

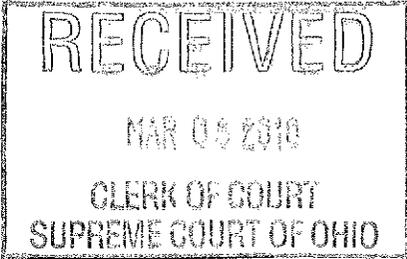
ORIGINAL

SUPREME COURT OF OHIO

BARBARA ZUMWALDE, :
 :
 Plaintiff/Apellee, :
 :
 vs. :
 :
 MADEIRA & INDIAN HILL :
 JOINT FIRE DISTRICT, :
 :
 Defendants, :
 and :
 :
 CHIEF STEPHEN ASHBROCK, :
 :
 Defendant/Appellant. :

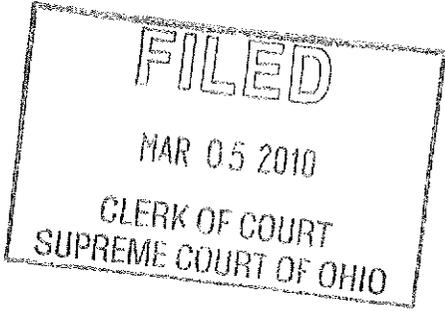
Case No. 2010-0218

On Appeal from the
Hamilton County Court of Appeals
First Appellate District



APPELLEE BARBARA ZUMWALDE'S MEMORANDUM IN OPPOSITION
TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. INTRODUCTION

The issue raised by this appeal—whether R.C. 2744.09(B) removes immunity from employees of political subdivisions for claims alleged against them as individuals in cases arising out of the employment relationship where the political subdivision is also a defendant—does not implicate a substantial constitutional question nor does it represent a matter of great general interest. Indeed, this issue turns upon nothing more than a routine interpretation and application of Ohio’s Political Subdivision Tort Liability Act, R.C. 2744.01, et seq. (“the Act”).

In drafting Chapter 2744, the Ohio General Assembly expressed an unequivocal intent to remove certain types of civil actions from the purview of the Act. For instance, the exclusion at issue in this case dictates that “this chapter does not apply to, and should not be construed to apply to...[c]ivil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision.” R.C. 2744.09(B). In other words, Chapter 2744 does not have any application to employment law cases in which one of the defendants is a political subdivision.

Despite the unambiguous language of the statute, Appellant asserts in his proposition of law that R.C. 2744.09(B) applies only to claims by an employee against a political subdivision and not to the civil action as a whole. Because this proposition is little more than a request for the Court to ignore the plain language of R.C. 2744 and judicially confer rights and immunities upon political subdivision employees not granted to them by the General Assembly, this Court should not accept jurisdiction and the matter should be remanded to the trial court for disposition on the merits.

II. STATEMENT OF THE FACTS AND CASE

On December 19, 2006, Barbara Zumwalde filed a lawsuit in the Hamilton County Court of Common Pleas against her employer, the Madeira & Indian Hill Joint Fire District, and its Chief, Stephen Ashbrock. In her Complaint, Ms. Zumwalde alleged that Defendants violated Ohio law by purposefully and maliciously retaliating against her for having previously filed an employment discrimination lawsuit and/or for having filed a workers compensation claim for injuries she sustained on the job.

Defendants filed a Motion for Summary Judgment on August 8, 2008, contending, among other things, that Chief Stephen Ashbrock was immune from liability pursuant to Chapter 2744. The trial court denied that motion and Chief Ashbrock immediately appealed the decision to the extent it found that he was not entitled to immunity as a matter of law.

In the First District Court of Appeals, Ms. Zumwalde articulated two reasons that Chief Ashbrock should be denied immunity from liability at the summary judgment stage: (1) because the Ohio Political Subdivision Tort Liability Act does not apply to actions arising out of the employment relationship; and (2) even if the Act does apply, genuine issues of fact exist with regard to whether Chief Ashbrock's suspension of Ms. Zumwalde was motivated by a malicious, retaliatory animus. Finding in favor of Ms. Zumwalde, the appellate court agreed that Chapter 2744 has no application to the instant action and therefore did not arrive at the issue of whether Chief Ashbrock's actions were malicious, willful or wanton.

Appellant Chief Ashbrock now urges this Court to overturn the First District Court of Appeals' finding.

III. ARGUMENT IN OPPOSITION TO JURISDICTION

PROPOSITION OF LAW: R.C. §2744.09(B) applies only to claims by an employee against a “public subdivision” for “claims arising out of the employment relationship.”¹

R.C. 2744.09(B) states that “this chapter does not apply to, and should not be construed to apply to...**civil actions** by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision.” (emphasis added). Pursuant to the plain meaning of this language, the First District Court of Appeals found that Chief Ashbrock could not avail himself of the protections afforded by Chapter 2744 because the instant litigation is one of a category of “civil actions” to which the Act—including its provisions granting qualified immunity to employees of political subdivisions—does not apply.²

Despite the First District’s clear adherence to the unambiguous language of the statute, Appellant contends that the decision should be overturned because R.C. 2744.09(B) “limits its application only to an employee’s claims against his ‘political subdivision’” and that “the statute does not include claims against fellow employee’s of the political subdivision.” [sic]. This interpretation must be rejected, however, as it disregards the intent of the legislature by ignoring the literal wording of the statute. See *Bd. of Edn. v. Fulton Cty. Budget Comm.* (1975), 41 Ohio St.2d 147, 70 O.O. 2d 300, 324 N.E.2d 566 (courts must enforce the literal writing of statutes whenever possible).

¹ Plaintiff/Appellee will assume for the purpose of this memorandum that Appellant’s reference to a “public subdivision” actually refers to a “political subdivision.”

² Both the 11th and 12th appellate districts have also concluded that R.C. 2744.09(B) removes immunity from not only the political subdivision but also from individuals named as defendants in actions arising out of the employment relationship. See *Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, 833 N.E.2d 300; *Ross v. Trumbull Cty. Child Support Enforcement Agency* (Feb. 9, 2001), 11th Dist. No. 2000-T-0025.

The General Assembly's intent to entirely remove civil actions arising out of the employment relationship from the purview of Chapter 2744 is evident upon a reading of R.C. 2744.09 as a whole. Specifically, comparison of R.C. 2744.09(B) with R.C. 2744.09(E) forecloses the possibility that the legislature intended, as Appellant contends, to limit the operation of R.C. 2744.09(B) to claims against a political subdivision such that individuals named in the suit retain protections afforded by the Act:

This chapter does not apply to, and shall not be construed to apply to, the following:

(B) **Civil actions** by an employee, or the collective bargaining unit of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;

(E) **Civil claims** based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

If the legislature had intended R.C. 2744.09(B) to apply only to claims raised by an employee against her political subdivision, the legislature could have clearly stated that by using the word "claims" as it did in R.C. 2744.09(E). However, the General Assembly's deliberate choice in drafting R.C. 2744.09(B) was to exclude entire "civil actions" arising out of the employment relationship between a political subdivision and an employee—including claims raised in the same action against individual defendants. To adopt Appellant's reasoning to the contrary would improperly render the legislature's distinction between "civil actions" and "civil claims" virtually meaningless. See *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 336-237, 78 N.E.2d 370 (the legislature is presumed to know the meaning of words and to have used words of statute advisedly and to have expressed legislative intent by use of words found in the statute); *State ex.*

rel. Burrows v. Indus. Comm. (1997), 78 Ohio St.3d 78, 676 N.E.2d 519 (unambiguous statutes are to be applied according to the plain meaning of words used and courts are not free to delete or insert other words).

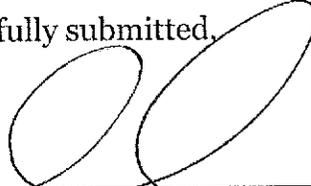
Moreover, Appellant's argument that the First District's interpretation of R.C. 2744.09(B) renders other provisions of Chapter 2744 addressing immunities of individual political subdivision employees "irrelevant and obsolete" is wholly unfounded. Those provisions, including R.C. 2744.03(A)(6) about which Appellant is so deeply concerned, remain in effect with regard to a panoply of legal claims and actions that a citizen might allege against a political subdivision and/or its employees. Indeed, the only "claims" and "actions" such provisions do not apply to are those specifically enumerated in Chapter 2744.09—one of which is "civil actions" arising out of the employment relationship.

Under these circumstances, it is clear that the First District Court of Appeals properly applied R.C. 2744.09(B) by finding that Chief Ashbrock could not avail himself of the rights and immunities afforded to him under the Political Subdivision Tort Liability Act because the Act does not apply to civil actions arising out of the employment relationship. To accept Appellant's proposition of law and rule to the contrary would require this Court to ignore the plain language of the statute and judicially confer rights and immunities on political subdivision employees not given to them by the General Assembly. Because such an act would fall well outside the scope of the judiciary's function, Appellant's invitation to do so should be denied and this Court should affirm the First District Court of Appeals' decision. See *Fulton*, 41 Ohio St.2d at 147 (it is not the judiciary's function to rewrite laws but to enforce the literal writing of the statute).

IV. CONCLUSION

For these reasons, Plaintiff-Appellee Barbara Zumwalde respectfully requests that this Court refuse to accept jurisdiction over the issue raised by Chief Ashbrock in this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via regular U.S. mail to Wilson E. Weisenfelder, Jr. and Chad Willits, RENDIGS, FRY, KIELY & DENNIS LLP, One West Fourth Street, Suite 900, Cincinnati, OH 45202 on this 4th day of March, 2010.



MARC D. MEZIBOV (0019316)