

ORIGINAL

IN THE SUPREME COURT OF OHIO

BARBARA ZUMWALDE,

Plaintiff/Appellee,

-vs-

MADEIRA AND INDIAN HILL
JOINT FIRE DISTRICT,

Defendant,

and

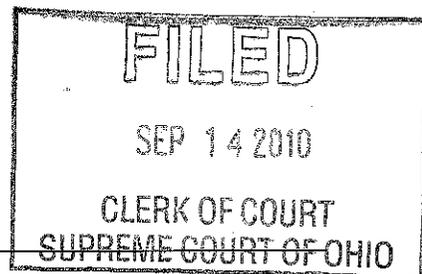
STEPHEN ASHBROCK,

Defendant/Appellant.

Case No. 2010-0218

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

Court of Appeals
Case No. C0900015



REPLY BRIEF OF APPELLANT, STEPHEN ASHBROCK

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III. REPLY TO ARGUMENT IN OPPOSITION

A. THE EXCEPTION TO IMMUNITY IN R. C. §2744.09(B) APPLIES ONLY TO POLITICAL SUBDIVISIONS AND NOT THEIR EMPLOYEES.

In his Merit Brief, Ashbrock's argues R. C. §2744.09(B) applies only to "claims" made against a political subdivision. Ashbrock does not differentiate between "claims" and "civil actions" and uses both terms interchangeably. In response, Zumwalde argues the statute applies to "employees of political subdivisions" because the term "civil actions" is used in the statute - not "claims." Zumwalde apparently believes a distinction exists between a "claim" and a "civil action". In fact, however, the terms are synonymous and there is no legal distinction. In *Martin v. City of Rochester*, 642 N.W.2d 1 (Minn. 2002), the Court, citing from Black's Law Dictionary, observed:

A cause of action, often referred to as a claim, is a group of operative facts giving rise to one or more bases for suing or the legal theory of a lawsuit. *Id.* at 9.

Regardless of whether the term "claims" or "civil actions" is used, R. C. §2744.09(B) allows for no inference or interpretation that "employees" are excepted from immunity.

Additionally, the term "civil actions" in R. C. §2744.09(B) does not demonstrate legislative intent to exclude immunity consideration for "employees of political subdivisions." Rather, R.C. §2744.09(A) demonstrates the intent to exclude "employees of political subdivisions" from immunity. R. C. §2744.09(A) also begins with the term "[c]ivil actions" but it specifically refers to both "political subdivisions" and its "employees" as excluded from immunity. If Zumwalde's interpretation is correct, the term "employees" in subsection (A) would not be necessary because "civil actions" would encompass all claims for liability and "employees" is redundant.

Since the words “claim” and “civil action” are synonymous, Zumwalde’s argument fails. R.C. §2744.09, read as a whole, reveals the Legislature’s intent not to include “employee” in R.C. §2744.09(B).

B. THE MAJORITY OF APPELLATE COURTS HAVE NOT DETERMINED R. C. §2744.09(B) REMOVES IMMUNITY FROM EMPLOYEES.

Zumwalde misstates the holdings by other Ohio appellate courts concerning the application of R.C. §2744.09(B).

Zumwalde cites *Nagel v. Horner* (2005), 162 Ohio App. 3d 221, and *Ross v. Trumbull County Child Support Enforcement Agency*, Trumbull App. No. 2000-T-0025, as examples of where an employee was denied immunity due to the provisions of R.C. 2744.09(B). Neither decision addresses the specific issue before this Court. *Ross* and *Nagel* simply determined the political subdivision and employee were not entitled to immunity consideration. The issue of whether the exception to immunity applies to employees was not discussed and presumably was never raised as an issue before those Courts.

More to the point, the court in *Satterfield v. Karnes*, ___ F. Supp.2d ___, 2010 WL 3365943 (S.D. Ohio), considered whether R.C. §2744.09(B) applies to political subdivisions and its employees.¹ The *Satterfield* Court cites the First District’s decision in *Zumwalde*, and unpersuaded by that court’s rationale, declined to follow the result. The District Court also noted the *Nagel* decision, *supra*, and makes the same observations as noted earlier, *i.e.*, *Nagel* does not distinguish between the immunity of political subdivisions and its employees.

¹ Decided August 23, 2010.

Campolieti v. Cleveland (2009), 184 Ohio App.3d 419, is discussed in *Satterfield*. The *Campolieti* decision is persuasive and convinces the court the Legislature does not intend to include employees within the purview of R. C. §2744.09(B). The court analyzed and concludes the Legislature knew how to withdraw immunity from employees and had it intended to do so in R. C. §2744.09(B), it would have.

Plaintiff's arguments were rejected that R. C. §2744.09(B) excludes political subdivisions and employees from immunity. Judge Holschuh explained:

The text of section 2744.09(B) is quite clear that political subdivisions are the entities from which immunity is removed in employment suits. This section deals only with civil actions by an employee against his political subdivision. Ohio Revised Code section 2744.09(B) (emphasis added). There is simply no mention of actions against employees of a political subdivision in that section, despite the fact that section 2744.09(A) explicitly included employees along with political subdivisions when addressing suits arising out of contractual relationships. And where the text of a statute is clear and unambiguous, the court should not read in additional requirements or interpretations that are not supported by that clear text. *Id.* at ____.

The *Nagel* decision relied upon by Zumwalde does not support her position because that court never determined the issue of whether R. C. §2744.09(B) applies to political subdivisions and its employees. Zumwalde's reliance upon the *Nagel* decision is misplaced as recently recognized by the court in *Satterfield*.

The majority of appellate courts in Ohio have not addressed whether R. C. §2744.09(B) applies to employees. The *Satterfield* decision reflects the correct interpretation of the statute and that which was intended by the Legislature.

C. ZUMWALDE’S INTERPRETATION OF R. C. §2744.09(B) FRUSTRATES THE LEGISLATIVE INTENT OF R. C. §2744.03(A)(6).

Zumwalde argues that application of R. C. §2744.09(B) to “employees” does not frustrate the Legislature’s intent to afford employees of political subdivisions immunity from tort liability. Zumwalde concedes R. C. §2744.09(B) is a narrow exception to the Political Subdivision Tort Liability Act (“PSTLA”). Yet, her interpretation of including employees broadens the application of the exceptions to immunity for employees and conflicts with the intent and application of the PSTLA.

Employees of a political subdivision enjoy a presumption of immunity under R. C. §2744.03(A)(6). *Alagha v. Cameron*, Ham. App. No. C-081208, 2009-Ohio-4886 at ¶ 19. The presumption of immunity exists for an employee of a political subdivision as long as one of the exceptions does not apply. *Pernell v. Bills*, Lucas App. No. L-09-1082, 2009-Ohio-6493 at ¶ 15. The presumption of immunity for political subdivision employees applies to governmental and proprietary functions. *Whitley v. Progressive Preferred Insurance Co.*, Ham. App. No. C-090240, 2010-Ohio-356 at ¶ 11.

The fact employees of political subdivisions are granted immunity and are presumed to be immune for governmental and proprietary functions demonstrates the Legislature’s intent to provide immunity to employees in most instances.

In addition to the presumption of immunity, the exceptions to immunity are to be narrowly construed. *Stoll v. Gardner* (2009), 182 Ohio App.3d 214, 221.

Zumwalde’s interpretation of R. C. §2744.09(B) conflicts with the presumption of immunity for employees and the established rule that exceptions to immunity are to be narrowly construed.

Her interpretation cannot be reconciled with the legislative intent nor the plain and unambiguous meaning of the statute.

D. THE POLITICAL SUBDIVISION TORT LIABILITY ACT CONSISTENTLY AFFORDS EMPLOYEES IMMUNITY AND DENIES POLITICAL SUBDIVISIONS IMMUNITY FOR THE SAME ACTS.

Zumwalde concludes that employees of a political subdivision should be included within the scope of R. C. §2744.09(B) due to consideration of the financial well-being of political subdivisions. Her theory is premised on the notion that preservation of fiscal integrity is not satisfied where an employee may enjoy immunity but the political subdivision does not enjoy immunity for the same act. Consequently, Zumwalde opines it would make little sense for R. C. §2744.09(B) to apply to political subdivisions and not its employees.

While at first glance, Zumwalde's argument seems plausible, beneath its veneer, all substance is lost. The PSTLA contains numerous provisions where an employee enjoys immunity for conduct which the political subdivision does not.

R. C. §2744.02(B)(1) provides the political subdivision is liable for the injury, death or loss to person or property caused by the negligent operation of any motor vehicle by employees of a political subdivision However, R. C. §2744.03(A)(6)(a)-(c) provides no such exception for immunity to an employee of a political subdivision. Succinctly, employees of a political subdivision are not liable for the negligent operation of a motor vehicle.

Similarly, R. C. §2744.02(B)(2) provides that the political subdivision is liable for the death or loss of person or property caused by the negligent performance of acts by employees with respect

to proprietary functions. R. C. §2744.03(A)(6)(a)-(c) contains no such exception to immunity for employees.

R. C. §2744.02(B) provides that political subdivisions are liable for injury, death or loss to person or property caused by the negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads R. C. §2744.03(A)(6)(a)-(c) contains no such exception to immunity for employees.

R. C. §2744.02(B) provides political subdivisions are liable for injury, death or loss to person or property caused by the negligence of their employees and that occurs within or on the grounds of and is due to physical defects within or on the grounds of buildings that are used in connection with the performance of a governmental function, R. C. §2744.03(A)(6)(a)-(c) contains no such exception to immunity for employees.

Zumwalde's position cannot be reconciled with the language of the Act.

Zumwalde also argues that while Ashbrock should enjoy immunity for performing discretionary decisions as to "how best to manage a large urban fire", he should not be shielded from his decision to discriminate against one of his employees.² The distinction which Zumwalde is implicitly making is that Ashbrock should enjoy immunity for governmental functions but not those deemed to be proprietary. Again, Zumwalde's argument is misplaced in that it ignores the clear language of the PSTLA. R. C. §2744.03(A)(6) does not distinguish between governmental and proprietary functions in determining an employee's entitlement to immunity. The Legislature

² Ashbrock denies any discriminatory intent.

intended employees of political subdivisions to be immune from nearly all claims. Zumwalde's interpretation encroaches upon that intent.

E. RESPONSE TO AMICUS CURIAE ASSERTION R. C. §4112.01 EXPRESSLY IMPOSES CIVIL LIABILITY ON AN EMPLOYEE OF A POLITICAL SUBDIVISION.

This case is before the Court on a discretionary appeal of Appellant Ashbrock. Appellant's Memorandum in Support of Jurisdiction contains only one "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." (Appellant's Memorandum in Support of Jurisdiction, p. 5). This Court accepted jurisdiction to resolve this issue.

The Amicus Briefs raise issues which are outside the scope of the appeal and which were not asserted or addressed in the lower courts. Specifically, the issue of whether R.C. §2744.03(A)(6)(c) excepts from immunity a claim against an employee of a political subdivision under R.C. §4112.02(I), was not raised in the trial court, never addressed by the Court of Appeals, nor mentioned in the Memorandum in Support of Jurisdiction or in the proposition of law accepted in this appeal.

When a single proposition of law is accepted for review, the scope of the appeal is limited and the Court should not address a statutory provision or claim not directly implicated in the appeal. See, *Meyer v. United Parcel Serv. Inc.* (2009), 122 Ohio St. 3d 104, 106, fn 3. This appeal does not implicate Appellee's "retaliation" claim under R.C. §4112.02, nor the application of R.C. §2744.03(A)(6)(c) to the claim.

The issue of whether a retaliation claim under R.C. §4112.02 “expressly imposes liability on the employee of a political subdivision” in the context of R.C. §2744.03(A)(6)(c) was never raised or addressed in the proceedings below. Moreover, because the issue was not presented to this Court in Appellant’s Memorandum in Support of Jurisdiction as a potential proposition of law, this Court should not, and did not, accept the issue for review and the Amicus Briefs on this issue deserve no consideration.

Beyond the procedural defect, R.C §4112.02 does not “expressly impose civil liability on an employee of a political subdivision” so as to remove immunity under R.C. §2744.03(A)(6)(c).

The plain language of R.C. §4112.02(I) does not “expressly impose civil liability” as contemplated by R. C. §2744.03(A)(6)(c).

R.C. §2744.03(A)(6)(c) provides a limited exception to an employee’s immunity if:

civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term “shall” in a provision pertaining to an employee.

R.C. §4112.02 provides that it “shall be an unlawful discriminatory practice”:

* * *

(I) For any person to discriminate in any manner against any other person because that person has ... made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112 .07 of the Revised Code.

R.C. §4112.02(I) does not impose civil liability on a political subdivision employee. In fact, the statutory section is silent as to “civil liability” but simply defines one type of conduct that

constitutes an “unlawful discriminatory practice” under R.C. §4112.02. The mere description of a “discriminatory practice” does not impose liability; nor does the use of the term “shall” in the definition or even a perceived “general authorization” for an employee to be sued or sued, amount to the imposition of “express liability” under R.C. §2744.03(A)(6)(c).

The only reference to “civil liability” in the statute is provided in RC § 4112.99: "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief." R. C §4112.99 is applicable to the entire chapter, not just a claim under R.C. §4112.02(I) and the section only provides the mechanism for a civil action to be filed by a person who believes there is a violation of the chapter. R.C. §2744.03(A)(6)(c) recognizes the mere authority to assert a cause of action does satisfy the “civil liability is expressly imposed” requirement to strip immunity from an employee of a political subdivision.

At best, R.C. §4112.02(I) and §4112.99 can be construed as an establishing an avenue for an aggrieved employee to assert a claim against another “employee of a political subdivision.” The fact a claim or cause of action may exist against a political subdivision employee is insufficient to establish “civil liability is expressly imposed” and remove immunity. R.C. §2744.03(A)(6)(c) clearly states that a general authorization in a statute “that an employee may sue and be sued” is insufficient to “expressly impose liability” and remove the cloak of immunity.

Recently, the Court in *Horen v. Board of Education of the City of Toledo Public Schools*, Lucas App. No. L-09-1143, 2010-Ohio-3631, addressed whether R. C. §4112 expressly imposed civil liability on a political subdivision in order to remove immunity. The Court determined it did not and noted:

Nonetheless, a reading of the entire statute reveals that it does not expressly impose civil liability on a political subdivision for a violation of R. C. 4112.02(G). Instead, R. C. 4112.05 sets forth a procedure to be followed in charging such persons with unlawful discriminatory practices. *Id.* at ¶ 41.

In *Howard v. The City of Beavercreek*, 276 F.3d 802 (6th Cir. 2002), the Court specifically rejected the contention that R. C. §4112.99 expressly imposed liability on a municipality. The Court found the Magistrate's comments instructive:

As Magistrate Judge Merz correctly pointed out, Howard's interpretation would essentially swallow up section 2744.02(B)(5) because it would make municipalities liable for damages, despite the general immunity sections, whenever any statute provides for liability whether it mentions municipalities or not. *Id.* at 808.

This Court in *O'Toole v. Denihan* (2008), 118 Ohio St. 3d 374, 385, 386, recognized the mere imposition of a duty on political subdivisions and their employees does not equate to the required express imposition of liability for failure to perform that duty. In *Campolieti v. City of Cleveland* (2009), 184 Ohio App.3d 419, 430, the Court rejected the assertion R. C. §4112 expressly imposed liability upon the Fire Chief defendant and concluded the Chief was entitled to immunity.

The most recent decision addressing this issue is *Satterfield v. Karnes*, ___ F. Supp.2d ___, 2010 WL 3365943 (S.D. Ohio). In *Satterfield*, the Court recognized there is very little case law in Ohio on the issue of whether immunity is removed from employees of political subdivisions for claims of discrimination through §2744.03(A)(6)(c). While ultimately deciding immunity was removed, the Court apparently not totally comfortable with its position observed:

Notwithstanding this, the Court notes that an argument can be made that section 2744.03(A)(6)(c)'s requirement that liability be "expressly" imposed upon an employee "by a section of the Revised Code" means that some statutes necessarily do *not* impose liability "expressly" enough to withdraw immunity from the employee, and

that this may be the case for claimed violations of Ohio Revised Code sections 4112.02(A) and (I) by employees of political subdivisions.
Id. at _____.

Succinctly, the issue of whether R. C. §4112.01, *et seq.*, expressly imposes civil liability in order to deprive Ashbrock of immunity is not properly before the Court. Even if the issue had been properly raised, the answer remains that R. C. §4112 does not expressly impose liability upon an employee of a political subdivision consistent with the cautionary language set forth in R. C. §2744.03(A)(6)(c).

IV. CONCLUSION

The Legislature did not intend to include “employees” within the scope of R. C. §2744.09(B). This is evidenced in a variety of ways. First, the text of that section is silent as to employees. The Legislature specifically included “employees” in other sections of the statute where it intended to exclude employees from immunity consideration. The intent of the PSTLA was to provide immunity to employees in most instances. The Act provides immunity for employees whether engaged in governmental or proprietary functions. These provisions of the statute lead to the inescapable conclusion “employees” were intentionally omitted from R. C. §2744.09(B).

Ashbrock respectfully requests this Court to reverse the decision of the First District Court of Appeals and remand to that Court with instructions to consider Ashbrock’s entitlement to immunity on the merits.

Respectfully submitted,



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V. CERTIFICATE OF SERVICE

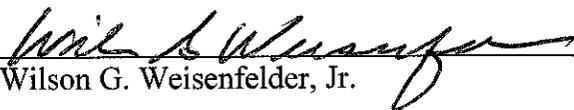
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