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IN THE SUPREME COURT OF OHIO 13-0291

ANITA HAUSER,	:	Supreme Court Case No._____
Plaintiff-Appellee,	:	Appeal from Montgomery County Court of Appeals, Second District
v.	:	
CITY OF DAYTON POLICE DEPT., et. al.	:	Court of Appeals Case No. CA 24965
Defendant-Appellant.	:	

JURISDICTIONAL MEMORANDUM OF MAJOR E. MITCHELL DAVIS

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

This case presents a critical issue for the Court's review: whether R.C. § 4112.02(A) expressly imposes liability on political subdivision employees to trigger the R.C. § 2744.03(A)(6)(c) immunity exception. This case is one of public or great general interest for several reasons. First, R.C. § 4112.02(A) imposes liability on political subdivisions for discriminatory conduct, not their employees. Moreover, *Genaro* liability is not what the legislature contemplated when it required that liability be expressly imposed on political subdivision employees in order to withdraw immunity. *Genaro v. Cent. Transp., Inc.*, 84 Ohio St. 3d 293, syllabus (1998); R.C. § 2744.03(A)(6)(c). Accordingly, R.C. § 4112.02(A) does not expressly impose liability on political subdivision employees to trigger the R.C. § 2744.03(A)(6)(c) immunity exception.

Second, the Second District's decision in *Hauser v. Dayton Police Dept.*, 2d Dist. No. 24965, 2013-Ohio-11 (attached as Exhibit A), clearly conflicts with law from the Eighth District Court of Appeals. *See Campolieti v. Cleveland*, 184 Ohio App.3d 419, 2009-Ohio-5224, ¶33 (8th Dist.). Finally, failure to address the aforementioned issue will subject political subdivision employees to civil liability under circumstances not contemplated by law, resulting in great financial uncertainty for Ohio municipalities.

A. R.C. § 4112.02(A) Does Not Expressly Impose Liability on Political Subdivision Employees to Trigger the R.C. § 2744.03(A)(6)(c) Immunity Exception

The Political Subdivision Tort Liability Act "generally provides that political subdivisions and their employees are immune from liability." *Schoenfield v. Navarre,* 164 Ohio App. 3d 571, 2005-Ohio-6407, ¶ 14 (6th Dist.). The Act was the legislature's "response to the judicial abrogation of common-law sovereign immunity." *Wilson v. Stark Cty. Dept. of Human Serv.,* 70 Ohio St. 3d 450, 453 (1994). "[T]he primary statutory purpose of R.C. Chapter 2744 is the preservation of the financial stability of political subdivisions." *Shoenfield,* 2005-Ohio-6407, at ¶ 14 (citing *Wilson,* 70 Ohio St. 3d at 453).

Political subdivision employees are immune from civil liability unless one of the following applies:

> ...
>
> (c) 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 that section uses the term 'shall' in a provision pertaining to an employee.

R.C. § 2744.03(A)(6)(c) (emphasis added). This case presents the issue of whether R.C. § 4112.02(A) expressly imposes liability on political subdivision employees to trigger the foregoing exception.

R.C. § 4112.02(A) states that "[i]t shall be an unlawful discriminatory practice: (A) For any *employer*...to discriminate against a "protected class in employment." *Hauser*, 2013-Ohio-11, at ¶ 31 (J. Hall dissenting). R.C. § 4112.01(A)(2) defines "employer" as:

> ...the state, any political subdivision of the state,...and any person acting directly or indirectly in the interest of an employer.

In *Hauser*, the court concluded that Appellant Major E. Mitchell Davis's ("Davis") immunity was blocked by R.C. § 2744.03(A)(6)(c) because civil liability was expressly imposed on political subdivision managers or supervisors under R.C. Chapter 4112. *Hauser*, 2013-Ohio-11, at ¶3. The court relied on *Genaro* in reaching its decision, which held that a supervisor or manager may be held personally liable for his or her violations of R.C. Chapter 4112. 83 Ohio St. 3d at syllabus.

In *Genaro*, a divided Court interpreted the definition of "employer" in R.C. § 4112.01(A)(2) to include managers or supervisors. *Id.* at 298-99 (emphasis added). The *Hauser* court concluded that because *Genaro* included managers and supervisors amongst those subject to liability under R.C. Chapter 4112, political subdivision managers or supervisors were necessarily "expressly subject to civil liability." *Hauser*, 2013-Ohio-11, at ¶ 25. However, political subdivision employee immunity was not an issue in *Genaro* "as the discussion involved the liability of managers and supervisors of a private company under the discrimination statute and thus the court did not specifically answer the question

of whether civil liability is expressly imposed upon a political subdivision employee by Chapter 4112 as required by R.C. §2744.03(A)(6)(c)." *Id.* at ¶19.

The *Hauser* court failed to apply the plain language of the aforementioned statutes in determining that political subdivision employees are subject to personal liability under R.C. § 4112.02(A). R.C. § 4112.02(A) does not expressly impose liability on political subdivision employees. The agency language of R.C. § 4112.01(A)(2) was included to impose vicarious liability on employers for their employees' discriminatory conduct, not add to the list of persons liable. *Genaro,* 84 Ohio St. 3d at 300-01 (C.J. Moyer dissenting).

It is imperative that the Court address this issue and reverse the Second District's holding in *Hauser,* which flies in the face of the longstanding Ohio public policy that political subdivision employees are immune from liability except in a few specific circumstances. As Judge Hall so aptly stated in his dissent in *Hauser:*

> If the legislature intended that one statute, R.C. § 4112.02, 'expressly imposed' liability that would circumvent another statute, R.C. § 2744.03(A)(6), it could have said so expressly. It did not. It is not our province to amend the General Assembly's legislation.

Hauser, 2013-Ohio-11, at ¶ 32.

B. The Second District's Decision in *Hauser* is in Conflict with the Eighth District's Decision in *Campolieti*

The Court should also accept jurisdiction because *Hauser* directly conflicts with law from the Eighth District Court of Appeals. *See Campolieti v. Cleveland,* 184 Ohio App.3d 419,

2009-Ohio-5224, ¶33 (8th Dist.). In *Campolieti*, the Eighth District held that because R.C. Chapter 4112 spoke in terms of employers, liability was not expressly imposed on a supervisor, there a fire chief, in order to invoke the R.C. § 2744.03(A)(6)(c) exception to the immunity statute. *Id.*

In *Hauser*, the Second District acknowledged that the Eighth District came to the opposite conclusion. *Hauser*, 2013-Ohio-11, at ¶20. Thus, a conflict exists because the Second District's ruling is directly opposite that of the Eighth District on the identical issue of law. Because a conflict exists, this Court should accept jurisdiction to ensure that Ohio law is consistently applied throughout the State. A motion to certify a conflict is currently pending with the Second District Court of Appeals, and a notice of that pending motion is being contemporaneously filed with this Court pursuant to S. Ct. Prac. R. 4.4.

C. Devastating Effect on Ohio Municipalities

As stated previously, the legislature passed the Political Subdivision Tort Liability Act to generally provide immunity to political subdivisions and their employees and to ensure the financial stability of political subdivisions. The Second District's ruling in *Hauser* threatens to cripple both of these established policies. There are approximately nine hundred and fifty (950) municipalities in Ohio, employing thousands of citizens.[1] The *Hauser* decision exposes political subdivision employees to liability under circumstances

[1] www.omlohio.org, February 6, 2013.

not contemplated by the legislature. If the *Hauser* decision is permitted to stand, its effects will be felt far, as political subdivisions are forced to pay for the defense of employees sued for alleged violations of R.C. Chapter 4112. The potential financial impact could devastate many municipalities already struggling with serious budgetary woes.

Therefore, this Court should accept jurisdiction and resolve the issue of whether R.C. § 4112.02(A) expressly imposes liability on political subdivision employees to trigger the R.C. § 2744.03 (A)(6)(c) immunity exception.

STATEMENT OF THE CASE AND THE FACTS

Plaintiff/Appellee Anita Hauser ("Hauser") is a female detective, employed by the Dayton Police Department ("PD"). Defendant Major Davis is a PD major who oversaw the division by which Hauser is employed (investigations and administrative support), reporting in turn to the assistant chief of police, the chief of police and the city manager. Amended Complaint, ¶ 3; Deposition of Anita Hauser ("Hauser Dep.") 4; Deposition of Major E. Mitchell Davis ("Davis Dep.") 17.

Training requests were reviewed by Major Davis. Davis Dep. 23. Davis denied Hauser's request for Skynarc training. Id. at 24. That denial was confirmed by Assistant Chief of Police Wanda Smith and Chief Richard Biehl. Id. at 26. In earlier years, Davis had approved Officer Kevin Bollinger's requests for Skynarc training. Id. at 25. When asked to explain his more recent denial of Hauser's request, which was affirmed by his superiors,

Major Davis stated that Hauser's request was denied because the PD was trying to contain spending and cut-down on the amount of personnel away at training. Id. at 24.

In March through June, 2007, Hauser attended three months of K-9 training with her dog, Zara, in Front Royal, Virginia. Hauser Dep. 19. She was advised on February 7, 2007, by email from Carol Rountree (a PD clerical employee), that City Manager Rashad Young was adopting a new travel policy. Id. at 32. Hauser was the first person to whom the policy was to be applied as a test case. The pertinent change in the policy was that on trips lasting more than seven days, although the City provided a per diem for meals, the employee was required to refund to the City any portion of the per diem which she could not substantiate by receipts as having been spent on food. Id. at 31-2, 36, 39. Hauser was advanced $4,550 for Meals and Tips. On her return, Hauser was unable to provide receipts for $3,058.62 of the advance, resulting in her being required to refund that amount to the City. The City otherwise paid for all of Hauser's K-9 training, food, transportation and hotels, a total of $19,985.38. Deposition of Kevin Powell, 40. Major Davis was unaware of the test travel policy requiring reimbursement of unspent advances. Davis Dep. 24-25; 29-31; 39; 44; 65-66.

Hauser initiated this action on June 29, 2009, against the PD and Major Davis, alleging intentional infliction of emotional distress, age discrimination, discrimination and hostile work environment, and due process violations. Complaint, Trial Docket ("T.D.")

¶ 1. On September 20, 2011, Defendants moved for summary judgment as to all of Hauser's claims. T.D. ¶ 45. The trial court granted in part and denied in part Defendants' Motion for Summary Judgment. T.D. ¶ 72. The only claims remaining for trial against both Defendants were Hauser's sex discrimination claims. Id.

Major Davis appealed the trial court's denial of immunity on December 27, 2011. T.D. ¶ 83. On the same day, Hauser voluntarily dismissed her action under Civ. R. 41(A)(1)(a). T.D. ¶ 85. The Second District affirmed the trial court's denial of immunity on January 4, 2013. *Hauser*, 2013-Ohio-11, at ¶ 3; Exhibit A.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: R.C. §4112.02(A) does not expressly impose liability on political subdivision employees to trigger the R.C. §2744.03(A)(6)(c) immunity exception

Under R.C. § 2744.03(A)(6)(c), a political subdivision employee is immune from liability unless "civil liability is expressly imposed on the employee by a section of the Revised Code." R.C. § 4112.02(A) does not expressly impose liability on political subdivision employees to trigger the R.C. § 2744.03(A)(6)(c) immunity exception.

R.C. § 4112.02(A) states that "[i]t shall be an unlawful discriminatory practice: (A) For any *employer*...to discriminate against a "protected class in employment." *Hauser*, 2013-Ohio-11, at ¶ 31. R.C. § 4112.01(A)(2) defines "employer" as:

> ...the state, any political subdivision of the state,...and any person acting directly or indirectly in the interest of an employer.

In *Genaro,* the Court held that R.C. Chapter 4112 imposed individual liability on managers and supervisors for their discriminatory conduct. *Genaro,* 83 Ohio St. 3d at 296. The Court interpreted "any person acting directly or indirectly in the interest of any employer" to include managers or supervisors. *Id.* *Genaro* was a sharply divided 4-3 decision. *Id.* at 300.

In a pointed dissent, former Chief Justice Moyer argued that R.C. Chapter 4112 did not impose liability on managers and supervisors. *Id.* His reasoning was twofold. First, R.C. § 4112.02(A) clearly imposes liability on employers for discriminatory acts, not their employees. *Id.* As C.J. Moyer rightly reasoned, if "the General Assembly wished to extend individual liability to managers and supervisors it could have easily included the word 'employee' in R.C. § 4112.02(A)." *Id.* at 301.[2]

Second, the phrase "any person acting directly or indirectly in the interest of an employer" was included in the definition of "employer" to "impose vicarious liability on employers for discriminatory acts of their employees," not to add them to the list of persons liable. *Id.* This argument was supported by the fact that "federal courts have held that the agency clause of Title VII does not impose liability on individual employees, but instead imposes vicarious liability on employers for their discriminatory acts of their

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[2] Why the *Genaro* Court limited liability to managers and supervisors is unclear. As J. Cook pointed out in his dissent, "to limit liability to managers necessitates that the majority superimpose a qualifying word 'supervisory' on R.C. 4112.01(A)(2)." *Genaro,* 83 Ohio St. 3d at 303-04 (J. Cook dissenting); *See also Satterfield v. Karnes,* 736 F. Supp. 2d 1138, 1152 (S.D. Ohio 2010).

employees." *Id.* (citing *Wathen v. Gen. Elec. Co.,* 115 F.3d 400 (6th Cir. 1997)). This Court has held that federal case law interpreting Title VII is "generally applicable to interpretations of R.C. Chapter 4112." *Id.*

R.C. § 4112.02(A) does not expressly impose liability on political subdivision employees to trigger the R.C. § 2744.03(A)(6)(c) immunity exception. The Court addressed a similar issue in *Cramer v. Auglaize Acres,* 113 Ohio St. 3d 266, 2007-Ohio-1946 (2007). In *Cramer,* the decedent's estate brought an action against an unlicensed nursing home and several of its employees after the decedent died during surgery. *Id.* at ¶¶ 2-3. The applicable statute subjected "any person" to liability for violations of R.C. § 3721.10 to 3721.17. *Id.* at ¶ 21. The Court held that the term "person" did not expressly impose liability on the county employee defendants to withdraw immunity. *Id.* at ¶ 32.

Similarly, R.C. § 4112.02(A) imposes liability on political subdivisions for discriminatory conduct, not their employees. The phrase "any person acting directly or indirectly in the interest of an employer" is no more express than the phrase "any person" in *Cramer*. Applying C.J. Moyer's reasoning in *Genaro,* if the legislature desired to impose liability on political subdivision managerial employees, it could have expressly included them in R.C. § 4112.02(A).

Moreover, the phrase "any person acting directly or indirectly in the interest of an employer" was included in R.C. § 4112.01(A)(2) to impose vicarious liability on political

subdivisions for their employees discriminatory conduct, not add to the list of persons liable. This interpretation is consistent with Title VII law, which does not impose liability on individual employees. *Genaro*, 83 Ohio St. 3d at 301 (citing *Wathen*, 115 F.3d at 404). The definition of employer in R.C. Chapter 4112 and Title VII "are sufficiently similar to warrant the conclusion that both were meant only to impose vicarious liability on employers for the acts of their employees." *Id.* at 302. Thus, the fine distinction drawn by the *Genaro* majority between the two definitions of "employer," is really no distinction at all. *Id.* (citing *Lenhardt v. Basic Inst. of Tech. Inc.*, 55 F.3d 377, 379 (8th Cir. 1995)).

R.C. § 2744.03(A)(6)(c) mandates that a political subdivision employee is immune from liability unless liability is expressly imposed by statute. R.C. § 4112.02(A) does not expressly impose liability on political subdivision employees to trigger the R.C. § 2744.03(A)(6)(c) immunity exception. R.C. § 4112.02(A) specifically imposes liability on political subdivisions, not their employees.

Acceptance of this appeal would not require the Court to reassess *Genaro*. Because immunity is the issue in this case, the analysis is wholly different from *Genaro*. The *Genaro* Court did not address whether R.C. § 4112.02(A) expressly imposed liability that would circumvent political subdivision employee immunity. *Hauser*, 2013-Ohio-11, at ¶ 19. *See also Satterfield v. Karnes*, 736 F. Supp 2d at 1153-54 (noting that the Supreme Court of Ohio could hold that *Genaro* based liability is not what the legislature had in mind when it

required that liability be expressly imposed on a political subdivision employee in order to withdraw immunity). Thus, *Genaro* is distinguishable.

CONCLUSION

Major Davis respectfully urges the Supreme Court to consider the above analysis of law and accept the issue regarding political subdivision employee immunity for review. This is a critical issue affecting Ohio municipalities and their employees. R.C. § 4112.02 does not expressly impose liability on political subdivision employees to trigger the R.C. § 2744.03(A)(6)(c) immunity exception. At present, Ohio Appellate courts are at odds with respect to this issue. If the legislature intended for R.C. Chapter 4112 to expressly impose liability that would circumvent R.C. §2744.03(A)(6)(c) "it could have said so expressly." *Hauser*, 2013-Ohio-11, at ¶¶29, 32.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing has been served on Plaintiff/Appellee by forwarding copy of same to her attorney of record, John J. Scaccia, Esquire, SCACCIA & ASSOCIATES, LLC, 1814 East Third Street, Dayton, Ohio 45403 by ordinary U.S. Mail on this 13th day of February, 2013.

THOMAS M. GREEN

Case: CA 024965
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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

ANITA HAUSER	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24965
v.	:	T.C. NO. 09CV5371
CITY OF DAYTON POLICE DEPARTMENT	:	(Civil appeal from Common Pleas Court)
Defendant-Appellee	:	
and		
MAJOR E. MITCHELL DAVIS	:	
Defendant-Appellant	:	
	:	

. . . . . .

OPINION

Rendered on the 4th day of January, 2013.

. . . . . .

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EXHIBIT
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VUKOVICH, J. (by assignment)

{¶ 1} Defendant-appellant Major E. Mitchell Davis appeals the decision of the Montgomery County Common Pleas Court which found that he was not entitled to statutory immunity on plaintiff-appellee Anita Hauser's sex discrimination claim. The main issue on appeal is whether liability is expressly imposed by the unlawful discrimination statutes in Chapter 4112 so that the exception to political subdivision employee immunity under R.C. 2744.03(A)(6)(c) applies.

{¶ 2} Appellant argues that the unlawful discrimination statutes do not expressly impose liability upon managerial employees of a political subdivision. He alternatively contends that even if liability is expressly imposed upon managers and supervisors, he was not appellee's manager or supervisor because, although he was the head of her department, others directly supervised her.

{¶ 3} For the following reasons, we conclude that the trial court correctly determined that Major Davis's immunity was lifted by R.C. 2744.03(A)(6)(c) because civil liability is expressly imposed upon managers or supervisors under R.C. 4112.01(A)(2) for their individual violations of R.C. 4112.02(A). As for his alternative argument, merely because a plaintiff has a more direct supervisor does not mean that individuals further up the chain of command are not considered managers or supervisors. The trial court's judgment is hereby affirmed.

STATEMENT OF THE CASE

{¶ 4} In 2009, appellee Anita Hauser filed a complaint against the City of Dayton Police Department and appellant, a major who was the head of Ms. Hauser's detective division in the police department. One of the claims she raised was sex discrimination in

violation of Chapter 4112, which defines various unlawful discriminatory practices. The defendants filed a motion for summary judgment on multiple grounds, raising immunity only for Major Davis.

{¶ 5} Major Davis urged that he had statutory immunity as an employee of a political subdivision. He relied upon the Eighth District's *Campolieti* case, which held that a fire chief cannot be held individually liable for an employee's discrimination claim because the discrimination statute speaks in terms of "employers" and thus liability was not expressly imposed upon the fire chief in order to invoke the RC. 2744.03(A)(6)(c) exception to the immunity statute. *See Campolieti v. Cleveland*, 184 Ohio App.3d 419, 2009-Ohio-5224, 921 N.E.2d 286, ¶ 33 (8th Dist.).

{¶ 6} Ms. Hauser responded that the exception to political subdivision employee immunity in R.C. 2744.03(A)(6)(c) applies here because liability is expressly imposed under Chapter 4112, the employment discrimination statutes. Ms. Hauser pointed out that the Supreme Court has held that a supervisor or manager is individually liable for their own acts of employment discrimination under the definitions within Chapter 4112. *See Genaro v. Central Transport, Inc.*, 84 Ohio St.3d 293, 296-297, 300, 703 N.E.2d 782 (1999). She concluded that the *Campolieti* holding was incorrect because it failed to cite the Supreme Court's *Genaro* case and failed to recognize that the statutory definition of an employer contained in Chapter 4112 includes any person acting directly or indirectly in the interest of the employer. Ms. Hauser cited cases from other courts which held that R.C. 2744.03(A)(6)(c) withdrew immunity from employees of a political subdivision facing claims for Chapter 4112 violations.

{¶ 7} Ms. Hauser alternatively argued that conduct arising from employment with

a political subdivision is excluded from immunity by R.C. 2744.09. In his reply, Major Davis alternatively claimed that, even if the *Campolieti* case was incorrect, he was immune because he was not Ms. Hauser's manager or supervisor.

{¶ 8} On December 7, 2011, the trial court granted summary judgment in part and denied summary judgment in part. In pertinent part, the court found that Ms. Hauser's sex discrimination claims remained for trial. In doing so, the trial court denied the immunity defense set forth by Major Davis and found that there existed a genuine issue of material fact as to whether he was her manager or supervisor.

{¶ 9} On December 27, 2011, Ms. Hauser and the defendants entered a stipulated entry of voluntary dismissal without prejudice under Civ.R. 41(A)(1)(b). That same day, Major Davis filed a timely notice of appeal from the court's denial of immunity, which remained a final order. *See* R.C. 2744.02(C) ("An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.").[1]

ASSIGNMENT OF ERROR

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[1]A voluntary dismissal of all defendants renders an interlocutory summary judgment decision a nullity with no res judicata effect. *Fairchilds v. Miami Valley Hosp., Inc.*, 160 Ohio App.3d 363, 2005-Ohio-1712, 827 N.E.2d 381, ¶ 37-39 (2d Dist.) (where summary judgment for some defendants had no Civ.R. 54(B) language, it remained interlocutory and thus was dissolved by voluntary dismissal). However, if that decision was a final order, such as one containing Civ.R. 54(B) language, then the order was not an interlocutory one subject to nullification by a voluntary dismissal. *See id.* at ¶ 39, distinguishing *Denlinger v. Columbus*, 10th Dist. Franklin No. 00AP-315, 2000 WL 1803923 (Dec. 7, 2000) (voluntary dismissal has no effect on claims already subject to final adjudication). Here, as the order denying Major Davis immunity was final when made, it is not nullified by the voluntary dismissal and it will have res judicata effect in the refiled action; thus, it is subject to appeal at this time. *See id.*

{¶ 10} Appellant's sole assignment of error provides:

The trial court erred in denying Major Davis the benefit of immunity under R.C. 2744.03(A)(6).

{¶ 11} We begin by disposing of a brief alternative argument set forth in Ms. Hauser's response brief.[2] Ms. Hauser seems to suggest that Major Davis lacks immunity due to R.C. 2744.09(B). This statute provides that the immunity provisions in Chapter 2744 do not apply to 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). *See also* R.C. 2744.09(C) (Chapter 2744 does not apply to civil actions by an employee of a political subdivision against the political subdivision relative to conditions or terms of employment).

{¶ 12} This argument is unfounded. Even the case she mentions under this argument holds that R.C. 2744.09(B) does not apply to the portion of the suit naming employees as defendants. *See Sampson v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. Cuyahoga No. 93441, 2010-Ohio-1214, ¶ 34 (R.C. 2744.09(B) does not apply to bar the individual defendants from asserting immunity as its express language applies only to political subdivisions). *See also Sampson v. Cuyahoga Metro. Hous. Auth.*, 188 Ohio App.3d 250, 2010-Ohio-3415, 935 N.E.2d 98, ¶ 40 (8th Dist.) (a majority of judges reiterated this point on rehearing en banc).

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[2]Contrary to the contention in Major Davis's reply brief, Ms. Hauser did raise this argument in her response to summary judgment as well.

{¶ 13} Notably, division (A) of R.C. 2744.09 includes employees in the removal of immunity. *See* R.C. 2744.09(A) (providing that Chapter 2744 does not apply to civil actions that seek to recover damages from a political subdivision *or any of its employees* for contractual liability). However, the plain language of R.C. 2744.09(B) deals only with an action filed by the employee against the political subdivision. It does not remove immunity in an action filed by the employee against someone other than the political subdivision, such as Major Davis. *See* R.C. 2744.01(B), (F) (political subdivision and employee are not interchangeable in this chapter). Hence, Ms. Hauser's alternative argument is without merit. We now turn to the main issue on appeal.

{¶ 14} In a civil action against an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the employee is immune from liability unless one of the following applies: (a) the employee's acts or omissions were manifestly outside the scope of employment or official responsibilities; (b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (c) civil liability is expressly imposed upon the employee by a section of the Revised Code. R.C. 2744.03(A)(6)(a)-(c).

{¶ 15} From these three sections, it is only subdivision (c) that Ms. Hauser claims is applicable as an exception to Major Davis's statutory immunity. After setting forth an exception to immunity when civil liability is expressly imposed by statute, subdivision (c) explains:

> 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. 2744.02(A)(6)(c).

{¶ 16} Ms. Davis argues that civil liability is expressly imposed by Chapter 4112, the collection of statutes dealing with unlawful employment discrimination. Specifically, it shall be an unlawful discriminatory practice *for any employer*, because of the sex of any person, to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment. R.C. 4112.02(A). As used in Chapter 4112, an "employer" is defined as including the state, *a political subdivision*, any person employing four or more persons within the state, *and any person acting directly or indirectly in the interest of an employer.* R.C. 4112.01(A)(2). *See also* R.C. 4112.01(A)(1) (definition of "person" includes political subdivisions, agents, or employee).

{¶ 17} "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief." R.C. 4112.99. This clearly and unambiguously creates an independent civil action to remedy all forms of discrimination prohibited by Chapter 4112. *Elek v. Huntington Natl. Bank*, 60 Ohio St.3d 135, 136-137, 573 N.E.2d 1056 (1991). *See also Campbell v. Burton*, 92 Ohio St.3d 336, 341, 750 N.E.2d 539 (2001) (list of those who must report abuse, which includes employees of a political subdivision, combined with statement in R.C. 2151.99 that "Whoever violates" the failure to report statute is guilty of a crime, is sufficient to break employee immunity as it

expressly imposes liability).

{¶ 18} In *Genaro*, a federal district court asked the Ohio Supreme Court to answer the certified question of whether a supervisor/manager may be held jointly and/or severally liable with his employer for his conduct in violation of Chapter 4112. *Genaro*, 84 Ohio St.3d at 295, 703 N.E.2d 782. The Supreme Court noted that it would not follow federal cases interpreting the federal discrimination statutes because the definition of "employer" in federal discrimination statutes was not as broad as the definition in the Ohio discrimination statutes. *Id.* at 298-299. That is, the federal definition includes "a person engaged in an industry affecting commerce who has fifteen or more employees * * * and any agent of such a person," *id.* at 299, whereas Ohio's language broadly stated, "any person acting directly or indirectly in the interest of an employer," *id.* at 298-299. The Supreme Court concluded by answering the certified question affirmatively, holding that individual managers and supervisors are liable for their own discriminatory conduct in the workplace. *Id.* at 300.

{¶ 19} Major Davis notes that immunity was not at issue in *Genaro* as the discussion involved the liability of managers and supervisors of a private company under the discrimination statute and thus the court did not specifically answer the question of whether civil liability is "expressly imposed" upon a political subdivision employee by Chapter 4112 as required by R.C. 2744.03(A)(6)(c). However, the Court did say that the language defining an employer in R.C. 4112.01(A)(2) was clear and unambiguous. *Id.* at 300. And, aforementioned, an employer who is liable for discrimination includes a political subdivision *and* any person acting directly or indirectly in the interest of an employer. R.C. 4112.01(A)(2).

{¶ 20} Major Davis relies on the Eighth District's *Campolieti* case, which held that a fire chief cannot be held individually liable for an employee's discrimination claim because the discrimination statute speaks in terms of "employers" and thus liability is not expressly imposed upon the fire chief in order to invoke an exception to the immunity statute. *See Campolieti*, 184 Ohio App.3d 419, 2009-Ohio-5224, 921 N.E.2d 286, at ¶ 33. However, *Campolieti* failed to cite or analyze the effect of the Supreme Court's 1999 holding in *Genaro* that managers and supervisors are liable individually for their acts of workplace discrimination. *Campolieti* also failed to recognize that the statutory definition of an employer contained in Chapter 4112 included any person acting directly or indirectly in the interest of the employer or explain why that did not encompass the fire chief. *See id.* Rather, that court seemed to merely use the everyday definition of employer as the entity itself without realizing that there existed a special statutory definition of employer applicable to Chapter 4112.

{¶ 21} To the contrary, the Seventh District has held that a person in a supervisory position at a political subdivision was not immune from liability in a discrimination action, finding that liability was expressly imposed under Chapter 4112 by focusing on the definition of employer in R.C. 4112.01(A)(2) and the Supreme Court's cited *Genaro* holding. *State ex rel. Conroy v. William*, 185 Ohio App.3d 69, 2009-Ohio-6040, 923 N.E.2d 191, ¶ 30 (7th Dist.). The *Conroy* court thus concluded that the mayor's statutory immunity was lifted under R.C. 2744.03(A)(6)(c) as civil liability was expressly imposed for discrimination in hiring under R.C. 4122.02(A)(2), the same section utilized herein. *Id.*

{¶ 22} Similarly, the Third District has held that three defendants who occupied managerial or supervisory positions in a hospital, which was a political subdivision, were

not entitled to statutory immunity as liability was expressly imposed for disability discrimination under Chapter 4112. *Hall v. Memorial Hosp. of Union City*, 3d Dist. Union No. 14-06-03, 2006-Ohio-4552, ¶ 15. That court relied on *Genaro* and the statutory definition of employer in R.C. 4112.01(A)(2) and concluded that supervisors and managers at a political subdivision can be held liable for violating Chapter 4112. *Id.* at ¶ 14-15.

{¶ 23} The Eleventh District has utilized similar reasoning in holding that an employee of a political subdivision can be liable if she engages in an unlawful discriminatory practice while performing the function of an employment agency. *Albert v. Trumbull Cty. Bd. of MRDD*, 11th Dist. Trumbull No. 98-T-0095, 1999 WL 957066 (Sep. 30, 1999) (but then finding that the functions of the entity did not fit the definition of an employment agency).

{¶ 24} Ms. Hauser cites a case from this court, apparently to show the factual background as no issue was raised concerning immunity or liability of supervisors of a political subdivision under Chapter 4112 and thus the court did not issue a ruling on said topics. *See Mitchell v. Lemmie*, 2d Dist. Montgomery No. 21511, 2007-Ohio-5757, ¶ 52, 102 (race and gender discrimination claim under R.C. 4112.02 filed by employee of political subdivision against city and city manager who refused to promote plaintiff). Ms. Hauser also points out that the Southern District of Ohio reviewed these decisions and concluded that cases such as the Seventh District's *Conroy* case "are the best evidence of how the Ohio Supreme Court would rule regarding the immunity of employees of political subdivisions under § 2744.03(A)(6)(c) for claims brought under § 4112.02." *Satterfield v. Karnes*, 736 F.Supp.2d 1138, 1154 (S.D.Ohio 2010) (concluding that sheriff was not entitled to immunity in his individual capacity on employee's R.C. 4112.02(A) claim).

{¶ 25} We agree that civil liability is expressly imposed upon managers and supervisors of a political subdivision under Chapter 4112. This conclusion is supported by the above case law and the following litany of law. It is unlawful discrimination for an employer to discriminate against an employee due to their sex, and whoever commits unlawful discrimination is clearly subject to a civil suit for damages. R.C. 4112.02(A); R.C. 4112.99; *Elek*, 60 Ohio St.3d at 136-137, 573 N.E.2d 1056. Chapter 4112 specifically includes a political subdivision in the statutory definition of an employer. R.C. 4112.01(A)(2). Certain employees of such an employer are also included in the statutory definition of an employer, and the Supreme Court has stated that this statutory definition clearly allows managers and supervisors of an employer to be held individually liable. R.C. 4112.01(A)(2); *Genaro*, 84 Ohio St.3d at 295, 703 N.E.2d 782. Accordingly, a manager or supervisor of a political subdivision is expressly subject to civil liability for his individual act of discrimination against an employee and thus is not immune from suit for such acts.

{¶ 26} Major Davis suggests that even if we adopt this position, he is not liable as he should not be considered a manager or supervisor of Ms. Hauser because he was merely the head of her department and another person working under him was her direct supervisor. However, merely because a person has a more direct supervisor does not mean that another individual further up the chain of command cannot also be considered a manager or supervisor of a certain employee. *See Hall*, 3d Dist. Union No. 14-06-03, 2006-Ohio-4552 (suing hospital's chief operating officer and the vice president of nursing along with the political subdivision hospital). That is, each manager/supervisor is liable for his own individual acts of discrimination. *See Genaro* at 293 (allowing plaintiff to sue corporate employer and various supervisory employees). It is not as if Major Davis is Ms.

Hauser's non-supervisory co-employee. *Compare Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, 798 N.E.2d 1141, ¶ 31 (10th Dist.); *Hoon v. Superior Tool Co.*, 8th Dist. Cuyahoga No. 79821, 2002 WL 93422 (Jan. 24, 2002).

{¶ 27} Rather, he is the top individual in Ms. Hauser's department and her third level of report. (Hauser Depo. at 4). Her position is under his command. (Davis Depo. I at 8). He signed her request to attend a dog training program and handed in the request on her behalf. (Davis Depo. I at 40-41). Major Davis is the individual who denied her request to participate in a certain training program, which decision she claims was a result of discrimination. (Davis Depo. II at 24). Ms. Hauser received an order from Major Davis demanding she pay back money received for her travel expenses incurred in three months of out-of-town training because she did not maintain receipts (even though no other officer had ever been asked to keep receipts). (Hauser Depo. at 53-54; Davis Depo. I at 65, 104). She met with him multiple times to discuss the issue, and he sent word through her direct supervisor for her to produce receipts. (Davis Depo. I at 46, 56-58). His signature is on documents involved in initiating disciplinary charges against her alleging that she violated his order; although he states his name was placed on some documents even though he did not initiate them, such is not an immunity issue. (Davis Depo I at 93, 104-111; Davis Depo. II at 40-41, 47). He also ordered her to produce a report of all of her activity in 2009. (Hauser Depo. at 155). There is sufficient evidence that he could be considered a supervisor of Ms. Hauser, and thus, he could be held liable *if* he is factually found to have committed acts of discrimination.

{¶ 28} For the foregoing reasons, we conclude that the trial court correctly determined that Major Davis's immunity was lifted by R.C. 2744.03(A)(6)(c) because civil

liability is expressly imposed upon managers or supervisors, such as Major Davis, under R.C. 4112.01(A)(2) for their individual violations of R.C. 4112.02(A). In accordance, the trial court's judgment is hereby affirmed.

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DONOVAN, J., concurs.

HALL, J., dissenting:

{¶ 29} Because I believe there is no statute that "expressly imposes" individual liability on a manager or supervisor of a political subdivision for a claim of discrimination, the individual employee is statutorily immune from suit and the claimant's action may be pursued only against the employer.

{¶ 30} This state has long had a codified policy that individual employees of a political subdivision are immune from suit except in a few specific instances. Statutory immunity was instituted in response to the Ohio Supreme Court's abrogation of judicially created municipal sovereign immunity in *Haverlack v. Portage Homes, Inc.*, 2 Ohio St.3d 26, 442 N.E.2d 749 (1982), holding in paragraph two of the syllabus: "The defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation * * *." The legislature soon enacted the immunity statute in 1985, generally defining when political subdivisions are immune from suit. From the beginning, public employees, as individuals, were granted greater immunity protection. Although a political subdivision, as an entity, could be liable where immunity did not extend, the individual employee was shielded by the terms of R.C. 2744.03(A)(6). The individual could be individually liable only if (1) he acted outside the scope of employment, (2) he acted maliciously, in bad faith or recklessly, or (3) liability was "expressly imposed" by the

Revised Code. The last phrase is the crux of this matter.

{¶ 31} The long-standing policy of shielding individual public employees from liability, as opposed to liability of the political subdivision which remains liable for acts of its employees, should not be diminished by a statute that does not "expressly impose" civil liability on the individual. R.C. 4112.02(A) does not expressly impose liability on the individual. That statute states: "It shall be an unlawful discriminatory practice: (A) For any *employer* * * *" to discriminate against a protected class in employment. It is only through the 4-3 Ohio Supreme Court's decision in *Genaro v. Cent. Transp., Inc.*, 84 Ohio St.3d 293, 298, 703 N.E.2d 782 (1999) that the term "employer" in R.C. 4112.01(A)(2) was interpreted to include supervisors or managers. That subdivision of the statute states: "'Employer' includes the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer." If it took a divided Supreme Court to interpret "any person acting directly or indirectly in the interest of an employer" to include managers and supervisors as persons subject to liability for discrimination in the private sector, I fail to see how that interpretation means the statute "expressly imposed" liability on individual employees of a municipal corporation, especially when the "political subdivision," as an entity, is specifically subject to liability.

{¶ 32} If the legislature intended that one statute, R.C. 4112.02, "expressly imposed" liability that would circumvent another statute, R.C. 2744.03(A)(6), it could have said so expressly. It did not. It is not our province to amend the General Assembly's legislation. I dissent.

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(Hon. Joseph J. Vukovich, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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