

ORIGINAL

IN THE SUPREME COURT OF OHIO

BARBARA ZUMWALDE,)	Case No. 2010-0218
)	
Plaintiff-Appellee)	On Appeal from the Hamilton
)	County Court of Appeals
v.)	First Appellate District
)	
MADEIRA AND INDIAN HILL)	Court of Appeals Case
JOINT FIRE DISTRICT)	No. C-09-00015
)	
and)	
)	
STEPHEN ASHBROCK)	
)	
Defendant - Appellant,)	

REPLY BRIEF OF *AMICI CURIAE*
THE OHIO MUNICIPAL LEAGUE, THE OHIO TOWNSHIP ASSOCIATION
AND THE OHIO FIRE CHIEFS' ASSOCIATION
URGING REVERSAL ON BEHALF OF APPELLANT
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INTRODUCTION

The Ohio Municipal League, the Ohio Township Association and the Ohio Fire Chiefs' Association (together "Amici Curiae"), on behalf of Fire Chief Stephen Ashbrock, Defendant-Appellant (the "Chief Ashbrock"), urge this Court to reverse the decision of the First District Court of Appeals, in *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 2009-Ohio-6801.

This Court is respectfully requested to reverse the decision of the First District and remand the matter to the First District with a mandate to remand the matter to the Court of Common Pleas to determine Chief Ashbrock's immunity under R.C. 2744.03(A)(6).

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League (the "League") is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. The League was incorporated as an Ohio non-profit corporation in 1952 by city and village officials who saw the need for a statewide association to serve the interests of Ohio municipal government. The League provides educational opportunities for municipal officials and advocates on behalf of Ohio's municipal corporations.

The Ohio Fire Chiefs' Association is a not-for-profit, statewide organization that represents the interests of over 800 Fire Chiefs in Ohio. The Association provides programs and services, including education and professional development, legislative advocacy, communication and information exchange, to Ohio's Fire Chiefs.

The Ohio Township Association ("OTA") is a statewide professional organization dedicated to the promotion and preservation of township government in Ohio. OTA, founded in 1928, is organized in 87 Ohio counties. OTA has over 5,200 active members, comprised of elected township trustees and township fiscal officers from Ohio's 1,308 townships. OTA has an additional 4,400 associate members who are dedicated to supporting the causes of the OTA.

Municipalities, townships and fire districts are political subdivisions in Ohio and are most frequently public employers. Consequently, these political subdivisions and their employees are subject to the provisions of Chapter 2744 of the Revised Code. See Revised Code section 2744.01(F). The immunities provided to a political subdivision, as a governmental entity, and to its employees are critical to the effective operation of local government. Public employees, and particularly supervisory employees, must be able to manage key local governmental functions within the scope of their employment, without fear of burdensome litigation. This is particularly true when the function being managed is public safety and fire protection for a local community. The decision below resulted from a flawed interpretation of Revised Code section 2744.09(B) and must be overturned to ensure fire chiefs and other supervisory public employees can rely on the immunity expressly granted to them by Chapter 2744 of the Revised Code.

ARGUMENT

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)**

R.C. 2744.09(B) provides:

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 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), therefore, excludes, from the application of the provisions of R.C. Chapter 2744, civil actions by 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.) This language does not mention actions against fellow employees and does not expressly address the immunity of employees under R.C. 2744.03(A)(6). Only actions against the political subdivision that arise from the employment relationship between the plaintiff employee and the political subdivision are addressed by the plain language of R.C. 2744.09(B). The broadening of this language by the First District’s “interpretation” is erroneous.

2. “Political subdivision” is clear and unambiguous

This Court has held that “[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer* (1944), 143 Ohio St. 312, 55 N.E.2d 413, paragraph 5 of the syllabus. See also *State v. Taniguchi* (1995), 74 Ohio St.3d 154, 656 N.E.2d 1286, *Cline v. Ohio Bureau of Motor Vehicles* (1991), 61 Ohio St.3d 93, 573 N.E.2d 77, and *Meeks v. Papadopoulos* (1980), 62 Ohio St.2d 187, 4040 N.E.2d 159. The Court has also stated that “the time-honored rule of statutory construction *** decrees that the legislative intent may be inquired into only if the enactment is ambiguous upon its face.” *Carmelite Sisters, St. Rita’s Home v. Board of Review, Bureau of Unemployment Compensation* (1969), 18 Ohio St.2d 41, 46, 247 N.E.2d 477 (superseded by statute on other grounds pertaining to tax exemption status).

Amicus Curiae Ohio Association for Justice (“Ohio Association for Justice”) asserts that “[t]his 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.” *Amicus Curiae Brief on Behalf of Ohio Association for Justice*, page 4. This assertion is contrary to this Court’s well established rule that there is no need to apply rules of statutory interpretation where the language of a statute is plain and unambiguous. *Cline* at 96; *Meeks* at 190.

The term “political subdivision” is plain and unambiguous and has a fixed and definite meaning in law. R.C. 2744.01(F) defines “political subdivision” for purposes of Chapter 2744. It states, in pertinent part, that a “‘Political Subdivision’ means a municipal corporation, township, county, school district, or other body corporate and politic responsible for government activities in a geographic area smaller than that of the state.” R.C. 2744.01(F). A “political subdivision,” for purposes of 2744.09(B), is not an individual or an employee of a political subdivision. The definition of a political subdivision is unambiguous on its face.

The First District concluded, however, that “a more logical reading” of R.C. 2744.09(B) is one that applies to claims against a fellow employee if the claims arise out of the employment relationship between the plaintiff employee and the political subdivision. *Zumwalde* at ¶9. This is not a more “logical” reading; it is a reading which ignores the language of the statute.

Appellee argues that while Chief Ashbrock “should properly be afforded immunity for discretionary decisions such as how best to manage a large urban fire, he **should not** be shielded from his decision to discriminate against one of his employees simply by virtue of the fact that he is a government employee.” *Merit Brief of Appellee Barbara Zumwalde*, page 9. (Emphasis added.)

Amicus Curiae the Ohio Employment Lawyers’ Association (“Ohio Employment Lawyers’ Association”) argues that the Chief “has no logical answer or countervailing policy to justify immunizing him from responsibility for his retaliatory acts.” *Brief of Amicus Curiae The Ohio Employment Lawyers’ Association In Support of Appellee Barbara Zumwalde*, page 10.

Both the Appellee and the Ohio Employment Lawyers’ Association ask this Court to “interpret” R.C. 2744.09(B) instead of “apply” the plain and unambiguous definition of political subdivision, as required by this Court’s rules of statutory interpretation. This Court should reject this request of Appellee and Ohio Employment Lawyers’ Association. The policy choices

regarding the immunities enjoyed by employees has been made by the General Assembly, and the General Assembly has not chosen to strip the immunity provided by R.C. 2744.03(A)(6) by the language contained in R.C. 2744.09(B).

This Court “should not construe words that need no construction or interpret language that needs no interpretation.” *Taniguchi* at 156. It should “apply” the plain and unambiguous meaning of “political subdivision” and not interpret it. *Cline* at 96; *Meeks* at 190.

3. Campolieti v. City of Cleveland,

In *Campolieti v. City of Cleveland*, 184 Ohio App.3d 419, 921 N.E. 2d 286, the Eighth District applied the plain and unambiguous meaning of “political subdivision.” It noted that R.C. 2744.09(B) “specifically removes sovereign immunity from ‘political subdivisions’ in actions by its employees involving matters arising out of the employment relationship” and concluded that “[w]hile appellant’s claim against the city fits neatly into this statutory exception, the claim against Chief Stubbs does not.” *Campolieti* at ¶32.

The Eighth District correctly applied the fixed and definite meaning of “political subdivision” to an employee’s appeal of a trial court’s grant of immunity to a fire chief in a claim arising out of an employment relationship. This court is urged to do so too.

4. Other decisions.

Appellee asserts that “[t]he majority of Ohio appellate courts to directly address the issue have determined that R.C. §2744.09(B) removes immunity from both political subdivisions and their employees in cases arising out of the employment relationship.” *Merit Brief of Appellee Barbara Zumwalde*, page 6. Appellee’s assertion, for the reasons set forth below, is misleading. The cases cited by Appellee did not “directly address the issue” that is presented in this case.

Appellee directs this Court’s attention to the decision of the Fourth District in *Nagel v. Horner*, 162 Ohio App.3d 221, 833 N.E.2d 300, and the decision of the Eleventh District in *Ross*

v. Trumbull County Child Support Enforcement Agency, 2001 WL 114971. (A copy is attached as “Appendix i”.) In *Nagel* the court held that an employee’s claims of retaliation and hostile work environment arose out of the employment relationship and, therefore, the city, police department, and other individual defendants were not statutorily immune from liability. *Nagel* at ¶20. The *Nagel* opinion, however, focuses on the issue of whether “claims that are causally connected to an individual’s employment fit into the category of actions that are “relative to any matter that arises out of the employment relationship.” *Nagel* at ¶19. The opinion does not include an analysis of whether R.C. 2744.09(B) applies to the immunity of employees of a political subdivision, granted pursuant to R.C. 2744.03(A)(6).

Likewise, the Eleventh District, in *Ross*, concluded that R.C. Chapter 2744 immunity did not apply to a political subdivision and its employee as the appellant’s invasion of privacy claim arose out of her employment with the political subdivision. *Ross* at *8. The Eleventh District’s opinion, like the opinion of the Fourth District in *Nagel*, does not discuss the issue of whether R.C. 2744.09(B) applies to individual employees of a political subdivision. In fact, the Eleventh District’s opinion contains a detailed discussion on whether a provision of Ohio’s Privacy Act, R.C. 1347.10(B), expressly imposes an exception to the R.C. Chapter 2744 immunity.

The cited cases fail to include a discussion of the issue squarely presented in this case. The persuasive value of the Fourth District and the Eleventh District decisions is therefore limited, at best.

5. The applicability of R.C. Chapter 4112 is not before this Court.

The Ohio Employment Lawyers’ Association and the Ohio Association for Justice argue that R.C. Section 2744.03(A)(6) exempts employment discrimination cases, brought under R.C. Chapter 4112, from R.C. Chapter 2744 immunity.

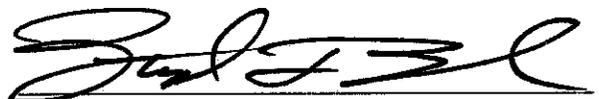
This issue was not addressed by the First District and is not before this Court. In order for a court to reach this issue, there would first have to be a determination that R.C. 2744.09(B) does not prevent an analysis of the immunities provided in R.C. 2744.03. Under the lower court's holding, an analysis of the relationship between R.C. 4112.02(I) and R.C. 2744.03(A)(6) would be superfluous.

The argument of the amici curiae in support of the Appellee effectively concedes that the lower court erred by holding as it did. They are now seeking to move-on to an issue that is not properly before this court.

CONCLUSION

Based upon the foregoing, Amici Curiae respectfully request this court to reverse the judgment of the First District Court of Appeals and remand the matter to the appellate court with a mandate that the case be remanded to the Common Pleas Court to determine the Chief Ashbrock's entitlement to immunity, pursuant to R.C. 2744.03(A)(6).

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the within *Reply Brief of Amici Curiae The Ohio Municipal League, The Ohio Township Association and the Ohio Fire Chiefs' Association Urging Reversal on Behalf of Appellant Stephen Ashbrock*, has been mailed by regular U.S. mail on the 14 day of September, 2010 to:

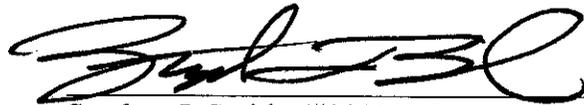
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CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.

Carol Lee ROSS, Plaintiff-Appellant,

v.

TRUMBULL COUNTY CHILD SUPPORT ENFORCEMENT AGENCY, et al., Defendants-Appellees.

No. 2000-T-0025.

Feb. 9, 2001.

Civil Appeal from the Court of Common Pleas, Case No. 98 CV 1221, Judgment Affirmed.

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Dennis Watkins, Trumbull County Prosecutor, James J. Misocky, Assistant Prosecutor, Warren, OH, Atty. Timothy T. Reid, Reid, Berry, Marshall & Wargo, Cleveland, OH, for defendants-appellees.

CHRISTLEY, P.J., NADER and O'NEILL, JJ.

OPINION

CHRISTLEY.

*1 This case came from the Trumbull County Court of Common Pleas. Appellant, Carol Lee Ross, appeals the trial court's grant of summary judgment in favor of appellees, the Trumbull County Child Support Enforcement Agency ("TCCSEA") and James W. Keating ("Keating"), director of the Trumbull County Department of Personnel and Risk Manage-

ment.

The following facts gave rise to this present matter. Appellant had been employed by the TCCSEA since January 1995 as a clerk aide II. Diane Shamrock ("Shamrock"), Larry Tripodi ("Tripodi") and Christina Campbell ("Campbell") were appellant's supervisors at TCCSEA.^{FN1}

Appellant first complained to her supervisor, Shamrock, that she was developing headaches possibly attributed to the fluorescent lighting in the workplace and was having difficulty with another co-worker. Shamrock advised appellant to obtain a doctor's excuse so that the fluorescent lights could be replaced with pink lights. Appellant proceeded to obtain a note from a chiropractor, but this note was not acceptable, as it was not from a medical doctor. Then, appellant went to Tripodi with her complaints. In order to relocate appellant to another office in the agency, Tripodi also advised appellant to obtain a doctor's excuse.

FN1. The following individuals were within the chain of command at TCCSEA: appellant's supervisor was Shamrock; the administrative officer was Tripodi; Tripodi's supervisor was Campbell, and in turn, her supervisor was the Trumbull County Commissioners.

Numerous meetings were held between appellant, Keating, Shamrock, Tripodi and Campbell regarding her work environment complaints. Tripodi and Keating advised appellant to see the agency's doctor. In accordance with the collective bargaining agreement, TCCSEA's psychologist, Dr. Edward Amicucci ("Dr. Amicucci"), examined appellant. Appellant signed a release permitting Dr. Amicucci to forward a copy of his psychological evaluation to Keating. Keating distributed copies of this report to Tripodi, Campbell and Shamrock. In her deposition testimony, appellant stated she assumed that this report was distributed "to find out what exactly was going to be their solution to this problem."

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On July 16, 1998, appellant filed a complaint with the trial court naming appellees, along with the Trumbull County Commissioners, as defendants and alleging that the defendants invaded her privacy by disclosing her confidential psychological report.^{FN2} Specifically, the complaint alleged that Keating, while acting in his official capacity for both TCCSEA and the Trumbull County Commissioners, deliberately, intentionally, unlawfully, and in reckless disregard disclosed appellant's confidential medical records to her supervisors, Campbell, Shamrock, and Tripodi, who were not authorized and had no compelling reason to receive this confidential medical information. The defendants each filed separate answers in response to appellant's complaint.

FN2. The complaint makes no reference to a claim under R.C. 1347.10.

On December 2, 1999, TCCSEA and Keating filed a motion for summary judgment on the basis that Keating's distribution of the psychological report was privileged in that appellant's supervisors needed to review the psychologist's findings to determine what action should be taken with regard to appellant's complaints about her work environment. Further, appellees' maintained that because TCCSEA is a political subdivision engaged in a governmental function, both the agency and its employee, Keating, were entitled to governmental immunity under R.C. 2744.02(A)(1) and 2744.03(A)(6). The Trumbull County Commissioners filed a separate motion for summary judgment on December 10, 1999.

*2 On January 31, 2000, appellant filed a response to TCCSEA and Keating's motion for summary judgment contending that Keating's disclosure of appellant's confidential psychological report was made for the "mere curiosity" of its recipients and exceeded the recipients' need to know. No response was filed by appellant with regard to the Trumbull County Commissioners' motion for summary judgment.

In a judgment entry dated February 8, 2000, the trial court granted the Trumbull County Commissioners' motion for summary judgment. On that same date, in a separate judgment entry, the trial court also granted TCCSEA and Keating's motion for summary judgment based on the following reasons:

"Releasing the evaluation results to Defendant, James Keating, without the information being supplied to the individuals responsible for addressing Plaintiff's complaints, ie, Diane Shamrock, Larry Tripodi, and Christina Campbell, would defeat the intended purpose.

"To suggest that the release of the psychological evaluation was only intended for Defendant Keating's personal knowledge, and expected to go no further, would result in a classic example of an exercise in futility. Under that scenario, the only negligence would have occurred if Defendant Keating failed to disseminate the information to the appropriate supervisor so that they may properly respond to Plaintiff's complaints."

The trial court found that Keating limited his disclosure of appellant's psychological report to appellant's three supervisors in the chain of command, "who had a compelling reason to know the content of that psychological evaluation. A privilege existed, thus barring a claim of invasion of privacy." Moreover, the trial court determined that appellant's claim of invasion of privacy was barred by governmental immunity pursuant to R.C. 2744.02.

From this decision, appellant filed a timely notice of appeal presenting a single assignment of error for our consideration:

"The trial court erred to the prejudice of Plaintiff-Appellant in granting Defendant-Appellees [*sic*] Motion for Summary Judgment."^{FN3}

FN3. Appellant only challenges the trial court's grant of summary judgment in favor of TCCSE and Keating, not the Trumbull County Commissioners. Therefore, we

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limit our analysis to whether the grant of summary judgment to TCCSE and Keating was appropriate. Before we could consider the merits of this case, a preliminary issue had to be resolved. The docket reflected that appellant's counsel filed a notice to take the depositions of Shamrock, Tripodi, and Campbell. Only the deposition of appellant and Tripodi were filed with the trial court on December 2, 1999 and January 31, 2000 respectively. However, the record was transmitted to this court without the deposition of Tripodi and only contained appellant's deposition. As a result, on October 13, 2000, this court remanded this matter to the trial court for determination as to whether Tripodi's deposition was before the trial court and relied upon in making its determination to grant summary judgment in favor of appellees, but inadvertently omitted from the record by error or accident. On October 17, 2000, the trial court issued a judgment entry stating that Tripodi's deposition was considered by it in making its determination to grant summary judgment, and that the deposition should be made part of the record before this court.

With respect to her sole assignment of error, appellant has presented two issues for our review. First, appellant maintains appellees were unable to satisfy the burden required by *Levias v. United Airlines* (1985), 27 Ohio App.3d 222, as the disclosure of the psychological report allegedly was made for "mere curiosity." As a result, appellant argues that reasonable minds could find that Keating had no reason to believe that Campbell, Shamrock and Tripodi had a compelling reason to know the intimate details of appellant's psychological evaluation. The supervisors "need to know" could have been satisfied had Keating summarized Dr. Amicucci's findings and recommendations or limited his disclosure of appellant's psychological evaluation to the "summary and conclusion" section contained in the

report. To support this contention, appellant looks to Tripodi's deposition statement wherein he admitted that Dr. Amicucci's summary and conclusion "[f]or [his] purposes, probably" would have been enough to make a decision regarding how to deal with appellant's workplace complaints.

*3 Before addressing the merits of appellant's first assignment of error, we will lay out the appropriate standard of review. In reviewing a trial court's entry of summary judgment, an appellate court employs the same Civ.R. 56(C) standard as the trial court. *Drawl v. Cornicelli* (1997), 124 Ohio App.3d 562, 566. Thus, an appellate court reviews a trial court's decision on a motion for summary judgment *de novo*. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

Under Ohio law, summary judgment is appropriate when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can reach only one conclusion, which is adverse to the party against whom the motion is made, such party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Moonispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385; *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 268; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146.

In Ohio, there are three distinct types of invasion of privacy: "[1] the unwarranted appropriation or exploitation of one's personality, [2] the publicizing of one's private affairs which the public has no legitimate concern, and [3] the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Housh v. Peth* (1956), 165 Ohio St. 35, paragraph two of the syllabus.^{FN4} In general, "malice is not an element of invasion of privacy; consequently, absence of malice on the part of the employer is no defense to this tort." Ohio Employment Practices Law (2000) 181, Section 5.13 citing *Prince v. St. Francis-St. George Hosp., Inc.* (1985), 20 Ohio App.3d 4 and

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Chambers v. Terex Div. of Gen. Motors Corp. (Mar. 31, 1983), Cuyahoga App. No. 45377, unreported, 1983 WL 5878.

FN4. The right to privacy has been described as “the right to be let alone; to live one’s life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of the community living under a government of law.” *Time, Inc. v. Hill* (1967), 385 U.S. 374, 413. (Fortas, J., dissenting). See, also, *Housh* at 39.

Turning to the claim at issue in this case, there is, of course, a general cause of action for invasion of privacy from the unauthorized disclosure of personal medical records by medical personnel. *Housh, supra*; *Knecht v. Vandalia Med. Center, Inc.* (1984), 14 Ohio App.3d 129, 131. Similarly, the tort of invasion of privacy protects persons from having their medical information released by their employer without their consent. See, e.g., *Levias*.

The Eighth Appellate District was faced with a similar issue as in this case. In *Levias*, a flight attendant brought an action against her employer airline claiming invasion of privacy for the disclosure of confidential medical data. The plaintiff’s evidence showed that she directed her private physician to supply the airline’s medical examiner/physician with confidential medical information. With this information, the medical examiner/physician authorized a waiver of weight limits imposed for the appearance regulation applicable to plaintiff’s employment. The evidence also showed that plaintiff provided all this information with the belief that the employer’s medical examiner/physician would not further disclose it without her permission. Nevertheless, the medical examiner/physician disclosed this information to the flight supervisor who then repeatedly contacted her to discuss the details of her medical condition and its effects on her employment. *Levias* at 224.^{FN5}

FN5. The employer’s medical examiner/

physician also disclosed the medical information to plaintiff’s husband.

*4 The court determined that the employer and the employer’s medical examiner/physician could be liable for the unauthorized disclosure of medical information to plaintiff’s supervisor. Specifically, the court held that “[t] he discloser has no privilege unless he has reason to believe that the recipient has a real need to know, not mere curiosity.” (Emphasis added.) *Id.* at 225-226. According to the *Levias* court, it was doubtful that the plaintiff’s supervisor “had a real need to know the disclosed data” because the supervisor had “no authority to act upon that data “ as he was required to rely entirely on the medical examiner’s grant or denial of the requested waiver of weight limits. (Emphasis added.) *Id.* at 226. In other words, the supervisor had no compelling reason to know this information. Thus, the disclosure of medical information by the employer’s medical examiner/physician was not protected by a qualified privilege because there was no “need to know” established. *Id.* at 224-226.

Prior to *Levias*, the Second Appellate District applied a “commonality of interest” rationale and determined that a statement falls within a qualified or conditional privilege when a “commonality of interest” exists between the publisher and recipient, and the communication is of a kind that is reasonably calculated to protect that interest. *Knecht* at 131; See, also, *Creps v. Waltz* (1982) 5 Ohio App.3d 213, paragraph two of the syllabus.

Apparently, this “need to know” standard announced in *Levias* evolved from the above or similar employment context cases in which Ohio courts had considered privacy claims brought by employees against their employers for disclosure of private information to a third party.^{FN6} Generally, those cases based their determination on whether the matters communicated were privileged. See, e.g., *Gaumont v. Emery Air Freight Corp.* (1989), 61 Ohio App.3d 277; *Wilson v. Procter & Gambl e* (Nov. 6, 1998), Hamilton App. No. C-970778, unreported, 1998 WL 769718; *Chambers, supra*.

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FN6. *Levias* provides little insight into the source of the standard announced therein.

For a communication to be considered privileged, the following elements need to be set forth: (1) “ ‘good faith[;]’ “ (2) “ ‘an interest to be upheld [;]’ “ (3) “ ‘a statement limited in its scope to this purpose[;]’ “ (4) “ ‘a proper occasion [;]’ “ and (5) “ ‘publication in a proper manner and to proper parties only.’ “ *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 244, quoting 50 American Jurisprudence 2d 698, Libel and Slander, Section 195.

In applying *Levias* and the above standards to the instant facts, we note the following: the disclosure from TCCSEA's psychologist to Keating, the agency director, was done with appellant's expectation and permission. In *Levias*, the plaintiff agreed to allow her personal physician to provide information to the employer's medical examiner/physician. Further, it was understood in *Levias* that it was only the medical examiner/physician who had the authority to act on the request for a waiver of weight limitations. In the instant matter, however, it is uncontested that appellant's more immediate supervisors had the ultimate responsibility to make recommendations and evaluate whether appellant was fit for work, as well as the responsibility to deal with or accommodate her complaints. Thus, there was no expectation that Keating was the sole decision maker.

*5 Because there was no dispute as to whether Keating rightfully received the report, the query became what could he do with it? Keating, as the discloser, averred that he believed appellant's supervisors, as the recipients, had a real need to know the disclosed information in order to evaluate appellant's fitness for work and determine what action should be taken with regard to resolving appellant's work environment complaints.^{FN7} Further, the supervisors to whom the report was given were already directly aware of and formally involved in discussions with appellant about her workplace complaints. At least two of them were directly aware of her referral to the agency psychologist.

FN8 Upon considering these facts, we agree with the trial court that appellees did, indeed, satisfy their burden established in *Levias* of demonstrating a legitimate “need to know.”

FN7. An affidavit from Keating was attached to appellees' motion for summary judgment as Defendant's Exhibit D.

FN8. Tripodi and Keating both advised appellant to see the agency's psychologist.

As previously indicated, appellant relies heavily upon Tripodi's deposition statement that the summary and conclusion portion of the report would “probably” have been sufficient to determine how to resolve appellant's workplace complaints. However, Tripodi's statement only addressed Tripodi's state of mind, not that of the discloser, to-wit: Keating. Further, Tripodi stated that he had to first see the *entire* psychological report because he did not know whether he “could have made a decision based on somebody else's summary[.]”

Thus, upon considering all of the evidence and construing it most strongly in appellant's favor, we hold that no genuine issue of material fact existed as to whether Keating could have reasonably believed that Campbell, Shamrock and Tripodi had a need to review the entire psychological report, not just the summary and recommendation portion of the report. That is not to say that the situation could not have been handled in a more sensitive way. It merely means that appellee had the burden to demonstrate that Keating reasonably believed that the other three supervisors had a legitimate need to know the disputed revelation because they were the decision makers. We, therefore, affirm the trial court as to this issue.

Appellant presents a second issue for our consideration under her single assignment of error. Here, appellant contends that the trial court erred by finding, as a matter of law, that the provisions of R.C. 2744.02 barred appellant's claim under the doctrine of governmental immunity. She argues that R.C.

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1347.10(A)(2), Ohio's Privacy Act, provided a specific cause of action for wrongful disclosure in the case at bar.^{FN9} According to appellant, R.C. 1347.10 and R.C. 2744.02 are in conflict, and as a result, the court must refer to the rules of construction in order to determine which statute applied. If R.C. 1347.10 prevails as an exception to R.C. 2744.02, then the trial court erred in granting appellees' motion for summary judgment. While we find appellant's legal theory to be correct, we also determine the instant facts to be inapplicable.

FN9. Appellees do not dispute the fact that they maintain a personal information system as defined by R.C. 1347.10.

*6 In a summary judgment exercise, when an affirmative defense, such as governmental immunity, is raised by a political subdivision in its own motion, it has the initial burden of proving the existence of this defense. *Vance v. Jefferson Area Local School Dist. Bd. of Educ.* (Nov. 9, 1995), Ashtabula App. No. 94-A-0041, unreported, at 4, 1995 WL 804523. In turn, the plaintiff, herein appellant, has the burden of proving that an exception to the doctrine of governmental immunity is applicable. *Schaffer v. Bd. of Cty. Commrs. of Carrol Cty.* (Dec. 7, 1998), Carroll App. No. 672, unreported, at 7, 1998 WL 886947.

R.C. Chapter 2744, otherwise known as the political subdivision immunity statute, provides immunity to governmental entities. In addition, political subdivision employees acting within the scope of their employment are also immune from tort liability unless they act "with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6).^{FN10}

FN10. R.C. 2744.03(6) grants an employee immunity unless one of the following apply:

"(a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;

"(b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

"(c) Liability is expressly imposed upon the employee by a section of the Revised Code."

While TCCSEA's liability is no longer an issue in this matter, any liability of TCCSEA employees, such as Keating, is directly related to any immunity which was available to TCCSEA.

In their motion for summary judgment, appellees maintained that appellant's claim was barred by governmental immunity. In particular, R.C. 2744.02(A)(1) reads as follows:

"For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

TCCSEA is clearly a political subdivision of the State of Ohio for governmental purposes. *Williams v. Ohio Dept. of Human Services* (Dec. 12, 1995), Franklin App. No. 95API06-778, unreported, at 2-3, 1995 WL 739993.

Appellant, however, suggests that R.C. 2744.02(B)(5) extinguished TCCSEA's governmental immunity in this matter. R.C. 2744.02(B)(5) reads as follows:

"In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability

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shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term 'shall' in a provision pertaining to a political subdivision." (Emphasis added.)

*7 Appellant looks to R.C. 1347.10 to create an exception to the grant of governmental immunity. Specifically, appellant claims that R.C. 1347.10(A)(2) provides a cause of action for wrongful disclosure for an individual who is directly or proximately harmed by the disclosure of personal information.^{FN11}

FN11. We note that in her complaint, appellant alleged that Keating, while acting in his official capacity for TCCSEA and Trumbull County Commissioners, *intentionally* disclosed appellant's medical records to her supervisors.

First, we agree that R.C. 1347.10(B) does expressly impose an exception to the governmental immunity as required by R.C. 2744.02(B)(5).^{FN12} However, such an exception is limited to the preservation of the right of an injured party to seek injunctive relief against the political entity itself. It does not create a right to seek or recover damages. Further, under Ohio's Privacy Act, political subdivisions "may be liable only for 'authorized disclosures' " by subdivision employees and "not for disclosures that were recklessly or negligently permitted." *Patrolman 'X' v. Toledo* (1999), 132 Ohio App.3d 374, 392.

FN12. Specifically, R.C. 1347.10(B) refers to imposing an injunction on a state or local agency:

"Any person who, or any state or local agency that, violates or proposes to violate any provision of this chapter may be enjoined by any court of competent jurisdiction. The court may issue an order or

enter a judgment that is necessary to ensure compliance with the applicable provisions of this chapter or to prevent the use of any practice that violates this chapter. An *action for an injunction* may be prosecuted by the person who is the subject of the violation, by the attorney general, or by any prosecuting attorney." (Emphasis added.)

Second, in regards to a damage claim against an employee of a political entity, the Eighth Appellate District in *McGraw v. Euclid* (July 18, 1996), Cuyahoga App. No. 69952, unreported, at 2, 1996 WL 403334, has held that "R.C. 1347.10 does not expressly impose liability against public employees to overcome their statutory immunity [granted in R.C. 2744.03(A)(6)]." We disagree. This is merely persuasive authority and, as such, is not binding upon us. Further, the court in *McGraw* does not offer any explanation as to the authority or logic employed in reaching its conclusion. Neither does the court explain why it believes R.C. 1347.10 is not an explicit imposition of liability.

We determine, to the contrary of *McGraw*, that a plain reading of R.C. 1347.10(A), in conjunction with subsection (B), imposes personal liability for wrongful disclosure of confidential information by a governmental employee:

"(A) A person who is harmed by the use of personal information that relates to him and that is maintained in a personal information system *may recover damages in a civil action from any person who directly and proximately caused the harm by doing any of the following:*

" * * *

"(2) *Intentionally using or disclosing the personal information in a manner prohibited by law.*" (Emphasis added.)

"A defendant may be liable under the Ohio Privacy Act only upon an 'intentional' disclosure * * *."

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Patrolman 'X' at 391. The term "intentional" is not defined by R.C. Chapter 1347. However, the Sixth Appellate District has defined "intentional" under R.C. 1347.10(A)(2) as follows:

" 'Intentional' conduct may be established by nothing short of 'substantial certainty'; a defendant may be found to have 'intended' a particular harmful result only where his/her behavior poses a substantially certain risk that harm will result. *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph two of the syllabus. 'Recklessness' is insufficient to constitute 'intent.' * * * *Id.*" (Footnote omitted.) *Patrolman X* at 391-392.

*8 It is further evident from reading R.C. 1347.10(A)(2) that the intentional disclosure requirement does not stand alone in that the disclosure must also be done "in a manner prohibited by law." Even if we were to assume that appellees intentionally disclosed personal information about appellant, to-wit: the psychological report, the disclosure was *not* done in a manner prohibited by law as their conduct fell within the qualified privilege of a "need to know" under *Levias*. Thus, appellant's R.C. 1347.10(A)(2) exception is inapplicable.

We note that the trial court's application of R.C. Chapter 2744 statutory immunity is also inapplicable because "[c]ivil actions by an employee * * * against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision" are excluded therefrom by R.C. 2744.09(B). With this in mind, we determine that R.C. Chapter 2744 does not provide TCCSEA and Keating with immunity as appellant's invasion of privacy claim arises out of her employment with TCCSEA. See *Patrolman 'X'* at 397.

However, a reviewing court passes only upon the correctness of the judgment, not the reasons therefor. *Joyce v. Gen. Motors Corp.* (1990), 49 Ohio St.3d 93, 96. Thus, an appellate court must affirm a trial court's judgment if upon review any valid grounds are found to support it. *Joyce* at 96.

Specifically, although appellant's claim was not barred by government immunity, her claim is still defeated as appellees' have satisfied the "need to know" requirement promulgated in *Levias*. We, therefore, affirm the trial court's judgment, but for different reasons than those set forth in the trial court's judgment entry.

Based on the foregoing analysis, appellant's sole assignment of error is not well-taken, and the judgment of the trial court is affirmed.

NADER, J., concurs.
 O'NEILL, J., dissents.

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