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EXPLANATION OF WHY THIS CASE IS
A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Almost one hundred years ago, the people of Ohio adopted a constitutional provision authorizing the General Assembly to establish, by statute, a workers' compensation system. Section 35, Article II, Ohio Constitution. The resulting statutory system did not supplement the unsatisfactory common-law remedies for injured employees; it supplanted them. The workers' compensation system supplanted those common law remedies as part of a compromise between employers and employees:

[W]orkers' compensation laws are the result of a unique mutual compromise between employees and employers, in which employees give up their common-law remedy and accept possibly lower monetary recovery, but with greater assurance that they will receive reasonable compensation for their injury. Employers in turn give up common-law defenses but are protected from unlimited liability.

Stetter v. R.J. Corman Derailment Services, Slip Opinion No. 2010-Ohio-1029, at ¶ 54 (citing cases).

This "unique mutual compromise" is evident in the system's treatment of employers who retaliate against injured employees. If an employer discharges (or takes some other punitive action against) an injured employee who has sought workers' compensation benefits (by filing a claim or taking an affirmative step towards filing a claim), then the workers' compensation system may provide a remedy to that employee. Rev. Code § 4123.90.

In the present case, however, the court of appeals held that if an employer discharges an injured employee who has *not* sought workers' compensation benefits (because the discharge occurred so soon after the injury that the employee had no reasonable opportunity to file a claim or take an affirmative step towards filing a claim), then the *common law* may provide a remedy to that employee even though the workers' compensation system does not. The court of appeals

described this remedy as a common law claim for wrongful discharge in violation of the public policy underlying Rev. Code § 4123.90.

The availability of such a remedy to an injured employee is a matter of interest to every single employee in Ohio, and the avoidance of the creation of any such remedy is a matter of great interest to their employers. Injured employees need to know when they are protected from retaliation and their employers need to know when they are potentially exposed to liability for taking punitive action against an injured employee. For these reasons, this case is a case of public or great general interest.

But this is not only a case about Ohio's workers' compensation system. It is also a case about a court of appeals that has misread *Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St. 3d 351, 2007-Ohio-6751, and, in doing so, marginalized the most recent binding precedent from this Court, apparently guided more by an earlier decision of the United States District Court for the Southern District of Ohio and by a 15-year-old decision of the Franklin County Court of Common Pleas.

Indeed, the law in Ohio is (or was) clear. Well before the court of appeals issued its opinion in this case, this Court had explicitly held that Rev. Code § 4123.90 provides the *exclusive remedy* for an employee who is terminated in violation of rights conferred by the Workers' Compensation Act. See *Bickers, supra*, at syllabus. Therefore, by holding that a common law claim for wrongful discharge in violation of the public policy underlying Rev. Code § 4123.90 exists in Ohio, the court of appeals in the present case has created a cause of action where this Court had already determined that none exists. In addition to contradicting this Court's authoritative statement of the law in Ohio, the decision below has given rise to a conflict

between the second appellate district and the appellate jurisdictions that have correctly applied this Court's decision in *Bickers*.

The present case, with its simple facts, presents this Court with an opportunity to resolve this conflict among the various courts of appeals, and confirm that this Court meant what is said when it decided *Bickers*, *i.e.*, Rev. Code § 4123.90 provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act.

STATEMENT OF THE CASE AND FACTS

DeWayne Sutton ("Sutton") is a former employee at will of Tomco Machining, Inc. ("Tomco"). Sutton filed a complaint in the common pleas court of Montgomery County naming Tomco as the sole defendant and asserting two causes of action:

- (1) unlawful retaliation (wrongful discharge) in violation of Rev. Code § 4123.90, and
- (2) wrongful discharge in violation of Ohio public policy.

Tomco answered Sutton's complaint and, shortly thereafter, filed a motion for judgment on the pleadings. The trial court sustained Tomco's motion in its entirety, entering judgment in favor of Tomco on both the statutory claim and the public-policy claim. Sutton appealed. With respect to the public-policy claim, by a 2-1 majority, the court of appeals reversed the trial court's judgment, holding that Tomco was not entitled to judgment on the pleadings on that claim. Tomco now seeks review of this matter by the Supreme Court of Ohio. Because the court of appeals upheld the trial court's judgment with respect to the statutory claim, however, the statutory claim is no longer at issue and the present appeal relates solely to whether there is a common law claim for wrongful discharge in violation of the public policy underlying Rev. Code § 4123.90.

As this case was before the trial court and the court of appeals pursuant to Tomco's motion for judgment on the pleadings, the facts alleged in the complaint, even to the extent that they would be strongly disputed by Tomco, are taken as true. The key facts alleged by Sutton may be summarized as follows:

In April 2008, Sutton was discharged from his employment by Tomco's president, Mr. Jim Tomasiak. Shortly before being discharged, Sutton had been injured while in the course and scope of his employment with Tomco, and had reported his injury to Mr. Tomasiak. Some time after being discharged, Sutton filed a claim for workers' compensation benefits, ultimately receiving such benefits.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I

In order to preserve the comprehensive framework of the workers' compensation system enacted by the General Assembly, there is no common law cause of action for employees claiming termination in violation of rights conferred by the Workers' Compensation Act.

At the end of 2007, in the *Bickers* case, this Court held that "[a]n employee who is terminated from employment while receiving workers' compensation has no common-law cause of action for wrongful discharge in violation of the public policy underlying *R.C. 4123.90*, which *provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act.*" *Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St. 3d 351, 2007-Ohio-6751, syllabus (emphasis added).

This Court did not reach its conclusion without careful consideration of the issues. On the contrary, it began by discussing at some length the origin and nature of the workers' compensation system and the compromise that it has represented for almost a century:

Prior to the enactment of the Workers' Compensation Act in 1913, common-law tort principles governed recovery for work-related

injuries. The common-law system, however, proved unable to address the social and economic consequences arising from industrial accidents. Eventually, it became clear that the tort-based system should be replaced by a system charging the economic losses incurred by injured Ohio workers and their families, without fault or wrongdoing, to the industry rather than to the individual or society as a whole.

In this spirit, the people of Ohio adopted a constitutional provision authorizing the General Assembly to establish the workers' compensation system by statute. This statutory framework supplanted, rather than amended or supplemented, the unsatisfactory common-law remedies. Moreover, the Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability. The underlying premise of the workers' compensation system arises from this compromise.

Bickers, at ¶¶ 18-19 (citations omitted). See, also, *Stetter v. R.J. Corman Derailment Services*, Slip Opinion No. 2010-Ohio-1029, at ¶ 54.

This Court then discussed in detail one of the difficult issues faced by the legislature in connection with the workers' compensation system, and the General Assembly's choice in addressing the particular issue:

The policy choice between permitting and prohibiting the discharge from employment of an employee who has been injured at work is a difficult one, as it inevitably creates a burden of some degree upon either the employer or the employee.

* * *

In addressing this difficult policy issue, which lacks wholly satisfactory solutions, the General Assembly chose to proscribe retaliatory discharges only. Employers may not retaliate against employees for pursuing a workers' compensation claim. R.C. 4123.90.

Bickers, at ¶¶ 20-23.

Recognizing that the General Assembly was the appropriate body to address such policy issues, this Court refused to interfere:

It is within the prerogative and authority of the General Assembly to make this choice when determining policy in the workers' compensation arena and in balancing, in that forum, employers' and employees' competing interests. We may not override this choice and superimpose a common-law, public-policy tort remedy on this wholly statutory system.

Moreover, it would be inappropriate for the judiciary to presume the superiority of its policy preference and supplant the policy choice of the legislature. For it is the legislature, and not the courts, to which the Ohio Constitution commits the determination of the policy compromises necessary to balance the obligations and rights of the employer and employee in the workers' compensation system.

Bickers, at ¶¶ 23-24 (citations omitted).

The General Assembly's prerogative and authority in connection with the workers' compensation system are not, of course, limited to the particular issue before this Court in *Bickers*. Indeed, since the decision of the court of appeals in the present case, this Court has explicitly recognized that the General Assembly's prerogative and authority extends to *other* choices to be made in connection with the workers' compensation system:

"It is within the prerogative and authority of the General Assembly to make [*choices*] when determining policy in the workers' compensation arena and in balancing, in that forum, employers' and employees' competing interests. See, e.g., *Rambaldo v. Accurate Die Casting* (1992), 65 Ohio St.3d 281, 288, 603 N.E.2d 975. We may not override [those *choices*] and [impose our own preferences] on this wholly statutory system. *Id.*"

Kaminski v. Metal & Wire Products Company, Slip Opinion No. 2010-Ohio-1027, at ¶ 74 (quoting *Bickers*, at ¶ 23) (alterations in original; emphasis added).

Therefore, this Court held in *Bickers* that a common law cause of action for wrongful discharge could not be imposed into the workers' compensation arena:

Against this backdrop, it becomes apparent that the imposition of common-law principles of wrongful discharge into the workers' compensation arena runs counter to "the balance of mutual compromise between the interests of the employer and the employee" as expressed by the General Assembly within the Act. Bickers' remedy must be found within the workers' compensation statutes.

Bickers, at ¶ 25.

Until last month, every court that had considered the *Bickers* case had concluded, correctly, that this Court meant what it said when it decided *Bickers*. In other words, every court that had considered *Bickers* applied this Court's holding in *Bickers*, as set forth in the syllabus, that "R.C. 4123.90 ... provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act." See *Sidenstricker v. Miller Pavement Maintenance*, Franklin App. No. 09AP-523, 2009-Ohio-6574; *Carpenter v. Bishop Well Services Corp.*, Stark App. No. 2009CA00027, 2009-Ohio-6443; *Mortensen v. Intercontinental Chemical Corporation*, 178 Ohio App. 3d 393, 2008-Ohio-4723; *McDannald v. Robert L. Fry & Associates*, Madison App. No. CA2007-08-027, 2008-Ohio-4169; *Cunningham v. Steubenville Orthopedics and Sports Medicine*, 175 Ohio App. 3d 627, 2008-Ohio-1172.

Federal courts applying Ohio law have reached similar conclusions. See *Amara v. ATK*, 3:08CV0378, 2009 U.S. Dist. LEXIS 76357, *6-9 (S.D. Ohio Aug. 5, 2009); *Helmick v. Solid Waste Authority of Central Ohio*, 2:07-CV-912, 2009 U.S. Dist. LEXIS 19301, *12 (S.D. Ohio Mar. 10, 2009); *Trout v. FirstEnergy Generation Corporation*, 3:07CV00673, 2008 U.S. Dist. LEXIS 102803, *15 (N.D. Ohio Aug. 6, 2008); *Powell v. Honda of America Mfg.*, 2:06-CV-979, 2008 U.S. Dist. LEXIS 56991, *7-8 (S.D. Ohio Jul. 22, 2008); *Compton v. Super Swan Cleaners*, 08-CV-002, 2008 U.S. Dist. LEXIS 39526, *13-14 (S.D. Ohio Apr. 29, 2008); *McDermott v.*

Continental Airlines, 2:06-cv-0785, 2008 U.S. Dist. LEXIS 29831, *45-46 (S.D. Ohio Apr. 11, 2008).

Then, in March 2010, the court of appeals for the second appellate district issued its judgment in the present case. *Sutton v. Tomco Machining, Inc.*, Montgomery App. No. 23416, 2010-Ohio-830. The court of appeals first set forth the four elements for a prima facie claim of wrongful discharge: clarity, jeopardy, causation, and (lack of) overriding justification. *Sutton*, at ¶¶ 9-13 (quoting *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 69-70).

With respect to the “clarity” element, the court of appeals held that the relevant public policy “against allowing an employer to discharge an employee solely in retaliation for filing a workers’ compensation claim” is manifested in Rev. Code § 4123.90. *Sutton*, at ¶ 16 (citing *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St. 3d 141, 2003-Ohio-5357, at ¶ 149). Despite also referring to the *Coolidge* case, the court of appeals in *Sutton* stated affirmatively and unambiguously that Rev. Code § 4123.90 was “the *sole source* of the public policy” in this case. *Sutton*, at ¶ 18 (emphasis added).

Having held that Sutton was claiming that his employment was terminated in violation of a public policy based solely on Rev. Code § 4123.90, the correct disposition of Sutton’s public-policy claim should have been clear to the court of appeals. As stated above, “R.C. 4123.90 ... provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers’ Compensation Act.” *Bickers*, syllabus. Also, this Court had held ten years earlier that an employee claiming discharge in violation of a public policy expressed *solely* in a statute must have complied fully with the requirements of the statute in order to maintain a common law cause of action for wrongful discharge. *Kulch v. Structural Fibers, Inc.* (1997), 78

Ohio St.3d 134, paragraph 3 of the syllabus. It is undisputed that Sutton did not comply fully with the requirements of Rev. Code § 4123.90.

Instead of following the law of Ohio as enacted by the General Assembly and set forth by this Court, the court of appeals considered the remaining three elements of the tort of wrongful discharge, and then attempted to distinguish *Bickers*. Having pointed out that the plaintiff in *Bickers* was discharged while receiving benefits and Sutton, in the present case, was discharged after being injured and before even applying for benefits, the court of appeals stated that “*Bickers*’s holding does not encompass Sutton’s claim” *Sutton*, at ¶ 36. In effect, the court of appeals concluded that it was free to ignore this Court’s decision in *Bickers*, or at least to limit its application to “non-retaliatory” discharges:

In *Bickers*, the Court barred only common-law tort claims of wrongful discharge when the discharge is for reasons that are not retaliatory. The discharge of an employee while the employee is receiving compensation benefits, like the plaintiff in *Bickers*, is not prohibited because it is not retaliatory.

Sutton, at ¶ 38.

The court of appeals quoted extensively from the judgment in *Bickers*, but believed that the “policy choice” referred to therein related only to “non-retaliatory” discharges. *Sutton*, at ¶¶ 38-39 (quoting *Bickers*, at ¶¶ 20-25). As noted above, this Court rejected this interpretation of *Bickers* in the *Kaminski* case.

The court of appeals was not, however, unanimous. Donovan, P.J., dissenting, correctly recognized that this Court’s holding in *Bickers* means what it says, and therefore applies to Sutton’s claim:

I do not believe we are at liberty to overrule the syllabus of a Supreme Court opinion, *Bickers*, which is on point. As an appellate court, we are bound by Rule 1 of the Supreme Court Rules for Reporting of Opinions. ... Nothing in the *Bickers*

syllabus indicates that the rule of law contained therein applies only to non-retaliatory discharges.

I would agree with the trial court the claim is barred based upon the *Bickers* holding which we are not free to modify.

Sutton, at ¶¶ 47-48 (Donovan, P.J., dissenting).

The decision below requires reversal for two reasons. First, it is contrary to the law of Ohio, as set forth by this Court in *Bickers* and its progeny, and since applied in other courts. Second, even if the court of appeals felt that Sutton's case was factually distinct from *Bickers*, it should not have ignored the principles carefully enunciated by this Court in *Bickers*. The logic that underpins the decision of this Court in *Bickers* requires the opposite result to that reached by the second appellate district below.

It should also be noted that, under the doctrine of judicial subordination, the decision of the court of appeals will inevitably result in one set of rules being applied in the courts of common pleas for the counties in the second appellate district while a second set of rules is applied in the courts of common pleas for the remaining counties in Ohio. Specifically, the courts of common pleas for the counties in the second appellate district will be forced to follow the decision of the court of appeals in the present case and permit discharged employees to argue that they have a viable common law cause of action for wrongful discharge in violation of the public policy underlying Rev. Code § 4123.90.

Tomco submits that this Court should take jurisdiction and reverse the court of appeals, reaffirming its decision in *Bickers* as an accurate statement of the law of Ohio.

Proposition of Law No. II:

There is no common law cause of action for preemptive retaliatory discharge in violation of public policy; the retaliation must follow the protected activity.

Undoubtedly, the public policy underlying Rev. Code § 4123.90 is to discourage employers from retaliating against employees who seek workers' compensation benefits. Of course an employer can only "retaliate" against an employee for something that the employee has done (or, perhaps, something that the employer believes that the employee has done).

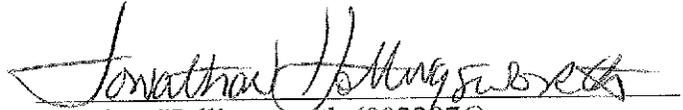
This Court has already reached this conclusion in the context of the anti-retaliation provision in Ohio's anti-discrimination laws. "To establish a claim of retaliation, a claimant must prove that (1) she *engaged* in a protected activity, (2) the defending party was aware that the claimant *had engaged* in that activity" *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶ 13 (citing *Canitia v. Yellow Freight Sys., Inc.* (C.A.6, 1990), 903 F.2d 1064, 1066) (emphasis added). Similarly, in the context of the anti-retaliation provision in Ohio's whistleblower statute, this Court held that an employee "may maintain a common-law cause of action against the employer ... so long as that employee *had fully complied* with the statute and was *subsequently* discharged or disciplined." *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, paragraph 3 of the syllabus (emphasis added).

The court of appeals, through its holding in this case, has created a common law "preemptive retaliatory discharge" or, perhaps, "preventative discharge" cause of action, holding in effect that Tomco retaliated against Sutton for conduct that Sutton had not undertaken and, indeed, might never have undertaken. The decision of the court of appeals sets a precedent that would create an entirely new cause of action for preemptive retaliatory discharge where none existed, and where none should exist.

CONCLUSION

In the end, this appeal is about what this Court meant in the *Bickers* case. Tomco believes that it meant precisely what it said, i.e., Rev. Code § 4123.90 provides the exclusive remedy. Because this case involves matters of public and great general interest, Tomco requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits and resolved for all those who seek clarity in the law and its application.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon:

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by ordinary first class United States mail, postage prepaid, this 16th day of April, 2010.


Jonathan Hollingsworth.



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39

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

DeWAYNE SUTTON

Plaintiff-Appellant

v.

TOMCO MACHINING, INC.

Defendant-Appellee

Appellate Case No. 23416

Trial Court Case No. 2008-CV-8579

(Civil Appeal from
Common Pleas Court)

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OPINION

Rendered on the 5th day of March, 2010.
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.....
BROGAN, J.

I.

On the morning of April 14, 2008, DeWayne Sutton was working at Tomco Machining, disassembling a chop saw, when he injured his back.¹ Sutton went to Tomco's president, Jim Tomasiak, and told him about his injury. Within an hour of talking with Tomasiak, Tomasiak discharged Sutton from his employment as an at-will employee. Tomasiak gave Sutton no affirmative reason for discharging him, but he did tell Sutton that it was not because of his work ethic or job performance or because Sutton had violated any work rule or company policy. Following his discharge, Sutton filed a claim for workers' compensation benefits, ultimately receiving them. On July 1, 2008, Sutton sent a letter to Tomco telling it of his intent to file a claim under R.C. 4123.90, which prohibits an employer from retaliating against an employee for filing a claim or initiating proceedings under the Workers' Compensation Act.

On September 18, 2008, Sutton filed a complaint against Tomco alleging that Tomco discharged him in order to avoid Sutton's being considered its employee when he filed for workers' compensation so as to prevent potential higher workers' compensation premiums. In his complaint, Sutton asserted two claims for relief. The first is a statutory claim for unlawful retaliation against Sutton under R.C. 4123.90 for initiating or pursuing workers' compensation benefits. And the second is a tort claim for wrongful discharge in violation of public policy.

Tomco filed on December 9, 2008, a motion under Civil Rule 12(C) for judgment on the pleadings. It claimed that Sutton had not alleged facts that if true would entitle him to

¹The facts we recite in this opinion are taken from Sutton's complaint. We will consider them true for the purposes of our review. See *Perez v. Cleveland* (1993), 66 Ohio St.3d 397, 399.

relief based on either claim. The trial court agreed and on April 15, 2009, sustained Tomco's motion. Sutton filed a timely notice of appeal, and he now presents two assignments of error, one for each claim in his complaint.

II.

First Assignment of Error

"THE TRIAL COURT ERRED IN FINDING THAT *BICKERS* PRECLUDED APPELLANT FROM PURSUING A PUBLIC POLICY WRONGFUL DISCHARGE CLAIM."

Before exploring the issue raised here, we must explain the standard we will use to review the trial court's decision to sustain Tomco's Civil Rule 12(C) motion for judgment on the pleadings. When the non-moving party can prove a set of facts entitling him to his requested relief under the law, a trial court ought not grant a Civil Rule 12(C) motion for judgment on the pleadings. We will review the trial court's decision de novo. *Pinkerton v. Thompson*, supra, at ¶18, citing *Hunt v. Marksman Prod.* (1995), 101 Ohio App.3d 760, 762. And we will accept as true the alleged material facts in Sutton's complaint and all reasonable inferences drawn from them. *Pinkerton v. Thompson*, 174 Ohio App.3d 229, 2007-Ohio-6546, at ¶18, citing *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App.3d 160, 163. We will reverse the trial court's decision if we conclude the law permits Sutton to bring the claim and he has alleged facts that, when the law is applied, entitle him to the relief he seeks. See *State ex rel. Hanson v. Guemsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548.

The issue raised by Sutton in the first assignment of error is one of first impression: when an employee suffers a work-related injury, tells his employer of the injury, and is

discharged before having had an opportunity to file a claim or institute or pursue proceedings under the Workers' Compensation Act, does the law allow the former employee to bring a common-law claim against his former employer for wrongful discharge in violation of the public policy underlying R.C. 4123.90? We conclude that a narrow exception to the employment at-will doctrine exists in this situation, allowing such a plaintiff to bring the tort claim, because such a discharge would undermine the General Assembly's effort to proscribe retaliatory discharges.

Tomco argues first that the Ohio Supreme Court's opinion in *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, bars Sutton's common-law claim, and it argues second that even if it does not, the law does not allow such a claim.

Under the employment at-will doctrine in Ohio the law generally does not provide relief to at-will employees who are discharged without good cause. However, in *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, the Ohio Supreme Court carved out an exception for discharges based on reasons inimical to public policy. Employees discharged for such reasons may bring a common-law claim for wrongful discharge in violation of public policy. A plaintiff must establish a prima facie claim based on the four elements, adopted by the Court in *Collins v. Rizkana*, that constitute the tort of wrongful discharge:

"1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).

"2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).

"3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).

"4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element)."

(1995), 73 Ohio St.3d 65, 69-70. The first two elements are questions of law to be decided by the court, and the last two are questions of fact, decided by the factfinder. See *Collins*, at 70.

The Workers' Compensation Act proscribes retaliation for filing a workers' compensation claim in Section 4123.90 of the Revised Code, which provides in pertinent part, "No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act." Sutton cannot claim that Tomco violated this section by discharging him because Sutton had not yet filed a claim or instituted proceedings before Tomco discharged him. After reviewing Ohio law on the legality of a common-law claim under this section, a plaintiff was permitted to bring such a claim under this section for discharge in retaliation for his wife's pursuit of workers' compensation on her own behalf. See *Collins v. U.S. Playing Card Co.* (S.D. Ohio, 2006), 466 F.Supp.2d 954. The court noted that, while the Ohio Supreme Court has not decided the question, several Ohio appellate courts have considered the issue and recognized a common-law claim for wrongful discharge based on this statute. *Id.*, at 974 (citing six Ohio appellate-court cases). The court cited one contrary decision. *Id.*, at 974. It also found that several Ohio district courts have also analyzed Ohio law and concluded that such a common-law claim exists. *Id.* (citing four federal-district-court cases). It did find an

unpublished Sixth Circuit Court of Appeals decision to the contrary, but the court noted that such unpublished opinions are not binding upon it. *Id.*, at 974-975.

The question is whether, in the circumstances of this case, Sutton may bring a common-law claim against Tomco for violating the public policy that underlies Section 4123.90. As the Ohio Supreme Court has not decided this question, to find the answer we must examine each of the four elements of this claim.

The clarity element

The first element requires a manifest public policy. Section 4123.90 manifests a clear public policy against allowing an employer to discharge an employee solely in retaliation for filing a workers' compensation claim. This public policy is also expressed in *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357. The Court explained there that "[t]he recognition of a public-policy exception for wrongful discharge in retaliation for filing a workers' compensation claim, *whether derived from statutory or common law*, is built on the premise that inability to challenge retaliatory discharges would undermine the purpose of the workers' compensation statute by forcing the employee to choose between applying for the benefits to which he is entitled and losing his job." *Coolidge*, at ¶ 149.

The jeopardy element

The second element requires that the circumstances of the discharge jeopardize this public policy. Under the jeopardy element, we must determine whether the absence of a public-policy claim "would seriously compromise the Act's statutory objectives." *Wiles v.*

Medina Auto Parts, 96 Ohio St.3d 240, 2002-Ohio-3994, at ¶14 (referring to the FMLA). Permitting an employer to dismiss an employee before the latter has an opportunity to obtain the protections of R.C. 4123.90 would seriously compromise the Act's statutory objectives by giving employers a perverse incentive to discharge the injured employee before he had the opportunity to trigger the protection of the R.C. 4123.90.

We must also "inquir[e] into the existence of any alternative means of promoting the particular public policy to be vindicated by a common-law wrongful-discharge claim." *Wiles*, at ¶15. Because the sole source of the public policy here is R.C. 4123.90, which provides the substantive right and remedies for its breach, we must examine the adequacy of the remedies available. See *Wiles v. Medina Auto Parts*, *Id.*, at ¶15 (saying that "[w]here * * * the sole source of the public policy opposing the discharge is a statute that provides the substantive rights *and* remedies for its breach, the issue of adequacy of remedies becomes a particularly important component of the jeopardy analysis."); see, also, *Bickers*, at ¶42 (Moyers, C.J., dissenting) ("[P]ublic policy is jeopardized only when there are no alternative means of enforcing the public policy or, if a particular statute applies, the remedies therein are inadequate."). We find that an employee discharged under the circumstances in which Sutton was discharged has no remedy. No statutory remedy, therefore, adequately protects society's interests. See *Wiles*, at ¶15 ("Simply put, there is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interests.").

The inability to bring a tort claim would frustrate the legislative intent of R.C. 4123.90 to proscribe retaliatory discharges. As we point out in our review of the second assignment of error, the Ohio Supreme Court has held that an injured employee need not actually file

a claim in order to claim the protections of the statute. See *Roseborough v. N.L. Industries* (1984), 10 Ohio St.3d 142, 143. In *Roseborough* the Court adopted the reasoning of Justice Brown's concurrence in *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367. There, Justice Brown expressed his concern that "a requirement that an actual filing of a claim is the only means by which a proceeding can be instituted or pursued would frustrate the legislative intent as evinced in R.C. 4123.90." *Bryant*, at 372 (Brown, J., concurring). "If such a requirement was mandated," he continued, "an employer could, upon receipt of an employee's request to complete the form prior to filing, fire the claimant and thus avoid the consequences of R.C. 4123.90. * * * [S]uch a requirement would also result in a footrace, the winner being determined by what event occurs first--the firing of the employee or the filing of the claim with the bureau." *Bryant*, at 372-373 (Brown, J., concurring). He concluded, "[t]his scenario, in light of the fact that R.C. 4123.95 provides that R.C. 4123.90 should be liberally construed in favor of the employee, should not be encouraged by a decision from this court." *Bryant*, at 373 (Brown, J., concurring). The same is true here. Were a tort claim not permitted, an employer upon hearing that an employee was injured could fire the employee to avoid the consequences of R.C. 4123.90. The exact footrace that Justice Brown identified would result between the injured employee running to file a claim, or initiate proceedings, and the employer's running to fire the employee. And the employer may have a head start: upon learning of the injury the employer can discharge the employee almost immediately; an employee may not have time to file a claim or initiate proceedings. The perverse incentive such a rule creates would most hurt those workers most likely to be injured and therefore most in need of the statute's protection. Those working in physically demanding jobs often have an inherently greater chance for injury.

The causation element

The third element requires the dismissal to have been motivated by conduct related to that prohibited by the public policy. According to the facts alleged in Sutton's complaint, his dismissal was motivated by the nexus created by Sutton's on-the-job injury and the right of injured employees to workers' compensation. This is related to retaliatory discharge, prohibited by public policy.

The overriding justification element

The fourth element requires that the employer lacked business justification for the discharge. Sutton's complaint alleges that Tomco lacked any business justification for discharging him. As this is a question of fact, we accept, as we must, the allegation in the complaint as true.

The narrow exception

Therefore we will recognize a very narrow exception to the at-will employment doctrine similar to the one recognized in *Moore v. Animal Fair Pet Center, Inc.* (1995), 81 Ohio Misc.2d 46. The exception must be narrow because, ordinarily, "merely asserting that the discharge was in violation of a statutory right is insufficient." Cavico, *Employment At Will and Public Policy* (1992), 25 Akron L. Rev. 497, 514. A tort claim for wrongful discharge is "premised on protecting employees who actively pursue rights and benefits they are entitled to by virtue of statutes." *Id.* An employee is not compelled to exercise this right but has the option to do so. So when the injured employee delays in exercising his right, he may not avail himself of this exception. Yet where the injured employee is

discharged before he has an opportunity to exercise this right, the public policy underlying R.C. 4123.90 requires courts to give him the chance to obtain relief. The Court has noted that "[t]he basic purpose of any antiretaliation statute is to enable employees to freely exercise their rights without fear of retribution from their employers." *Coolidge*, at ¶ 149. Were an employer permitted to discharge an employee to circumvent the antiretaliation statute, the basic purpose of the statute would be frustrated. Incorporating all four elements of the tort of wrongful discharge, we conclude that when an employee suffers a work-related injury he may bring a claim of wrongful discharge if his employer discharges him so quickly that he has no reasonable opportunity to file a claim or institute proceedings under the Workers' Compensation Act when the employer lacks an overriding business justification for the discharge.

Here, the material allegations in Sutton's complaint satisfy the requirements of the exception. First, Sutton was discharged so quickly after being injured that he had no reasonable opportunity to exercise his rights under the Workers' Compensation Act. In Sutton's complaint he states:

"3. On or about April 14, 2008, at approximately 7:30 a.m., Plaintiff injured his back while disassembling a chop saw. Plaintiff's injury occurred during the course and within the scope of his employment with Defendant.

"4. Plaintiff reported his injury to Jim Tomasiak * * *, Defendant's President.

"5. Within approximately one hour of reporting the injury to Tomasiak, Plaintiff's employment was terminated."

September 18, 2008, Complaint with Jury Demand, p.2. Although the complaint does not state the length of time between the injury and the report to Tomasiak, we think it is

reasonable to infer that the second event came on the heels of the first. Sutton plainly had no reasonable opportunity to take the first step toward obtaining compensation benefits. Second, the allegation is that Tomco discharged Sutton to avoid paying higher premiums, which we do not believe qualifies as an overriding business justification. The complaint alleges:

"1. Plaintiff began his employment with Defendant on or about August 22, 2005.

"* * *

"6. Tomasiak did not provide Plaintiff a reason for terminating his employment; however, he stated that it was not due to Plaintiff's work ethic or job performance. Additionally, Tomasiak stated that Plaintiff did not violate any work rule or company policy.

"7. Defendant used immediate termination as means to preclude Plaintiff's Workers Compensation injury claim and higher Workers Compensation premiums.

"* * *

"13. Defendant lacked an overriding business justification for terminating Plaintiff's employment.

"14. Defendant's decision to terminate Plaintiff's employment was motivated by Plaintiff's workplace injury and in order to prevent him from filing of a workers compensation [sic]."

September 18, 2008, Complaint with Jury Demand, p.2-3. Accepting these allegations as true for purposes of evaluating Tomco's Civil Rule 12(C) motion, we find that the facts alleged in Sutton's complaint, if true, entitle him to his requested relief, meaning that the trial court erred in sustaining Tomco's motion.

Tomco argues that the trial court correctly concluded that in *Bickers v. W. & S. Life Ins. Co.*, supra, the Court barred all common-law tort claims of wrongful discharge under the Workers' Compensation Act. We disagree. We find that *Bickers's* holding does not encompass Sutton's claim because the policy at issue there differs from the one here.

Unlike Sutton, the plaintiff in *Bickers* was discharged for non-retaliatory reasons while she was receiving workers' compensation benefits. She was injured in 1994 and filed a claim for workers' compensation soon after. Because of the injury, she was unable to work for stretches of time. The employer did not discharge her until 2002, a decision based primarily on *Bickers's* inability to do her job effectively. The issue in *Bickers* was "whether the tort of wrongful discharge in violation of public policy applies to a nonretaliatory discharge of an injured worker receiving workers' compensation benefits." *Bickers*, at ¶1. The Court held that "[a]n employee who is terminated from employment while receiving workers' compensation has no common-law cause of action for wrongful discharge in violation of the public policy underlying R.C. 4123.90, which provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers' Compensation Act." *Id.*, at the syllabus. Sutton's claim falls outside this holding. Sutton was not discharged by Tomco "while receiving" compensation benefits. Nor had Sutton filed a claim before he was discharged.

In *Bickers*, the Court barred only common-law tort claims of wrongful discharge when the discharge is for reasons that are not retaliatory. The discharge of an employee while the employee is receiving compensation benefits, like the plaintiff in *Bickers*, is not prohibited because it is not retaliatory. The policy choice in *Bickers* is "between permitting and prohibiting the discharge from employment of an employee who has been injured at

work." *Bickers*, at ¶20. Deny employers the ability to discharge injured workers by requiring them to hold open such workers' jobs indefinitely and "employers will be burdened with employees unable to perform the work for which they were hired and an inability to obtain permanent replacements." *Id.*, at ¶21. But permit employers to terminate workers who are injured and cannot work as a result and "worker[s] suffer[] not only the burden of being injured but also the burden of unemployment at a time when seeking a new position is made more difficult by the injury." *Id.*, at ¶22. *The choice* of the General Assembly, reflected in R.C. 4123.90, was "to proscribe retaliatory discharges only." *Id.*, at ¶23. Deferring to the General Assembly's choice, the Court said that "[i]t is within the prerogative and authority of the General Assembly to make *this choice*." *Id.* (Emphasis added). "We," the Court continued, "may not override *this choice* and superimpose a common-law, public policy tort remedy on this wholly statutory system." *Id.* (Emphasis added). Also, "it would be inappropriate for the judiciary to * * * supplant *the policy choice* of the legislature." *Id.*, at ¶24. Finally, said the Court, "the imposition of common-law principles of wrongful discharge into the workers' compensation arena runs counter to the balance of mutual compromise between the interests of the employer and the employee as [the balance represented by *this choice* is] expressed by the General Assembly within the Act." *Id.* "Bickers's remedy," concluded the Court, "must be found within the workers' compensation statutes." *Id.*, at ¶25.

The General Assembly's *policy choice* discussed by the Court in *Bickers* is not the policy choice raised here. Tomco is entirely correct when it says that the public policy embodied by R.C. 4123.90 does not extend beyond the language of the statute. This is why the Court barred common-law claims for wrongful discharge under this statute when

the plaintiff was discharged "while receiving workers' compensation." Such a plaintiff undoubtedly filed a claim but was not "discharged for retaliatory reasons." A discharge in these circumstances does not jeopardize the public policy of the statute, which proscribes only retaliatory discharges. Conversely, a discharge under the circumstances of this case does directly threaten this public policy by allowing an employer to prevent an employee from obtaining protection against retaliation.

To be sure, we do not mean to suggest that Sutton will or should prevail on his claim. Rather, we conclude only that neither *Bickers* nor other law bars Sutton from bringing the claim. However, "[i]n order to prevail on his claim, [Sutton] must carry his burden to prove the remaining elements of a wrongful-discharge claim." *Dohme v. Eurand Am., Inc.*, 170 Ohio App.3d 593, 2007-Ohio-865, at ¶38.

The first assignment of error is sustained.

Second Assignment of Error

"THE TRIAL COURT ERRED IN FINDING THAT APPELLANT'S ACTIONS WERE INSUFFICIENT TO CONSTITUTE THE INSTITUTION OR PURSUANCE OF A CLAIM UNDER R.C. § 4123.90."

Here Sutton alleges that the trial court erred by finding that he may not bring a statutory claim. Sutton argues that if we conclude that the Ohio Supreme Court's decision in *Bickers* does bar his tort claim, as the trial court concluded, we should construe the statutory words "pursued" and "instituted" more broadly than they were construed before *Bickers*. Sutton contends that his act of reporting the injury constituted "pursuit" under the statute. Without a broader understanding of these words, Sutton asserts, the intent of R.C.

4123.90 will be undermined by employers immediately discharging employees after they report an injury.

In the first assignment of error we concluded that *Bickers* does not bar Sutton's tort claim. And we there addressed Sutton's concern about the undermining of the statute's intent. Finally, Sutton cites no authority for the contention that reporting an injury satisfies the statute, nor does he provide an argument for why reporting his injury satisfies the statute in this case. Thus, the complaint does not allege that, before being discharged, Sutton took any action that could be construed as filing a claim or instituting or pursuing proceedings under the Workers' Compensation Act.

The second assignment of error is overruled.

III.

We overruled the second assignment of error regarding Sutton's claim based on Tomco's violation of R.C. 4123.90, so we will not disturb this part of the trial court's judgment. But we sustained the first assignment of error regarding Sutton's claim for wrongful discharge, so we will reverse the court's judgment regarding this claim. Therefore, the trial court's judgment is Reversed and is Remanded for further proceedings.

.....

FROELICH, J., concurs.

DONOVAN, P.J., dissenting:

I disagree. I do not believe we are at liberty to overrule the syllabus of a Supreme Court opinion, *Bickers*, which is on point. As an appellate court, we are bound by Rule 1

of the Supreme Court Rules for Reporting of Opinions. Rule 1(B)(1) and (2) indicate: "(1) The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes. (2) If there is disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls." Nothing in the *Bickers* syllabus indicates that the rule of law contained therein applies only to non-retaliatory discharges.

I would agree with the trial court the claim is barred based upon the *Bickers* holding which we are not free to modify. I would affirm.

.....

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Hon. Michael T. Hall



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GREGORY J. BRUSH
CLERK OF COURTS
IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

22

DeWAYNE SUTTON

Plaintiff-Appellant

v.

TOMCO MACHINING, INC.

Defendant-Appellee

Appellate Case No. 23416

Trial Court Case No. 2008-CV-8579

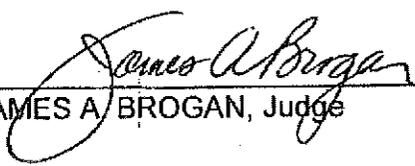
(Civil Appeal from
Common Pleas Court)

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 5th day
of March, 2010, the judgment of the trial court is **Reversed**, and this cause is
Remanded for further proceedings consistent with the Opinion.

Costs to be paid as stated in App.R. 24.

MARY E. DONOVAN, Presiding Judge



JAMES A. BROGAN, Judge



JEFFREY E. FROELICH, Judge

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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