ORIGINAL

IN THE SUPREME COURT OF OHIO

BARBARA ZUMWALDE,

Plaintiff-Appellee,

v.

MADEIRA AND INDIAN HILL
JOINT FIRE DISTRICT,

Defendant,

and

STEPHEN ASHBROCK,

Defendant-Appellant.

Case No.: 2010-0218

On Appeal from the Franklin County
Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No.: C0900015

AMICUS CURIAE BRIEF ON BEHALF OF OHIO ASSOCIATION FOR JUSTICE

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I. STATEMENT OF FACTS

A. Amicus curiae Ohio Association for Justice adopts the statement of facts as submitted by Appellee with two special notations. Appellant was not sued as a "fellow employee", but as a supervisor of the Subdivision for which Appellee worked, a significant distinction as noted later.

B. Appellee's complaint at paragraph 3 avers that it was brought "pursuant to the provisions of R.C.§4112.02, R.C. §4112.99, and R.C. §4123.90 as well as the common law of the State of Ohio." Thus, this appeal must be considered within the context of R.C. Chapter 4112 employment discrimination (retaliation).

II. ARGUMENT

Proposition of Law:

R.C. § 2744.09(B) APPLIES TO CLAIMS AGAINST BOTH A "PUBLIC SUBDIVISION" AND ITS SUPERVISORS FOR "CLAIMS ARISING OUT OF THE EMPLOYMENT RELATIONSHIP".

A. Introduction- Political Subdivision Supervisors Are Liable for Retaliation.

The law in this area is relatively settled and should be left undisturbed. R.C. §2744.09 was enacted twenty five years ago and has not been modified. Ohio courts have consistently held political subdivisions and supervisors liable for their acts of retaliation, a discriminatory practice prohibited by Chapter 4112. *Hout v. City of Mansfield* (N.D.Ohio 2008), 550 F.Supp.2d 701; *Hall v. Memorial Hospital of Union City.*, 3rd Dist. No. 14-06-03, 2006-Ohio-4552, at ¶15; *Nagel v. Horner,* 162 Ohio App.3d 221, 2005-Ohio-3574, at ¶16-20, 833 N.E.2d 300. See, also,

Genaro v. Cent. Transport, Inc. (1999 Ohio), 84 Ohio St.3d 293, 703 N.E.2d 782.

The appellate court below mentioned *Campolieti v. Cleveland,* 184 Ohio App.3d 419, 2009-Ohio-5224, 921 N.E.2d 286, but its analysis of that cited decision was brief. Appellant cites it to this Court as conflicting with the appellate court decision below. In *Campolieti*, the Eighth District Court of Appeals held that employment decisions made in the exercise of a government function are subject to or are governed by or fall within the ambit of R.C. Chapter 2744. The court relied upon and cited *Western-Southern Life Ins. Co. v. Fridley* (1990), 69 Ohio App.3d 190, 590 N.E.2d 325 in support of its holding. However, *Fridley* addresses neither immunity generally nor does it cite R.C. Chapter 2744. Reliance upon the *Fridley* decision by the Eighth District in *Campolieti* was misplaced.

A more apt analysis by the Eighth District was undertaken in *Davis v. City of Cleveland,* 8th Dist. No 83665, 2004-Ohio-664, wherein the same court held that in a discrimination and declamation case, "R.C. Chapter 2744 affords no immunity [in a discrimination and defamation case] to the City [defined as "the City and Supervisors Bratz and Sadie (collectively referred to as the "City" where appropriate")] by virtue of R.C. § 2744.09." *Id.,* at ¶34. The holding in *Fridley* simply does not accurately reflect the law of the Eighth District regarding supervisor immunity.

Ohio law also clearly distinguishes a claim against a "supervisor" (as in the case at bar) from a claim against a "fellow employee." *Hale v. City of Dayton,* 2nd Dist. No. 1800, 2002-Ohio-542. As noted below, supervisors are treated differently than fellow employees for purposes of R.C. Chapter 4112 and are not interchangeable. Appellant's references to cases addressing in the context of R.C. Chapter 4112 "fellow employee" are misleading and

inapposite.

B. The General Assembly Intended Not to Provide Immunity to Subdivision Supervisors in Chapter 4112 discrimination claims by reason of R.C. §2744.03(C).

In its analysis, the trial court first filtered this case through R.C. §2744.03, holding that retaliation by its nature is motivated by malicious purpose, bad faith and/or in a wanton or reckless manner and accordingly is excluded from immunity. The trial court omitted another applicable statutory exclusion in R.C. Chapter 2744.03.

R.C. §2744.03(C) also excludes immunity when civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability in this case is expressly imposed upon Appellant supervisor pursuant to R.C. Chapter 4112. *"Employer" includes the state, any political subdivision of the state,..,* ***and any person acting directly or indirectly in the interest of an employer."*** R.C. §4112.01 [emphasis added.].

Thus, even if this Court were to hold that the trial court were correct to begin its analysis with R.C. §2744.03, and that its findings were incorrect that retaliation by its nature is not motivated by malicious purpose, bad faith or in a wanton or reckless manner, the decision below should still be affirmed by reason of R.C. §2744.03(C).

C. R. C. § 2744.09 Specifically Exempts Employment Cases from Chapter 2744 Immunity.

This Court has held that neither political subdivisions nor supervisors are immune, pursuant to R.C. §2744. 09. *Whitehall ex Rel. Wolfe v. Ohio Civil Rights Commission* (1995), 74 Ohio St.3d 120, 656 N.E.2d 684 (also cited by the appellate court below). Other courts have also denied R.C. §2744. 09 immunity to supervisors. See, eg., *Ogilbee v. Bd. of Edu. of Dayton Pub. Schools,* 2nd Dist. No. 23432, 2010-Ohio-1913, at ¶18 (citing *Whitehall*); *Nagel v. Horner,*

162 Ohio App.3d 221, 2005-Ohio-3574 at ¶16-20, 833 N.E.2d 300; *State ex rel. Conroy v. Williams,* 185 Ohio App.3d 69, 2009Ohio-6040, at ¶27, 923 N.E.2d 191. Further, it appears that this Court in *Wolfe, supra,* has already addresses the issue raised by Appellant. The facts of this case do not warrant disturbing settled law.

D. The Wording of the Statute

1. R. C. §2744. 09 Contains Ambiguity.

R.C. §2744.09 lacks clarity and is not susceptible to the rigidity of the plain meaning doctrine. While Appellant correctly noted that the phase "or any of its employees" is found only in R.C. Chapter 2744.09(A), he failed to note as well that subsection (A) is limited to civil actions "that seek to recover damages" from a political subdivision or any of its employees. That distinct phrase is also found only in R.C. §2744.09(A). Applying the same statutory analysis demonstrates "or any of its employees" applies only to situations where the action is to "recover damages", not to those where equitable relief is available. Therefore, the specific language of R.C. §2744.09(A) is not analogous to the other sub-sections.

R.C. §4112.09 specifically allows equitable relief for instances of retaliation: "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any appropriate relief." The meaning of the expression found in R.C. §2744.09(A) "or any of its employees" is thus limited only to contract cases in which damages is the sole remedy. Retaliation cases, such as the case at bar, are not subject to Appellant's reasoning.

2. Judicial Interpretation of the Plain Meaning of an Ohio Statute.

This Court has never allowed the doctrine of plain meaning to impair its ultimate duty in statutory interpretation to determine the true intent of the General Assembly. Rather, this Court

looks to sources widely accepted in common parlance for the accurate meaning and rejects definitions that would defeat the legislative intent in enactment of a statute. See, *Lake County National Bank v. Kosydar* (1973), 36 Ohio St.2d 189, 305 N.E.2d 799. As this Court explained decades ago: "this Court has recognized that the cornerstone of statutory construction is legislative intention. In determining that intention courts look to language employed and to the purpose to be accomplished. *Ohio Ass'n of Public School Employees, Chapter No. 672 v. Twin Valley Local School Dist. Bd. of Educ.* (1983), 6 Ohio St.3d 178, 181, 451 N.E.2d 1211," (Citing *State, ex rel. Francis v. Sours* (1944), 143 Ohio St. 120, 124, 53 N.E.2d 1021 28 O.O. 53.)

Likewise, this Court should not be constrained by the so called plain meaning doctrine but rather should analyze this statute, as it has examined others historically, consistent with legislative intent.

E. Judicially Imposition of Supervisor Immunity Would Be Inconsistent with the Purposes of R.C. Chapter 2744.

The clear legislative purpose of R.C. Chapter 2744 is to protect subdivisions, <u>not</u> supervisors, from liability for tortious actions. The legislation was manifestly based upon fiscal concerns. See, *Engleman v. Cincinnati Bd. of Educ.,* 1st Dist. No. C-00597, 2001 WL 705575; *Doe v. Marlington Local School Dist. Bd. of Edn.,* 122 Ohio St.3d 12, 2009-Ohio-1360, at ¶11, 907 N.E.2d 706, (The recognized purpose of R.C. Chapter 2744, the political subdivision immunity law, is the "preservation of the fiscal integrity of political subdivisions.") *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 453, 639 N.E.2d 105. R.C. ("Chapter 2744 was the General Assembly's response to this court's abrogation of governmental

immunity for political subdivisions."). The General Assembly has expressed no intention to differentiate treatment of supervisors with regard to immunity from employers. See *Genaro, supra* ("Petitioners argue that the plain language of R.C. Chapter 4112 imposes individual liability on managers and supervisors for their discriminatory conduct found to be in violation of R.C. Chapter 4112. We agree." *Id.*, 84 Ohio St.3d at 296).

Appellant concedes that subdivisions are not immune pursuant to R.C. §2744. 09 for employment and employment discrimination cases but suggest without legal support that supervisors of those same subdivisions are entitled to immunity for their actions even though no immunity was granted to their employers. Appellant's reliance rests solely on ambiguity within R.C.§2744.09(A). Legislative intent does not support Appellant's claim.

As a general matter, the sovereign immunity afforded to a political subdivision extends to its employees. See, R.C.§2744.03(A)(6), *Albert v. Trumbull County Bd. of Mental Retardation/Developmental Disabilities,* 11th Dist. No. 98-T-0095, 1999 WL 957066. Logic dictates that the converse would be true as well: If a political subdivision is not immune, neither should be its employees.

Appellant offers no rationale upon which the General Assembly would immunize supervisors, after having legislated not to immunize the supervisor's employer for the same conduct. Despite its keen awareness of decades of decisions finding no supervisor immunity, the General Assembly has made no modification to R.C. §2744.09 since enactment in 1985.

F. Judicial Creation of Supervisor Immunity Would Frustrate the Purposes of R.C. Chapter 4112

1. Immunity Would Change Complainant's Burden of Proof.

Retaliation requires proof of four specific elements. "To establish a case 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, (3) the defending party took an adverse employment action against the employee, and (4) there is a causal connection between the protected activity and adverse action." *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 327; 2007-Ohio-6442, at ¶13, 879 N.E.2d 174.

If this Court were to impose R.C. Chapter 2744 requirements in employment discrimination cases, then implicitly R.C. §2744.03(A) would require an employment discrimination plaintiff to prove in addition "malicious purpose, in bad faith, or in a wanton or reckless manner". Not only does R.C. Chapter 2744 not suggest that the Ohio Legislature intended to create additional burdens upon discriminated plaintiffs and/or to destroy employment discrimination jurisprudence created since the enactment of R.C. Chapter 4112, but such an application of R.C. Chapter 2744 would frustrate claimant's prosecution of such a case and be inconsistent with R.C. Chapter 4112.

The General Assembly's intent was clear when it enacted R.C. Chapter 4112. "This chapter shall be construed liberally for the accomplishment of its purposes, and **any law inconsistent with any provision of this chapter shall not apply."** R.C. §4112.08 (emphasis added).

Likewise, this Court has not deviated from its understanding of that legislative intent. "This court has noted in numerous cases the existence of a strong public policy against discrimination." *Genaro, supra,* 84 Ohio St.3d at 296. Succinctly stated, "there is no place in this state for any sort of discrimination, no matter its size, shape or form or in what clothes it might

masquerade." Id. at 296.

In addition to R.C. Chapter 4112, state courts have concurrent jurisdiction to hear retaliation and other matters under Title VII. *Manning v. Ohio State Library Bd.* (1991), 62 Ohio St.3d 24, 577 N.E.2d 650. Subdivision supervisors may not be personally liable under Title VII, even though the subdivision can be held liable. Over a decade ago, in noting this difference, this Court found, "Without doubt, the language employed by the General Assembly with regard to R.C. 4112.01(A)(2) is much broader in scope than that employed by the analogous Title VII provision." *Genaro, supra*, 84 Ohio St.3d at 298-299.

Against this backdrop, Appellant's plea for the creation of a judicially imposed distinction eliminating what this Court has recognized as a major distinction between federal and state law rings hollow. Supervisor immunity is inconsistent with R.C. Chapter 4112 and therefore, "shall not apply". R.C. §4112.08.

G. Fiscal Concerns

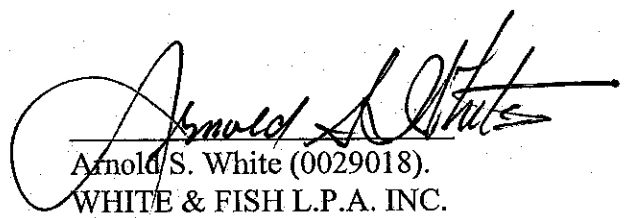
R.C. Chapter 2744 was written to protect political subdivision coffers only in certain situations and political subdivisions also bear the cost of supervisor liability. R.C.§2744.07(A)(2). The General Assembly has been careful to delineate under what circumstances political subdivisions are not immune, and the fiscal concerns are obvious. Apparently, Appellant is attempting to suggest an non-existent immunity as having an indirect effect on the subdivision's coffers, even though the General Assembly has not legislated the extension of immunity to an individual supervisor. Because the General Assembly has determined not only that the State is not immune under Chapter 2744 but that, pursuant to R.C.§ 2744.07(A)(2), it must also pay for

Supervisor liability, Appellant must explain why then the General Assemble would have chosen to immunize supervisors and at the same time require the subdivision to bear the cost of supervisor liability. It simply makes no sense.

H. Conclusion

The settled law of the State in this regard should not be disturbed. Supervisors, like their employers, are not immune from violations of R.C. Chapter 4112 by reason of R.C. §2744.09(B). The Ohio Association for Justice urges the Court to affirm the decision of the court below and not impose any new interpretation of settled law.

Respectfully submitted,



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I hereby certify that a true and accurate copy of the foregoing Amicus Curiae Brief on Behalf of Ohio Association for Justice was served upon the following by first-class U.S. mail, postage prepaid, on this 9th day of August, 2010:

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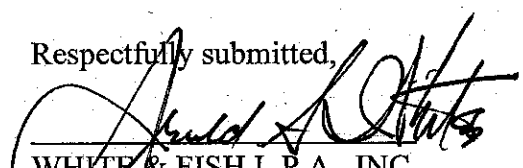

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