

ORIGINAL

IN THE SUPREME COURT OF OHIO

DeWAYNE SUTTON, :  
 :  
 PLAINTIFF/APPELLEE, : Case No. 10-0670  
 :  
 v. :  
 :  
 TOMCO MACHINING, INC., : On Appeal from the  
 : Montgomery County Court of Appeals  
 DEFENDANT/APPELLEE. : Second Appellate District  
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APPELLEE, DeWAYNE SUTTON'S, MEMORANDUM IN RESPONSE TO  
 APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

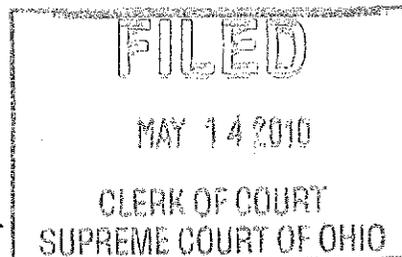
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APPELLEE'S RESPONSE TO APPELLANT'S EXPLANATION OF WHY  
THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Due to the unique nature of the facts at issue and the narrowly tailored public policy exception that was recognized by the Court of Appeals, this case does not rise to the level of being of public or great general interest. In fact, counsel for Appellant only discovered one other reported Ohio case addressing the same legal issue which is *Moore v. Animal Fair Pet Center, Inc.* (1995), 81 Ohio Misc.2d 46, a common pleas court case out of Franklin County. The decisions reached by the court of appeals in the present case and the court in *Moore* are consistent with one another and do not conflict with any decision of this Court.

Because the public policy exception at issue is extremely narrow and only applies in circumstances in which an employee is terminated so quickly after incurring an injury that the employee has no reasonable opportunity to file, institute, or pursue a workers compensation claim, the specific public policy recognized by the court of appeals does not implicate Section 35, Article II, Ohio Constitution or any provision of R.C. § 4123. The public policy at issue is not inconsistent with this Court's decision in *Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St. 3d 351, 2007-Ohio-6751, because the factual scenario necessary to pursue such a claim requires that the employee be discharged prior to receiving any of the rights and protections conferred upon the employee by virtue of the Workers' Compensation Act. In light of this Court's finding that the act of an employee informing the employer that the employee intends to file a

workers' compensation claim does not constitute instituting or pursuing any proceedings under R.C. § 4123.90, Appellee had no rights or protections under the Workers' Compensation Act, at the time of his discharge, and therefore was not preempted from pursuing a public policy wrongful discharge claim. *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 23 O.O.3d 341, 433 N.E.2d 142

Appellant is asking this Court to accept jurisdiction over this matter and to create a loophole which allows employers to escape any potential for liability under R.C. § 4123.90 by simply terminating injured workers before they have the opportunity to file a workers' compensation claim. As indicated above, the factual scenario giving rise to the public policy claim at issue is rarely litigated and the existence of the public policy exception is not a matter of great public or general interest. On the other hand, giving employers a license to avoid liability under R.C. § 4123.90, by promptly firing injured workers would undoubtedly become a matter of great public interest and unnecessarily draw attention and resources from more pressing issues facing the State of Ohio.

Appellee urges this Court not to accept jurisdiction over this case because the law set forth by the court of appeals has a very limited application, it is narrowly tailored, and it does not impact any case in which an injured worker is discharged after filing a workers' compensation claim or having a reasonable opportunity to file a claim.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### Proposition of Law No. I

**The public policy at issue is narrowly tailored to address circumstances in which employers terminate the employment of injured workers prior to the workers having reasonable opportunities to file workers compensation claims and does not impact any scenario in which employees have filed claims or pursued rights conferred by the Workers Compensation Act.**

Appellee was employed as an Operations Manager at Appellant's machine shop for over two and one-half years. (Complaint Para. 1, 2) On or about April 14, 2008, at approximately 7:30 a.m., Appellee injured his back while on the job. (Complaint Para. 3) Appellee reported his injury to Jim Tomasiak (hereinafter referred to as "Tomasiak"), Appellant's President. (Complaint Para. 4) Within approximately one hour of reporting the injury to Tomasiak, Appellee's employment was terminated without cause. (Complaint Para. 5) Following his termination, Appellee filed an application for workers' compensation benefits and was awarded benefits. (Complaint Para. 8)

The Court of Appeals ruled that when an employee suffers a work-related injury the employee may bring a public policy claim if the employer discharges the employee so quickly that the employee has no reasonable opportunity to file a claim or institute proceedings under the Workers' Compensation Act and the employer lacks an overriding business justification for the discharge.

Appellant's reliance on this Court's decision in *Bickers* is premised upon its taking of one phrase, in the decision, out of context and misapplying that phrase to this case which is factually and legally distinguishable. *Bickers* dealt with an injured employee who was terminated for absenteeism while receiving workers compensation benefits. The issue that this Court examined 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 v. Western & Southern Life Insurance Co.* (2007), 116 Ohio St. 3d 351 This Court ruled that, "an 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" and that "the workers' compensation system precludes a common-law claim of wrongful discharge in violation of public policy when an employee files a workers' compensation claim and is discharged for nonretaliatory reasons. *Bickers v. Western & Southern Life Insurance Co.* (2007), 116 Ohio St. 3d 351, 353-354, 355-356

In *Bickers*, this Court carefully weighed the encumbrance that such a policy would have on employers to "hold open the jobs of injured employees for indefinite periods of time" and "be burdened with employees unable to perform the work for which they were hired" against the impact that not recognizing such a policy would have on an employee who "suffers 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." *Bickers v. Western & Southern Life Insurance Co.* (2007), 116 Ohio St. 3d 351, 356-357

This Court's decision in *Bickers* specifically "precludes a common-law claim of wrongful discharge in violation of public policy when an employee files a workers' compensation claim." Appellee concedes that the *Bickers* decision bars public policy claims premised on: (1) Non-retaliatory discharges by persons receiving workers

compensation and (2) Retaliatory discharges by individuals after they have pursued or who have had a reasonable opportunity to pursue workers' compensation claims; however, neither of those scenarios are applicable here. Although Appellee had reported his injury to the employer neither the trial court nor the court of appeals found that Appellee had instituted or pursued a workers' compensation claim sufficient to invoke the protections of R.C. § 4123.90.

As Appellee was discharged so soon after his injury that he had no reasonable opportunity to institute or pursue a workers' compensation claim and received no compensation at the time of his discharge, he has a viable public policy claim. In *Moore v. Animal Fair Pet Center, Inc.*, 674 N.E. 2d 1269, (Franklin County Court of Common Pleas 1995), the court examined this very issue and concluded that R.C. § 4123.90 preempted public policy claims based on retaliation for filing a workers' compensation claim, but determined that the preemption does not affect an employee's public policy claim if the employee did not file or otherwise institute or pursue a workers compensation claim prior to his or her discharge. *Moore v. Animal Fair Pet Center, Inc.*, 674 N.E. 2d 1269, 1272 (Franklin County Court of Common Pleas 1995)

Appellant cited thirteen cases which it contends supports its theory that this Court's analysis in *Bickers* bars Appellee's public policy claim. Not one of these cases involves a scenario in which an employee was discharged so quickly after suffering an on-the-job injury that the employee had no reasonable opportunity to file a claim or institute proceedings under the Workers' Compensation Act. Appellant's argument that Appellee's claim is barred by *Bickers* because it pertains to rights conferred upon Appellee by Ohio's worker' compensation system is contradicted by this Court's finding

that the act of an employee informing the employer that the employee intends to file a workers' compensation claim does not constitute instituting or pursuing any proceedings under R.C. § 4123.90. *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 23 O.O.3d 341, 433 N.E.2d 142

This Court's decision in *Bickers* is clear: public policy claims premised on non-retaliatory discharges by persons receiving workers' compensation and retaliatory discharges by individuals terminated after filing workers' compensation claims are barred. The decision is silent on whether an employer may avoid liability under R.C. § 4123.90 by discharging an injured worker before he or she has a reasonable opportunity to file a workers' compensation claim.

#### Proposition of Law No. II

**Appellee is not required to satisfy the elements of a statutory retaliation claim in order to satisfy the elements of a public policy wrongful discharge claim.**

In Proposition of Law No. II, Appellant attempts to interpose the elements of a statutory retaliation claim onto Appellee's public policy wrongful discharge claim. In light of the facts required to give rise to the specific public policy claim at issue, Appellant's argument is illogical. Additionally, Appellant's "preemptive discharge" theory is flawed because it ignores the fact that Appellee was injured on the job and reported that injury to the Appellant.

Appellant contends that Appellee's public policy claim should be barred because he did not satisfy the elements of a statutory retaliatory discharge claim under R.C. § 4123.90. Appellant ignores the fact that the reason Appellee was unable to satisfy the elements of a R.C. § 4123.90 claim was the primary consideration giving rise to the court

of appeals' recognition of his public policy claim and that the elements of a public policy wrongful discharge claim are different from those of a statutory retaliation claim. Had Appellee satisfied the R.C. § 4123.90 criteria, his claim and remedies would have been governed by that statute; however, Appellant argued and the court of appeals agreed that Appellee's actions did not constitute the filing or pursuit of a claim under R.C. 4123.90. The reason the court of appeals recognized the public policy claim was because Appellee was discharged so quickly after his injury that he did not have a reasonable opportunity to file or pursue a workers' compensation claim as required by R.C. § 4123.90.

The proximity between Appellee's on-the-job injury and his discharge is the focal point of the court of appeals' analysis and recognition of a narrowly tailored public policy exception which prevents employers from avoiding liability under R.C. § 4123.90. Stated differently, but for the propinquity of Appellee's discharge to his injury, no public policy claim would have been recognized. It is this factor which distinguishes Appellee's claim from that of the employee in *Mortensen v. Intercontinental Chemical Corporation*, 178 Ohio App.3d 93 (1<sup>st</sup> Dist. 2008), who attempted to pursue a public policy claim even though he had a reasonable opportunity to file a workers compensation claim, but did not.

Appellant's reliance on *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442 is misplaced because that case involved a statutory retaliation claim under R.C. § 4112. The case at bar is distinguishable from *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 1997-Ohio-219 in that the employer in *Kulch* did not take affirmative steps to prevent the employee from satisfying the statutory requirements for pursuing a whistleblower claim. In the present case, Appellant's unscrupulous act of terminating Appellee's employment within an hour of learning of his workplace injury prevented

Appellee from meeting the statutory obligations set forth in R.C. § 4123.90. Allowing such conduct would undermine the anti-retaliation measures set forth in R.C. § 4123.90 and allow employers to legally circumvent R.C. § 4123.90 by firing an injured employee before he or she can file a claim.

In *Collins v. Rizkana* (1995), 652 N.E.2d 653, this Court defined the elements of a public policy wrongful discharge claim as follows: (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) That plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) That the employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

The court of appeals thoroughly discussed each element in its Decision and applied the facts of this case to those elements. On Page 10 of its decision, the court of appeals states, "In 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.

The complaint pleads that Appellee was injured on-the-job, reported his injury to the employer and was promptly discharged. Nothing "preemptive" occurred. Appellee

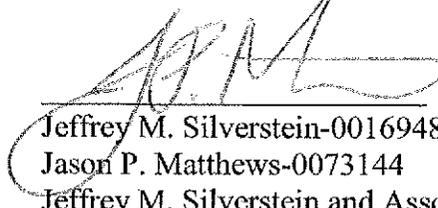
was injured at work, he advised Appellant of his injury, and soon thereafter was discharged.

### CONCLUSION

The narrowly tailored public policy recognized by the court of appeals is not worthy of great public or general interest because it is limited to the rare occasion when an employee is discharged so quickly after suffering an on-the-job injury that he or she has no reasonable opportunity to file a workers' compensation claim. In the only other reported case from Ohio addressing this issue, the Franklin County Court of Common Pleas employs the same reasoning and reaches the same conclusion as the court of appeals. The policy's only purpose is to prevent employers from circumventing the anti-retaliation measures of R.C. § 4123.90 "by simply employing swift employment terminations." *Moore v. Animal Fair Pet Center, Inc.*, 674 N.E. 2d 1269, 1273 (Franklin County Court of Common Pleas 1995) Pursuant to this Court's decision in *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 23 O.O.3d 341, 433 N.E.2d 142, employees in like circumstances have no rights or protections conferred by the Workers' Compensation Act, at the time of discharge, and therefore should not be preempted from pursuing public policy wrongful discharge claims.

For the reasons set forth above, Appellee respectfully requests that his Court decline jurisdiction in this case.

Respectfully submitted,



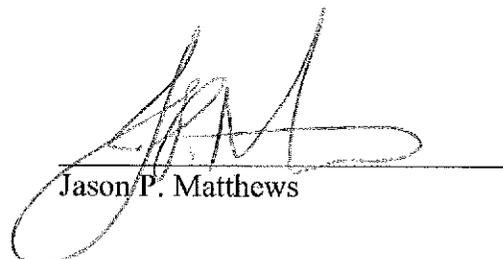
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**CERTIFICATE OF SERVICE**

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

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by regular U.S. mail this 14th day of May 2010.



Jason P. Matthews