

ORIGINAL

In the
Supreme Court of Ohio

RICHARD CORDRAY, OHIO ATTORNEY
GENERAL, et al.,

Plaintiff-Appellants,

v.

THE INTERNATIONAL PREPARATORY
SCHOOL, et al.,

Defendant-Appellees.

Case No. **09-1418**

On Appeal from the
Cuyahoga County Court of Appeals,
Eighth Appellate District

Court of Appeals Case
No. 91912

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS RICHARD
CORDRAY AND THE OHIO DEPARTMENT OF EDUCATION**

BRETT E. HORTON (0064180)
Horton & Horton Co., L.P.A.
1410 Tower at Erieview
1301 East Ninth Street
Cleveland, OH 44114-1817
216-696-2022

Counsel for Appellees
The International Preparatory School, et al.

RICHARD A. CORDRAY (0038034)
Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*
TODD R. MARTI (0019280)
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, OH 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Appellants
Richard Cordray and the Ohio Department
of Education

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INTRODUCTION

This case warrants review because the Court of Appeals has eliminated one of the most effective tools for policing the millions of taxpayer dollars flowing into Ohio's community schools: the ability to hold community school treasurers strictly liable for the public money entrusted to them. Community schools—commonly referred to as charter schools—are, by statute, public schools. R.C. 3314.01(B). And as officials of public schools, community-school treasurers are “public officials . . . liable for all public money received or collected by them.” R.C. 9.39, see R.C. 9.38(1), R.C. 117.01(E). Yet the Eighth District, entirely ignoring the applicable statutory standards, held that community-school treasurers are not “public officials” and therefore cannot be held to the same standard of strict liability that attaches to other public officials. Not only is the court's holding refuted by the statute's plain meaning, but it is also contrary both to established precedent and to the public interest.

Without this Court's review, the Eighth District's decision risks community-school accountability and taxpayer money. Each year, the State disperses hundreds of millions of tax dollars to community schools. Many of those schools have problems managing those funds. And while the combination of large amounts of public funds and chronic mismanagement counsels in favor of strong accountability, the Eighth District's decision removed the State's strongest accountability measure—personal, and strict, liability for school treasurers. Moreover, the decision hinders recovery of misappropriated funds. Because many troubled community schools leave their records in disarray, imposing strict liability is the only way to ensure recovery of state funds.

In addition, the Eighth District's erroneous definition of “public official” has potentially far-reaching effects beyond the realm of community schools. Without even mentioning the broad statutory definition of public officials that are strictly liable for public funds, the court

adopted a narrow definition of “public official” that is wholly unsupported by statute. If the court’s decision is allowed to stand, a variety of public officers, employees, and agents—whom the General Assembly has chosen to hold accountable for state money—may escape strict liability by arguing that they do not fall under the Eighth District’s novel definition of “public official.”

STATEMENT OF THE CASE AND FACTS

A. **Hasina Shabazz was treasurer of TIPS, a community school that imploded.**

This case arises from the ruins of The International Preparatory School (“TIPS”), a community school. *Cordray v. The Int’l Preparatory Sch.* (8th Dist.), 2009-Ohio-2364, ¶ 1 (“TIPS”). Community schools are “public school[s]” and “part of the state’s program of education.” R.C. 3314.01(B), formed as either nonprofit corporations or public-benefit corporations. R.C. 3314.03(A)(1). The schools are privately operated, but receive their funding from the State. R.C. 3314.08(D). They cannot charge tuition. R.C. 3314.08(I). Ohio law entitles community schools to a set amount of public money per pupil, which is diverted from the school district in which each student resides to the community school the student attends. R.C. 3314.08, see also *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512, ¶ 52. The amount of funding a community school receives is based on the number of students the community school reports to the Ohio Department of Education. See *Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.* (1st Dist.), 176 Ohio App. 3d 157, 2008-Ohio-1434, ¶ 7.

TIPS was established by Hasina Shabazz (“Shabazz”) and her husband. They each played key roles in TIPS’s management, with Shabazz serving as treasurer. *TIPS*, 2009-Ohio-2364 at ¶ 6. TIPS fared poorly under their leadership, closing abruptly in October 2005. See *id.* at ¶¶ 2, 4.

B. TIPS overstated its enrollment figures, receiving more funding than it was due, and the Auditor of State issued a Finding for Recovery to collect the overpaid public money.

Several days after TIPS closed, the Ohio Attorney General and the Ohio Department of Education (collectively, “State”) filed a complaint seeking a receiver to secure and marshal TIPS’s assets. *Id.* at ¶ 2. Sometime later, the Auditor of State (“Auditor”) completed an audit of TIPS, uncovering multiple instances of financial mismanagement. See *id.* at ¶ 4. Among the problems, the Auditor found that TIPS overstated its enrollment, resulting in a greater number of per-pupil disbursements, and causing the school to receive in excess of \$1.4 million more than it was due. *Id.* Because TIPS was not entitled to these funds, the Auditor issued a Finding for Recovery against Shabazz, jointly and severally with TIPS and the estate of her husband, in the amount of \$1,407,983. *Id.* at ¶ 5.

At the trial court, the State sought to reduce the Auditor’s finding to judgment, amending the original complaint to name Shabazz, the estate of her husband, and TIPS as defendants (collectively, “Defendants”). *Id.* at ¶ 6. Both sides moved for summary judgment. The State maintained that, under R.C. 117.36, the Findings for Recovery provided “prima facie evidence” of the validity of the claims against the Defendants. *Id.* at ¶ 7. The Defendants did not contest the accuracy of the audit. *Id.* Shabazz asserted that, as an officer of a nonprofit corporation, she could not be held personally liable for TIPS’s debts. In support, Shabazz cited statutes that relieve officers from liability on a corporation’s obligations, R.C. 1702.55(A), and on contracts entered into by community schools, R.C. 3314.071.

The trial court granted summary judgment to the State, holding that the Findings for Recovery were prima facie evidence of the truth of the allegations and that the Defendants had failed to present any rebuttal evidence. Rejecting Shabazz’s arguments, the court held that R.C. 1702.55(A) did not insulate her from personal liability because the claim for recovery was based

on personal, not corporate, obligations, and that R.C. 3314.071 only provided Shabazz protection from contractual claims, not claims for recovery of funds.

C. The Eighth District reversed, holding that Shabazz was not a “public official” and therefore could not be strictly liable for the findings against her.

On appeal, Shabazz argued that she was not liable for TIPS’s debts because there was no evidence that she committed any personal wrongdoing that resulted in the overpayments. The State argued that it was not necessary to demonstrate that Shabazz was personally involved with the overpayments to obtain a judgment against her, because she was a public official strictly “liable for all public money received or collected by [her] or by [her] subordinates.” R.C. 9.39.

The Eighth District reversed, holding that Shabazz was not a public official and therefore could not be held strictly liable. Rather than apply or even address the relevant definition of “public official” found in R.C. 117.01(E) and R.C. 9.38(1), the court devised a narrow, dictionary-based definition that Shabazz’s role as treasurer did not satisfy. *TIPS*, 2009-Ohio-2634 at ¶¶ 31-35. According to the court, then, summary judgment was not appropriate because Shabazz could only be liable if there was evidence of personal wrongdoing sufficient to pierce the corporate veil, and genuine issues of material fact existed as to whether Shabazz “actively . . . facilitated the [misappropriations.]” *Id.* at ¶ 50.

The State moved for reconsideration as to Shabazz, pointing out that Shabazz fell under the definition of public official in R.C. 117.01(E) and R.C. 9.38(1), which made her strictly liable under R.C. 9.39 for the public money she received. The Eighth District denied reconsideration on June 25, 2009.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

A. The Eighth District’s decision undermines a clear statutory directive to hold all public officials—community-school treasurers included—strictly liable for the public funds entrusted to their care.

This Court has long held that the liability for public officials entrusted with public funds “is absolute.” *Eshelby v. Bd. of Educ.* (1902), 66 Ohio St. 71, 73. R.C. 9.39 codifies this common-law rule by making “all public officials . . . liable for all public money received or collected.” The State does not need to show negligence or wrongdoing to obtain recovery. *Seward v. Nat’l Surety Co.* (1929), 120 Ohio St. 47, syll. ¶ 2.

Strong policy reasons support the imposition of strict liability. Given that public officials are the legal custodians of state money, “plac[ing] final responsibility for public funds on the shoulders of the officials charged with the collection and care of such funds” “prevent[s] frauds against the public” and “protect[s] public funds.” *State ex rel. Vill. of Linndale v. Masten* (1985), 18 Ohio St. 3d 228, 229.

R.C. 117.01(E) defines “public official” broadly to include “any officer, employee, or duly authorized representative or agent of a public office.” (“Public office” is defined just as expansively to mean “any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” R.C. 117.01(D).) And under the statute, any person within this definition of public official is held strictly liable for state funds. R.C. 9.39.

The Eighth District ignored this broad imposition of strict liability when it held that community-school treasurers, who are officers of *public* schools, R.C. 3314.01(B), are not public officials. By manufacturing its own definition of “public official”—far narrower than what the General Assembly codified—the Eighth District relieved community-school treasurers from the strict liability that attaches to all other public officials. The decision creates unsustainable

incongruity; in all other respects, community-school treasurers are indistinguishable from public officials. They have legal authority and control over state funds. R.C. 3314.011. They are subject to the same training and licensing requirements as school-district treasurers. R.C. 3301.074. And most important, they—like other public officials entrusted with state money—execute a bond payable to the State, conditioned on the faithful performance of their duties. R.C. 3314.011, O.A.C. 117-6-07(B). Had the General Assembly not intended to subject community-school treasurers to the same liability that attaches to all other public officials, it would not have expressly contemplated that community-school treasurers post a bond as surety for the public funds in their care.

The Eighth District's decision undermines the General Assembly's choice to impose strict liability on all public officials and trenches on the public's interest in maintaining strong accountability for the custodians of public funds. This Court should accept jurisdiction to correct the Eighth District's error.

B. The Eighth District's decision eliminates an important mechanism for policing community schools, institutions for which strong accountability is particularly important.

Not only did the Eighth District misinterpret the applicable statutes, but it did so with respect to a class of officials for which strong accountability measures are especially important. Community schools are entrusted with a tremendous amount of public money. During the 2007-2008 school year alone, they collectively received more than a half-billion dollars in state funding. *2007-2008 Annual Report on Ohio Community Schools*, table 1, available at <http://www.ode.state.oh.us/GD/DocumentManagement/DocumentDownload.aspx?DocumentID=61106>.

Many community schools have had chronic problems managing this significant public investment. In 2003, a legislative report found that many community schools lack adequate

financial controls and that almost all of the schools examined “had serious financial problems.” *Community Schools in Ohio: Final Report on Student Performance, Parent Satisfaction, and Accountability*, Legislative Office of Education Oversight, 48. For some schools, these problems are persistent. Former Auditor Betty Montgomery stated in 2005 that “the same audit findings are often made year after year.” See *Montgomery Asks Lawmakers to Regulate Charter Schools*, Columbus Dispatch, Dec. 6, 2005, at 03D. Indeed, TIPS itself has proven emblematic of community-school financial mismanagement. The media reported extensively on the findings that underlie this case, the controversy surrounding TIPS’s closure, and the school’s various management problems. See, e.g., *Fiscal Foolery at Charter Schools*, Plain Dealer, Mar. 4, 2007, at M2; *A Blow to Charter Schools*, Toledo Blade, Oct. 24, 2005, at A8; Scott Stephens, *Petro Wants Charter School Closed; State Trying to Collect Debts*, Plain Dealer, Oct. 21, 2005, at B1.

Financial mismanagement in community schools imposes significant costs on the public. The Auditor has found that scores of persons, companies, and other entities have been involved in the misapplication of community school funds. *Findings for Recovery Database (“Database”)*, available at <http://www.auditor.state.oh.us/onlineservices/ffr/Data/UnresolvedFindings.csv>. Community schools historically have had greater problems with this than other public entities; findings related to those schools occupy a disproportionate number of places in the list of the largest uncollected findings concerning *all* public entities of *any* type. See *id.* (findings related to Cleveland Academy of Math, Science & Technology, TIPS, Harmony Community School, Greater Achievement Community School, W.E.B. Dubois Academy, Imani Institute Leadership School, High Life Youth Community School.)

And the Findings for Recovery that the Auditor has issued are not in themselves a complete picture of the financial problems. Some schools’ financial records are not in an adequate

condition to undergo an audit to determine whether public money has been properly expended. Community schools constitute almost half of the public entities on the Auditor's most recent "unauditable list." *Unauditable List as of 07-06-09*, available at <http://www.auditor.state.oh.us/Publications/Issues/UnauditableList.pdf>.

Given both the large amount of money at issue and the history of financial mismanagement, the need to hold community-school officials accountable for public funds is particularly important. But the Eighth District has added an additional obstacle to recovering misappropriated funds by requiring the State to prove that a treasurer committed personal wrongdoing—a burden wholly unsupported by statute or case law.

In some cases, this burden may result in a complete bar to recovery. As shown by the number of community schools on the "unauditable" list, some community schools do not follow adequate record-keeping processes. The disarray of a school's records, then, could make it nearly impossible to establish particular instances of personal wrongdoing sufficient to "pierce the corporate veil." Indeed, requiring proof of personal wrongdoing could actually reward poor financial management: community-school treasurers—now exempt from strict liability—could escape personal liability because their poorly kept records do not reveal who mismanaged the funds. The Eighth District's new, more difficult burden to obtain judgment against community-school treasurers upends the General Assembly's decision to hold public officials accountable regardless of personal negligence or wrongdoing. This Court should accept jurisdiction to restore the law to what the General Assembly intended.

Further amplifying the problematic effects of the decision below, the Eighth District has removed strict liability in a county where the need for accountability in community schools is most acute. Cuyahoga County is home to some of the community schools with the greatest

financial problems. Of Ohio's 88 counties, Cuyahoga County has the largest number of unresolved Findings for Recovery against community schools, and these findings are among the largest in the State in terms of dollar amounts. See *Database, supra* p. 7 (findings against the Cleveland Academy of Math, Science & Technology total \$2,913,215; findings against the Greater Achievement Community School total \$1,757,043). Should legal action be necessary to recover unresolved findings in Cuyahoga County, the decision below will be binding precedent that hinders recovery of this large amount of state money.

C. The Eighth District's erroneous and restrictive definition of "public official" could affect the State's ability to hold a variety of public officers, agents, or employees accountable for their management of state money.

In addition to the difficulty that the Eighth District's decision will pose to policing community schools, the decision will potentially eliminate strict liability for a large number of public officials. Under the statute, "*any* officer, employee, or duly authorized representative or agent of a public office" is a public official subject to strict liability. R.C. 117.01(E) (emphasis added), see also R.C. 9.38(1), R.C. 9.39. But rather than adhere to—or, for that matter, even mention—the broad statutory definition of public officials that are strictly liable for public funds, the Eighth District adopted a narrow, overly restrictive definition. *TIPS*, 2009-Ohio-2364 at ¶ 33. Referencing two different dictionaries, the Eighth District found that public officials must be "issued a commission," "tak[e] [a] required oath," serve "for a fixed tenure," "exercise[] . . . some of the attributes of sovereign he or she serves for the benefit of public," or be "legally elected or appointed to office." *Id.* at ¶ 34. This substantially complicates the General Assembly's all-encompassing definition. If this Court allows the Eighth District's decision to stand, a variety of public officers, employees, and agents that the General Assembly has chosen to hold accountable for state money may escape liability by arguing that they do not fall under the Eighth District's narrow definition of "public official."

Ohio Attorney General's Proposition of Law:

Treasurers of community schools are “public officials” that are strictly liable for all public money received or collected by them during their time in office.

The Eighth District's decision should be reversed. The court ignored the applicable statutory definition of “public official,” opting instead to manufacture its own, dictionary-based definition. Applying its erroneous definition, the court held that, because community school treasurers were not public officials, they could not be strictly liable under R.C. 9.39 for the public money they receive. The court's decision undermines the broad statutory definition of “public official,” thereby eliminating the state's ability to hold community school treasurers strictly liable for the large amounts of public funding they receive.

A. “Public officials” are strictly liable for all funds received by their public offices.

Under statute and common law, public officials are strictly liable for the public funds their offices receive. R.C. 9.39 provides that “[a]ll public officials are liable for all public money received or collected by them or by their subordinates under color of office.” The statute codifies the longstanding common-law practice of “hold[ing] the public official accountable for the moneys that come into his hands.” *Seward*, 120 Ohio St. at 49. When public funds are due, those funds “must be accounted for and paid over” by the public official entrusted with that money, and the official cannot be relieved of liability by claiming to be “without fault or negligence.” *Id.* at 50 and syll. ¶ 2. Nor are public officials excused by claiming that someone else's wrongdoing caused the misappropriation. *Id.* “The decisions to this effect are . . . uniform and . . . numerous.” *Id.* at 50.

B. Treasurers of community schools are public officials subject to strict liability for public funds entrusted to them.

The fact that community school treasurers are public officials subject to that strict liability is established by both statutory and case law.

1. Community school treasurers fit within the statutory definition of “public official.”

Community school treasurers fall squarely within the Revised Code’s definition of a “public official” subject to strict liability. That liability arises under R.C. 9.39, and R.C. 9.38(1) states that “[a]s used in ... section 9.39 of the Revised Code ‘public office,’ and ‘public official’ have the same meanings as in section 117.01.” R.C. 117.01 in turn defines a “public official” as “any officer, employee, or duly authorized representative or agent of a public office,” R.C. 117.01(E), and a “public office” as “any ... political subdivision. ... established by the laws of this state for the exercise of any function of government.” R.C. 117.01(D)

Based on these definitions, Shabazz is a public official if (1) TIPS was a “political subdivision”; and (2) Shabazz was an “officer,” “authorized representative,” or “agent” of the school. Both conditions are satisfied.

TIPS was clearly a political subdivision. Ohio law expressly identifies community schools as political subdivisions in the subdivision immunity and collective bargaining statutes. R.C. 2744.01(F); 4117.01(B). This Court has treated community schools as political subdivisions for purposes of Ohio’s Constitution. *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512, ¶¶ 69-72. The federal courts likewise have treated community schools as subdivisions for federal constitutional purposes. *Greater Heights Acad. v. Zelman* (6th Cir. 2008), 522 F.3d 678, 680. Further, R.C. 3314.01(B) establishes that community schools are part of the State’s program of education, and education is a governmental function. *Doe v. Marlinton Local Sch. Dist. Bd. of Educ.*, 122 Ohio St. 3d 12, 2009-Ohio-1360, ¶ 11. TIPS was indisputably a political subdivision and hence a public office within the meaning of R.C. 117.01.

Mrs. Shabazz was just as indisputably an “officer,” “authorized representative,” and “agent” of TIPS. She was TIPS’s treasurer, and a treasurer serves in all of those capacities. By plain statutory terms, then, Shabazz falls under the definition of public official, making her strictly liable under R.C. 9.39.

2. Public treasurers are subject to strict common law liability—because of their status as public officials.

The decision below is also at odds with the cases. Ohio has always held that treasurers of public entities are subject to strict liability.

This Court has consistently held that public treasurers are—by virtue of their very offices—subject to strict liability. That principle was first established in *State use of Wyandot County v. Harper* (1856), 6 Ohio St. 607, a case involving a county treasurer. It held that “[b]y accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law,” that he “voluntarily takes upon himself the risks incident to the office,” and that such an official “is, in effect, an insurance against ... the faults and wrongs of others[.]” *Id.* at 610 (emphasis added). *Eshelby v. Board of Education* (1902), 66 Ohio St. 71, 73, noted, in a case involving a public school treasurer, that it is “quite clear that the liability of the treasurer is absolute.” *State v. Herbert* (1976), 49 Ohio St. 2d 88, 97, held the State Treasurer was, by virtue of his status as a public official, strictly liable.

Ohio’s lower courts have adhered to that rule. *State ex rel. Bolsinger v. Swing* (1st Dist. 1936), 54 Ohio App. 251, 258 held that “the law of Ohio imposed upon officers intrusted with public funds the liability of insurers of the safety of such funds,” that it “accept[s] no excuse for their loss,” and that “[t]he fact that the treasurer was without fault was no defense.” More recently, *State v. Gaul* (8th Dist. 1997), 117 Ohio App. 3d 839, noted that the “well-settled rule in Ohio that a public official is liable for the loss of public moneys, even though illegal or

otherwise blameworthy acts on his part were not the proximate cause of the loss of public moneys,” made a public treasurer strictly liable by virtue of his status as treasurer. *Id.* at 851 (quoting 1994 Ohio Atty. Op. No. 94-048, at 494).

It is undisputed that Mrs. Shabazz was the treasurer of a public entity. She was TIPS’s treasurer, TIPS was a community schools, and such schools are “public school[s]” under R.C. 3314.01(B). The Court of Appeals therefore erred when it exempted her from the long settled rule of strict liability.

C. Because the strict liability that attaches to public officials under R.C. 9.39 is a personal obligation, laws that shield corporate officers from corporate liability are inapplicable.

After finding that community-school treasurers were not public officials, the Eighth District turned to R.C. 1702.55(A)—which states that “the officers of a corporation shall not be personally liable for any obligation of the corporation”—to bolster its conclusion that community-school treasurers could not be held strictly liable for public funds. The court’s reliance on this corporate governance statute is misplaced. As reasoned by the Eighth District, Shabazz was an officer of a non-profit corporation, and as such, she could not be liable for the corporation’s debts. But the strict liability that attaches to community-school treasurers is a personal, not corporate, obligation. See *State v. Herbert* (1976), 49 Ohio St. 2d 88, 97.

As a community-school treasurer, Shabazz assumed a position of trust, and she “assume[d] upon [her]self the duty of receiving and safely keeping the public money.” *State, for the Use of Wyandot County v. Harper* (1856), 6 Ohio St. 607, 610. Because of Shabazz’s statutory duties, the obligation the State seeks to enforce, then, is distinct from the corporation’s debts. Thus, contrary to the Eighth District’s decision, R.C. 1702.55’s protection of corporate officers from corporate liability poses no bar to strict, personal recovery against officers under R.C. 9.39.

CONCLUSION

For these reasons, this Court should accept jurisdiction and correct the Eighth District's error.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General



BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*
TODD R. MARTI (0019280)
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, OH 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

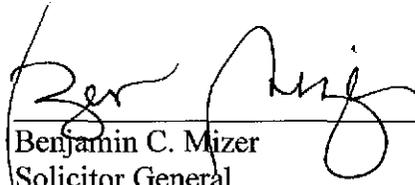
Counsel for Appellants
Richard Cordray and the Ohio Department
of Education

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellants Richard Cordray and the Ohio Department of Education was served by U.S. mail this 6th day of August, 2009, upon the following counsel:

Brett E. Horton
Horton & Horton Co., L.P.A.
1410 Tower at Erieview
1301 East Ninth Street
Cleveland, Ohio 44114-1817

Counsel for Appellees
The International Preparatory School, et al.



Benjamin C. Mizer
Solicitor General

EXHIBIT 1

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91912

**RICHARD CORDRAY,
OHIO ATTORNEY GENERAL, ET AL.**

PLAINTIFFS-APPELLEES

vs.

**THE INTERNATIONAL
PREPARATORY SCHOOL, ET AL.**

DEFENDANTS

Appeal by:

ESTATE OF DA'UD MALIK SHABAZZ, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED IN PART; REVERSED
IN PART AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-575404

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED: May 21, 2009

JOURNALIZED: JUN 25 2009

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JAMES J. SWEENEY, J.:

Defendants-appellants, Estate of Da'ud Abdul Malik Shabazz ("Da'ud") and Hasina Shabazz ("Hasina"),¹ appeal from the trial court's decision that granted plaintiffs-appellees, the Ohio Attorney General² ("OAG") and the Ohio Department of Education's ("ODE"), motion for summary judgment and held the defendants personally liable in the amount of \$1,407,983 plus interest, for overpayments made to The International Preparatory School ("TIPS"), an Ohio non-profit corporation organized under Chapter 1702 of the Ohio Revised Code. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

The undisputed facts of this case include that TIPS was an Ohio non-profit corporation, which operated as a community school under Chapter 3314 of the Ohio Revised Code until it closed in October 2005. TIPS entered into a Community School Contract with its state-approved sponsor, Lucas County Educational Service Center ("LCESC"). The OAG petitioned the trial court for a temporary restraining order along with its verified complaint against TIPS on October 20, 2005. In the verified complaint, OAG averred that "TIPS' directors

¹Collectively referred to herein as "defendants."

²The original caption of this case was "*Marc Dann, Ohio Attorney General, et al. v. The International Preparatory School, et al.* In accordance with App.R. 29(C), the court substitutes Richard Cordray, the present Attorney General, for Marc Dann.

passed a resolution on October 17, 2005 terminating its contract with LCESC, thereby terminating its status as a community school.” (Verified Complaint at ¶7.) OAG further averred that “R.C. 3314.072(C) provides that assets of a defunct and insolvent community school should be distributed pursuant to R.C. chapter 1702.” Id. at ¶10.

The trial court appointed a receiver in January 2006 to oversee the closure and distribution of the assets pursuant to R.C. 3314.074 and Chapter 1702. Sometime later, the Auditor of the State of Ohio (“AOS”) completed an audit of TIPS. Relevant to this appeal, the AOS audit issued a “Finding of Recovery” as follows:

“The School permanently closed and ceased its operation as a community school in October 2005. Between July 1, 2004 and October 18, 2005, the School was over funded by the Ohio Department of Education in the amount of \$1,407,983, which was deposited into the School’s account. The Ohio Department of Education calculated the amount overpaid for the year end[ing] June 30, 2005 was \$361,446 and for the year end[ing] June 30, 2006 was \$1,046,537. Since the School was not eligible for these funds, the funds were due the Ohio Department of Education and should have been returned.

“In accordance with the foregoing facts, and pursuant to Ohio Rev. Code Section 117.28, a Finding for Recovery for public funds due the State that has

not been remitted is hereby issued against The International Preparatory School, Hasina Shabazz, Treasurer and the Estate of Da'ud Abdul Malik, Chairman of the Board of Trustees, jointly and severally, and in favor of the Ohio Department of Education in the amount of \$1,407.983." (R. 129, Ex. A.)

After receiving the AOS audit, the OAG requested and was granted leave to file an amended complaint, which added the Shabazzes as party defendants. The amended complaint identifies Da'ud as the chairman of the governing authority for TIPS and Hasina as the treasurer for TIPS. The OAG based its claims against the defendants upon the above-quoted finding for recovery made in the AOS audit. Neither the amended complaint nor the AOS audit make any specific allegations of any wrongdoing by either Da'ud or Hasina with regard to the over funding received by TIPS from ODE.³ The defendants answered the amended complaint and asserted it failed to state a claim upon which relief could be granted against them individually.

Both parties moved for summary judgment. OAG moved for judgment maintaining the AOS's finding of recovery provided "prima facie evidence" pursuant to R.C. 117.36 of the validity of their claims under R.C. 117.28 against

³We note the AOS audit did flag a potential abuse by these individuals with regard to lease payments made by TIPS to a corporation affiliated with the defendants, which payments over a three-year period exceeded the value of the property. However, the finding for recovery at issue did not pertain to those payments.

the defendants and TIPS. TIPS did not respond. The defendants invoked the principle that shareholders, officers, and directors of a corporation are generally not liable for the debts of the corporation and that provisions of R.C. 3314.071 precluded recovery against them individually.

OAG asserted that "defendants overstated enrollment in FY2005 and FY2006 and received funds that they were not entitled to." In response, Hasina submitted an affidavit where she averred, among other things, that "the corporate officers/school administrators managed the day-to-day operations of The International Preparatory School" and that she and Da'ud were board members. In reply to the OAG opposition, the defendants submitted an affidavit of Patricia Ali, who averred to having personal knowledge of the fact that "The International Preparatory School hired employees whose duties included the monitoring of student enrollment, and the preparation and submission of monthly attendance reports."

The trial court denied the defendants' motion for summary judgment and granted the OAG's motion for summary judgment. The defendants now appeal, assigning three errors for our review. Because all of the defendants' assignments of error essentially challenge the trial court's decision which awarded summary judgment to OAG, they will be addressed together for ease of discussion.

"I. The trial court erred as a matter of law in concluding that the factual information contained in the report of a regular audit of The International Preparatory School for the period of July 1, 2004, through October 18, 2005, issued by the auditor of the State of Ohio on or about January 30, 2007, supported the finding of personal liability against the appellants, Estate of Da'ud Abdul Malik Shabazz and Hasina Shabazz.

"II. The trial court erred as a matter of law in concluding that R.C. §1702.55 does not shield the appellants, Estate of Da'ud Abdul Malik Shabazz and Hasina Shabazz, from personal liability for funds paid to The International Preparatory School, a non-profit corporation.

"III. The trial court erred as a matter of law in concluding that R.C. §3314.071 did not shield the appellants, Estate of Da'ud Abdul Malik Shabazz and Hasina Shabazz, from personal liability for funds paid to The International Preparatory School."

No one is challenging that portion of the summary judgment order which held TIPS liable to OAG and, therefore, we do not address it herein. The sole focus in this appeal is whether the trial court properly determined by summary judgment that certain select individual officers or directors of TIPS, an Ohio non-profit organization, were personally and strictly liable for ODE's payment of a certain amount of funding to it when TIPS was "not eligible for these funds."

An appellate court reviews a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. De novo review means that this Court uses the same standard that the trial court should have used, and we examine the evidence to determine if, as a matter of law, no genuine issues exist for trial. *Brewer v. Cleveland City Schools* (1997), 122 Ohio App.3d 378, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

We afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.

Summary judgment is appropriate where it appears that: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

The burden is on the movant to show that no genuine issue of material fact exists. *Id.* Conclusory assertions that the nonmovant has no evidence to prove its case are insufficient; the movant must specifically point to evidence contained within the pleadings, depositions, answers to interrogatories, written

admissions, affidavits, etc., which affirmatively demonstrate that the nonmovant has no evidence to support his claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107; Civ.R. 56(C).

Action to Recover Public Money - R.C. 117.28

OAG, through its amended complaint, sought to hold the defendants personally liable pursuant to R.C. 117.28 for overpayments the ODE made to TIPS. That statute provides in relevant part:

“Where an audit report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money is due has not been collected, or that any public property has been converted or misappropriated,***

“The auditor of the state shall notify the attorney general in writing of every audit report which sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money is due has not been collected, or that any public property has been converted or misappropriated and the date the report was filed.

“*** The attorney general or his assistant may appear in any such action on behalf of the public office and may, either or in conjunction with or independent of the officer receiving the report, prosecute an action to final determination ***.”

R.C. 117.36 provides that “[a] certified copy of any portion of the report containing factual information is prima-facie evidence in determining the truth of the allegations of the petition.”

“[I]n an action to recover funds, the single and crucial inquiry is whether those who obtained such funds were legally entitled to receive them.” *State v. Hale* (1991), 60 Ohio St.3d 62. According to the AOS audit, the subject funds were “deposited into the School’s account.”

As stated, the OAG averred that the AOS audit reported a finding of recovery that summarily concluded that the defendants were jointly and severally liable for TIPS receiving payments for which it was “not eligible.”

R.C. 3314.071

The individual defendants maintain that the trial court erred by not applying the provisions of R.C. 3114.071, which provides:

“Any contract entered into by the governing authority or any officer or director of a community school, including the contract required by sections 3314.02 and 3314.03 of the Revised Code, is deemed to be entered into by such individuals in their official capacities as representatives of the community school. No officer, director, or member of the governing authority of a community school incurs any personal liability by virtue of entering into any contract on behalf of the school.”

The trial court correctly found that this matter does not involve a breach of contract nor does it seek to hold the defendants personally liable for any contract that they entered in their official capacities as representatives of the community school. Therefore, the protections of R.C. 3314.071 do not apply to this recovery action commenced under R.C. 117.28.

Assignment of Error III lacks merit and is overruled.

Personal Liability of Corporate Officers Operating Community Schools.

The gravamen of the dispute among these parties is whether the defendants are afforded the protections of incorporating under R.C. Chapter 1702 or whether they are strictly liable as “public officials” for the payments of “public funds” to a community school.

None of the cases cited by the parties are directly on point nor could we locate any case in Ohio jurisprudence that held officers, directors, or shareholders of an Ohio non-profit corporation that operated as a community school personally liable as a matter of law pursuant to R.C. 117.28.

OAG in its brief and at oral argument advocated that the defendants be held personally and strictly liable upon the theory that they were “public officials” who received public money. OAG relies heavily on the precedent of *Seward v. Natl. Surety Co.* (1929), 120 Ohio St. 47. *Seward* held a postmaster

liable for public money stolen by a party connected with the post office management. *Seward* did not involve or address the personal liability of an officer, director, or shareholder of an Ohio corporation for the corporation's improper receipt of public funds.

Public Officials

Primarily, in maintaining that the defendants were public officials, OAG erroneously relies upon the definition of "public official" contained in R.C. 2921.01(A), which provides:

"As used in sections 2921.01 to 2921.45 of the Revised Code:

"(A) 'Public official' means any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement officers." (Emphasis added.)

The statutory definition supplied by R.C. 2921.01(A) is explicitly limited "as [the term] is used in sections 2921.01 to 2921.45," which concerns criminal offenses against justice and public administration in general. OAG brings this claim pursuant to R.C. 117.28.⁴

⁴OAG also cites to R.C. 9.39 pertaining to liability of public officials for public monies received; however, that statute does not define "public officials."

Without a statutory definition we must give the terms their ordinary meaning. See *Washington Cty. Home v. Ohio Dept. of Health*, 178 Ohio App.3d 78, 2008-Ohio-4342, at ¶36. In *Washington*, the court reasoned:

“To determine the plain meaning of ‘public official,’ we look to the ordinary use of that term. Blacks Law Dictionary, Sixth Edition, 1990, defines ‘public official’ as: ‘A person who, upon being issued a commission, taking required oath, enters upon, for a fixed tenure, a position called an office where he or she exercises in his or her right some of the attributes of sovereign he or she serves for the benefit of public. The holder of a public office though not all persons in public employment are public officials, because public official's position requires the exercise of some portion of the sovereign power, whether great or small.’ See *State ex rel. Sperry v. Licking Metro. Hous. Auth.* (Sept. 18, 1995), Licking App. No. 95CA52, 1995 Ohio App. LEXIS 4683. Merriam-Webster's Collegiate Dictionary, Tenth Edition, 1993, defines ‘public officer’ as: ‘A person who has been legally elected or appointed to office and who exercises governmental functions.’ See *id.*”

There is no evidence in the record to find that the defendants were “public officials” within the ordinary meaning of that term. Therefore, the case law relied upon by the OAG, which requires public officials to be held strictly and personally liable for public monies is not dispositive here. See *Seward*, *supra*.

Secondly, the Ohio law governing community schools, mandated that TIPS be established as a nonprofit corporation under Chapter 1702 of the Revised Code.⁵ R.C. 3314.03(A)(1). As such, the provisions of R.C. 1702.55, that its members, directors, and officers “shall not be personally liable for any obligation of the corporation,” would apply.

The law does not support the OAG’s argument that individuals of community schools, that are required by law to be corporate entities under R.C. chapter 1702, be deemed “public officials” who are personally and strictly liable for the corporations improper receipt of public funds.

Personal Liability of Corporate Shareholders, Officers, and Directors

The Ohio Supreme Court has held that “[t]he principle that shareholders, officers, and directors of a corporation are generally not liable for the debts of the corporation is ingrained in Ohio law.” *Dombroski v. Wellpoint, Inc.*, 119 Ohio St.3d 506, 510, 2008-Ohio-4827, citing Section 3, Article XIII, Ohio Constitution; *Belvedere Condominium Unit Owners’ Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274 [other citation omitted]. From this rule, the Ohio Supreme Court carved an exception by creating a claim whereby the corporate veil may be

⁵There is no dispute that TIPS was organized under R.C. Chapter 1702. See Verified Amended Complaint at ¶4.

“pierced” and the individuals held personally liable. See *Belvedere*, supra, as modified by *Dombroski*, supra.⁶

The OAG's complaint incorporated the findings of the certified AOS audit report, which made generalized factual findings and a legal conclusion that the individual defendants were jointly and severally liable. In the trial court, the individual defendants made specific denials in their complaint, asserted that the complaint failed to state a claim against them, and also asserted that they could not be held personally liable without establishing a basis to pierce the corporate veil throughout the summary judgment proceedings in the court below. Therefore, this issue was not waived.⁷

Additionally, directors of a nonprofit corporation are charged with the responsibility of carrying out a public purpose. R.C. 1702.30(B) establishes the standard of care of directors in carrying out such public purposes and provides that a director shall “perform his duties as a director *** in good faith, in a

⁶In *Dombroski*, the Ohio Supreme Court modified (by expanding) the second prong of a corporate veil piercing claim so that a plaintiff had to demonstrate that a defendant shareholder exercised control over a corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act.

⁷Case law lends support to the conclusion that the complaint must allege acts sufficient to qualify as an exception to the rule of law. See, e.g., *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, at ¶31; accord *Knotts v. McElroy*, Cuyahoga No. 82682, 2003-Ohio-5937 (upholding dismissal of plaintiff's complaint on basis of qualified immunity where plaintiff had not alleged acts against the governmental entity beyond that of mere negligence).

manner he reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances." Directors may be liable for damages resulting from their breach of these duties.

Defendants were directors of a corporation established as the governing authority of a community school. As such, they were charged by statute with overseeing the running of a public school funded with millions of dollars of public funds. If the State can prove that defendants breached their fiduciary duties as directors of the publicly funded nonprofit corporation, and that the breach resulted in over-funding by the State, then personal liability can be imposed for the results of that breach without the need to pierce the corporate veil.

The basis of the AOS's audit finding of recovery against all of the defendants was that ODE over funded TIPS amounts for which it was not eligible between July 1, 2004 and October 18, 2005, and for the year ending June 30, 2005 (as calculated by the ODE itself). The AOS audit specifically found that the amounts were "deposited into [TIPS] account." The ODE representative supplied an affidavit explaining that the over-funding calculations were derived from a failure to reconcile "error flags" concerning TIPS reported student enrollments at various times. Neither the affidavit nor the AOS audit report specifically charges either of the individual defendants with supplying the

erroneous enrollment reports, intentionally or otherwise. That is not to say that they are insulated from personal liability, where they occupied the positions of Treasurer and Chairman of the Board; only that their personal liability is not established by this record as a matter of law.

While there is a substantial amount of discussion in the audit report concerning TIPS failure to provide and maintain proper books and accounts, among other things, there is no direct factual finding that the individual defendants caused the improper payment of public money to TIPS that is the subject of this matter. At the same time, the factual findings of the audit report do create a genuine issue of material fact as to whether the individual defendants should be held personally liable for the public funds at issue.

The case law relied upon by the trial court does not persuade us to find otherwise. See *Hale*, 60 Ohio St.3d, at 62, 66; *Crane v. Secoy Twp. Trustees* (1921), 103 Ohio St. 258, 259; and *Shuster v. N. Am. Mtge. Loan Co.* (1942), 139 Ohio St. 315, 344. As set forth below, each case is factually distinguishable from this case and/or supports the conclusion that the OAG must establish some factual basis to hold the defendants personally liable for TIPS obligations.

In *Hale*, the attorney general sought recovery of money from appointed members and executive directors of the Ohio Civil Rights Commission, who had received excess compensation contrary to law. The Ohio Supreme Court in *Hale*

upheld the finding of liability against the executive director of the Ohio Civil Rights Commission, who was a public official appointed to his position. In *Hale*, the facts were that this individual "initiated the payroll information that resulted in the illegal payments to the commissioners[;]" he "exacerbated the overpayment situation" by making certain representations in a letter to the State Auditor. The court reasoned that "Brown was the commission's 'principal administrative officer' and, in that capacity, he was required to correctly report the number of hours the commissioners attended meetings. The active misrepresentations made by Brown in order to continue to pay Ellis and Lucas for days when no commission meetings were held clearly contravenes the wording of the statute." *Hale*, 60 Ohio St.3d, at 66. The court's determination of liability against Brown was additionally based on his role as a "public officer." *Id.* In conclusion, the *Hale* court held: "Brown, a public officer, negligently performed his duties by endorsing the overpayments made from the public treasury and assisted in violating the statute." *Id.*

Hale is distinguishable from the instant matter in at least two notable respects: (1) the court did not hold individuals of a non-profit corporation organized under R.C. Chapter 1702 personally liable for corporate obligations; and (2) the court's holding was against an individual that was appointed to a public office and based upon factual instances of that individual's involvement

in causing or contributing to the illegal expenditures and overpayments to the commissioners.

Likewise, the recovery of funds action at issue in *Crane* involved a finding of liability against township trustees who occupied "public office." *Crane*, 103 Ohio St. 258, 261-262 (court found that "[i]t is quite evident from the foregoing that the trustees knowingly and openly permitted and aided the township clerk in thus misappropriating public moneys of the township. That they should respond to the public for this disregard of plain public duty there can be no doubt").

Finally, *Shuster v. N. Am. Mtg. Loan Co.*, 139 Ohio St. 315, 344, involved a petition by a certificate holder against a mortgage loan company and its directors seeking an accounting of trust property placed in their hands under a reorganization plan. That case was not a recovery action like this case. Rather, the question presented in *Shuster* was: "whether or not the defendants-appellants committed a breach of trust by reinvesting the funds received from the sale of the defaulted bonds instead of immediately distributing the proceeds to the participation certificate holders" and, more narrowly stated, "[d]id the trustee breach its trust by purchasing securities with cash received from the sale of trustee assets?" *Id.* at 333.

In 1942, the Ohio Supreme Court affirmed the finding of liability against the trustees in *Shuster* based upon the specific terms of the contract and reconstruction plan⁸ and in part upon the principle that “[a]ny officer *who knowingly causes* the corporation to commit a breach of trust causing loss to a trust administered by the corporation is personally liable for the loss to the beneficiaries of the trust.” *Id.* at 344, quoting 3 *Scott on Trusts*, 1767 (emphasis added). This is similar to the exception to limited liability of corporate officers, directors, and shareholders that exists by virtue of a piercing-the-corporate-veil claim. *Dombroski*, *supra*.

Even in recovery actions concerning private individuals who have received public monies, it must be shown that the private individual had some involvement in procuring an illegal expenditure or actively engaged or facilitated the wrongdoing. See, e.g., *State ex rel. Smith v. Maharry* (1918), 97 Ohio St. 272,

⁸As the Court in *Shuster* noted, “the plan and the contract [and] the order of the Court of Common Pleas of Cuyahoga County show clearly that a trust was created for the purpose of liquidation and distribution of proceeds to the holders of the certificates of participation *** The mortgage loan company was created to act in a dual capacity, i.e., owner and trustee. In its own right as a corporation, it was first to borrow funds from the Reconstruction Finance Corporation and pledge the assets which it held as trustee for the certificate holders as security for the repayment of this loan. There was, therefore, necessity for the purpose clause of the corporation in dealing with these securities for the purpose of borrowing from and repaying to Reconstruction Finance Corporation. But after the Reconstruction Finance Corporation loan was satisfied, the authority to treat these assets as the absolute property of the corporation ceased, and from that point on the mortgage loan company was to hold the assets as trustee for the certificate holders.” *Id.* at 339-340.

277-278 (finding that anyone who wrongfully took public money or public property could be sued under [the former version of R.C. 117.28]); see, also, *Mahoning Valley Sanit. Dist. v. The Gilbane Bldg. Co.* (6th Cir. 2004), 86 Fed. Appx. 856.

Based on the foregoing, we find that there remain genuine issues of material facts as to whether the individual defendants are personally liable for the obligations of TIPS to repay ODE for over funding related to the identified fiscal years.

Assignments of Error I and II are sustained to the extent that the trial court erred by granting summary judgment on the issue of personal liability because the AOS audit report did not contain specific factual allegations that either Da'ud or Hasina were responsible for TIPS receiving public funds, which it was deemed ineligible by the ODE.

Judgment affirmed as to the trial court's decision denying the individual's cross-motion for summary judgment because there is sufficient evidence in the AOS audit report to create a genuine issue of material fact as to whether the defendants can be held personally liable for the obligations of TIPS.

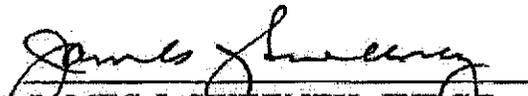
Judgment affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that appellants and appellees shall each pay their respective costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR

