. R. 25(D) – controls.

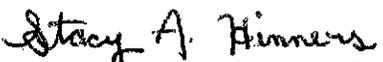
Simply put, Civ. R. 25(D) does not affect – and certainly cannot serve as a basis to expand through judicial fiat – immunity available to an elected official under R.C. Chapter 2744.

IV. CONCLUSION

There is no valid reason for this Court to consider the merits of a proposition of law that clearly has none. Mr. Hartmann’s proposition is contrary to both the plain language of R.C. Chapter 2744 and this Court’s precedent. Accordingly, Ms. Lambert respectfully requests the Court deny jurisdiction.

Respectfully submitted,

LAW OFFICE OF MARC MEZIBOV



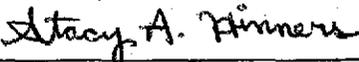
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CERTIFICATE OF SERVICE

A copy of the foregoing brief was served via electronic and regular U.S. mail to:
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Office, 230 E. Ninth St., Suite 4000, Cincinnati, OH 45202, on this 10th day of
December 2008.



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