

ORIGINAL

IN THE SUPREME COURT OF OHIO

Donald Lee	:	Case No. <u>13-1400</u>
	:	
Appellee,	:	On Appeal from the Morrow
	:	County Court of Appeals, Fifth
v.	:	Appellate District
	:	
Village of Cardington, Ohio	:	Court of Appeals
	:	Case No. 2012 CA 0017
Appellant.	:	

APPELLANT VILLAGE OF CARDINGTON'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

On several occasions, this Court has reiterated that "Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy." *See, e.g., Elam v. Carcorp, Inc.*, 2013 Ohio 1635, ¶24 (10th Dist.), citing *Painter v. Graley*, 70 Ohio St.3d 377, 385, 1994 Ohio 334, 639 N.E.2d 51 (Ohio 1994). Notwithstanding this foregoing legal principle, that's exactly what the court of appeals did in this case.

Many courts, including this Court, have indicated that the "whistleblower" statute, R.C. §4113.52, is to be "strictly" construed. Rather than apply the "whistleblower" statute as written, the court of appeals employed a liberal interpretation and greatly expanded the statute's application far beyond its express terms. The court of appeals decision will affect employers throughout Ohio, especially, public employers which have prosecutorial authority.

Although Ohio's employers could reasonably expect that when the employer (or its' employees) fail to take corrective action within 24 hours concerning the employer's *own* behavior of a felony criminal or environmental nature which presents an imminent threat to public health or safety, the court of appeals created a new statutory liability for all Ohio employers; namely, that the failure to take corrective action concerning *another party's* alleged felony criminal and/or environmental conduct can serve as the basis for a "whistleblower" claim against an employer who has committed no environmental crime. Such a decision has far reaching ramifications and should not be permitted to stand.

In the case *sub judice*, a privately owned auto supplier for Honda, Cardington Yutaka Technologies (“CYT”), was surreptitiously dumping a prohibited substance (glycol, which is found in radiator fluid), into the Village of Cardington’s wastewater treatment system. This was causing damage to the Village’s wastewater treatment plant. As such, in 2007, the Village contacted the Ohio EPA to determine the cause of the problem.

It is undisputed (in fact, it was alleged in Plaintiff’s Complaint), that in 2007, the Ohio EPA determined that the Village’s wastewater treatment plant, operations, procedures, and employees were not the source of the problem. After the Ohio EPA contacted the Federal EPA and requested assistance, the Federal EPA did its own investigation. In spring of 2008, the Federal EPA reached the same conclusion as the Ohio EPA; namely, that the Village’s wastewater treatment plant, operations, procedures, and employees were not the source of the problem. Again, this fact was undisputed. In fact, Plaintiff-Appellant admitted that he had no evidence whatsoever that the Village had been threatened with fines, penalties, or any other potential sanction by either the Ohio EPA or Federal EPA.

In 2008, both the Federal EPA and Ohio EPA turned their investigative efforts toward CYT. Ultimately, CYT was criminally prosecuted and eventually ordered to pay restitution to the Village of Cardington in excess of \$500,000 for damage caused to the Village’s wastewater treatment plant by CYT’s illegal discharges. In other words, the Village was the victim of this environmental crime, not the perpetrator.

During the oral argument, the appellate judges acknowledged that there was a question of first impression before them; namely, whether an Ohio employer could be

liable under the “whistleblower” statute where the employer itself had committed no environmental crime, but a third party had and it was the third party’s conduct that was allegedly being reported by the employee. The judges were also wrestling with whether the authority to correct the violation within 24 hours applied solely to the Village’s own behavior or, alternatively, to the conduct of third parties.

Ultimately, despite the complete absence of any statutory language supporting their decision, the court of appeals concluded that the Village could be liable under the whistleblower statute, even if it committed no environmental crime itself, because it “could have done something” within 24 hours correct CYT’s activities. The problem with the court of appeals’ interpretation of the statute is that it does something the General Assembly never intended; namely, it creates a direct and irreconcilable conflict between an employer’s mandatory statutory duty to take corrective action within 24 hours and, in the case of a local governmental entity, the prosecutor’s near absolute discretion whether or not to pursue a prosecution of the alleged third party offender.

As applied in this case, the Village of Cardington Prosecutor chose not to prosecute CYT because the Village simply did not have either the knowledge or financial resources to prosecute environmental crimes. Instead, the Village Prosecutor deferred to the experts with far greater resources, *i.e.* the Ohio EPA and Federal EPA, to pursue the prosecution against CYT.

Given the language and structure of the statute, it seems clear that the Ohio General Assembly did not intend to impose liability upon employers for alleged felony criminal or environmental conduct of third parties, which is reported to them by an

employee. For indeed, the statute speaks entirely in terms of employer and co-employee conduct, action or inaction.

Furthermore, by including a requirement that the employer take corrective action within 24 hours of an employee report of an alleged violation, it is difficult to imagine that the Ohio General Assembly intended to intrude upon the decisions of local prosecutors whether to take action or to otherwise limit local prosecutors to 24 hours to make a decision whether to prosecute. In other words, it does not appear that the whistleblower statute was ever intended to interfere with or apply to discretionary decisions which are solely the province of a local prosecutor.

This case illustrates one of the potential problems with the court of appeals' interpretation of the statute. In the case *sub judice*, both the Ohio EPA and Federal EPA, in 2007 and spring of 2008 respectively, advised Village officials that the Village was not the target of any investigation, criminal or otherwise. Plaintiff admitted that he knew this. Thus, in applying the statute, and as a matter of law, it is absurd to suggest that Plaintiff can be a "whistleblower" because he could not reasonably believe the Village had committed any environmental crime after the Village had already been cleared by both the Ohio and Federal EPA. Yet, that's the direct effect of the court of appeals conclusion.

This is a case of first impression in that no Ohio employer has ever been subjected to potential whistleblower liability for an employee's report concerning the alleged criminal environmental activities of a third party. Now that Pandora's Box has been opened, this is an opportunity for the Court to slam the lid shut and require that Ohio's trial and appellate courts apply the whistleblower statute as written, rather than create an

environment where Ohio's employers, particularly the public ones, are subject to liability predicated upon environmental crimes which are not their own.

STATEMENT OF THE CASE AND THE FACTS

The Village of Cardington is a municipal corporation located in Morrow County, Ohio. Lee was an employee of the Village and worked as a supervisor. As a supervisor, Lee was to oversee the street department, water distribution system, and wastewater treatment plant. Lee depo. at 202, l. 17 to 203, l. 21. Village employee Mike Chapman was the only class 3 sanitary sewage license holder. As such, when it came to communications with the Ohio EPA, e.g. signing and filing reports, Chapman (not Lee) was in charge of the wastewater treatment plant. Lee depo. at 15, l. 11-18; at 133, l. 15-21; at 154, l. 19 to 155, l. 11. Indeed, Lee admitted he never held a wastewater treatment license. *Id.* at 11, l. 18-22.

In the late nineties, CYT came to the Village of Cardington. Lee depo. at 25, l. 12-15. CYT was a manufacturer and supplier of parts to Honda. *Id.* at 47, l. 4-7.

From about 2000 to 2004, the Village would experience bi-annual problems with the bacteria in the wastewater treatment plant being destroyed. Lee depo. at 18-20. Although he wasn't entirely certain, Lee believed that CYT was the source of the problem. Lee depo. at 24, l. 14 to 25, l. 6. After 2004, the problem with bacteria in the wastewater treatment plant dying became more frequent. Lee depo. at 25, l. 7-11. Over time, as CYT expanded operations and increased the amount of wastewater the Village had to treat, the bacteria problem became more frequent. *Id.* at 47, l. 9-21.

In 2007, the Ohio EPA came into the Village and did a two-day inspection of the Village's wastewater treatment plant. The Ohio EPA **ruled out** the Village's procedures

and employees as the source or cause of any problems with the Village's wastewater treatment plant. Indeed, Lee testified as follows:

- Q Would it be fair to say that one of the things you did first was attempt to eliminate the Village as being the cause of these bacterial problems?
- A What we first did was double-checked our procedure so that we were handling the operation correctly.
- Q Okay. In terms of procedures, it's my understanding that the EPA had indicated that the Village was doing things procedurally correct; is that right?
- A They came in and went through a two-day review of our operation.
- Q Do you remember when that was?
- A That would have been in 2007.
- Q Do you remember what time of the year it was?
- A Springtime.
- Q And did they focus solely on wastewater, or did they also look at the water distribution system?
- A Just the wastewater plant operation.
- Q *** And I think you'd indicated earlier that everything was being done procedurally; is that correct?
- A Their comment was "**We wish all our wastewater plants were being run with this kind of an operation that takes care of the problems and works on 'em.'**"
- Q Okay.
- A So they were satisfied that we were operating the plant correctly.
- Q And that included not only the procedures, but that the employees themselves were doing their jobs correctly?

A Yes. By that time we had Mike Chapman licensed. The second person was proceeding to work on getting his license so we had a backup.

Q I take it, then, that the EPA at that point in time, in 2007, had basically **ruled out the Village of Cardington as being the problem or cause** of why your bacteria was dying?

A **That is true.**

Q *** And given that the Village was not the cause, I take it that that led the investigation elsewhere to look at other potential causes of the problem?

A Yes.

Q *** And did there come a point in time when the EPA advised you that it was going to investigate Cardington Yutaka Technologies to determine whether it was a source of the problem at the Village's wastewater plant?

A Yes.

Lee depo. at 25, l. 16 to 27, l. 22 (emphasis added). CYT denied that it was the source of the problems at the Village's wastewater treatment plant. *Id.* at 49, l. 12 to 50, l. 2.

In 2008, after CYT continued to deny illegal discharges into the Village's sanitary sewer system, Ohio EPA investigator Mike Sapp decided to bring the federal EPA into the picture. Lee depo. at 54, l. 13-20. In the spring of 2008, through investigator Dave Barlow, the federal EPA became involved in the investigation of CYT. *Id.* at 54, l. 20-25. However, after interviewing Lee and license holder Mike Chapman, Barlow quickly determined that the Village's procedures and operations were not the problem. *Id.* at 55, l. 1-10. The Village of Cardington was not the target of the federal EPA's investigation:

Q At any point in time after Mr. Barlow came on the scene from the Federal EPA, are you aware of the Village of Cardington being **threatened in terms of loss of their permit or penalties or fines to the Village itself?**

A I'm not aware that there were any.

Lee depo. at 60., l. 13-17 (emphasis added). To the contrary, the Village of Cardington was the victim of environmental contamination of its wastewater treatment plant, not the violator:

Q *** [D]id Mr. Ralley at any point in time ever indicate to you that the Village was seeking restitution from Cardington Yutaka Technologies through the Federal process?

A Yes.

Q *** At what point in time did he indicate that the Village was seeking restitution from Cardington Yutaka Technologies?

A As we would have conversations with Mr. Ralley and Mike Chapman and myself at the wastewater treatment plant he would bring up the fact that we were trying to get help in replacing equipment that had been destroyed through this process coming from Yutaka. There was always the feeling that he was not sure whether that was gonna be included in any kind of arrangement with Yutaka, but he thought we ought to have.

Q *** If I can just put it in plain language, Mr. Ralley was interested in seeing a successful prosecution of Cardington Yutaka Technologies so that the Village could get money back to pay for damage to the wastewater treatment equipment?

A Well, **I know it was** because that was what we were saying to Mr. Ralley, we've got equipment destroyed, Yutaka needs to help getting this back into operation, **that's correct.**

Q And Mr. Ralley was apparently in agreement with that, then?

A He appeared to be in agreement with it.

Lee depo. at 79, l. 15 to 80, l. 25 (emphasis added).

Approximately one year after the federal EPA began investigating CYT, the Village Administrator and some Village Council members were dissatisfied with Lee's performance as a supervisor relative to his responsibilities outside the wastewater treatment plant. In April 2009, due to the growing dissatisfaction with Lee's job performance, he was placed on paid administrative leave. Subsequently, at its Council meeting on June 15, 2009, Village Council voted unanimously to terminate Lee effective June 30, 2009. In other words, Lee was being paid between the time he was placed on administrative leave in April 2009 and June 30, 2009. Lee erroneously believes that he was a "whistleblower" and that his activities led to his termination in June 2009.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 1

Proposition of Law No. I:

R.C. § 4113.52(A) only applies to employee reports of criminal offenses or violations that are likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, which are allegedly committed by the employer itself or a fellow employee, and which the employer can correct within 24 hours, not to third parties outside the employment relationship.

R.C. § 4113.52 "establishes guidelines by which an employee can bring to the attention of the employer or appropriate authorities ***illegal activity by either the employer or a co-employee*** without being discharged." *Croskey v. Universal Health Svcs., Inc.* (5th Dist.), 2009 Ohio 5951, ¶22, discr. app. not allowed (2010), 124 Ohio St.3d 1508, 2010 Ohio 799, 922 N.E.2d 970. In this case, the court of appeals concluded that R.C. § 4113.52 applies not just to employee reports of alleged illegal activity (*i.e.* a felony criminal or environmental nature which presents an imminent threat to public health or safety), by employers or co-employees, but also third parties. This is reflected in the Court's decision.

Again, in 2007, by Plaintiff-Appellant's own testimony (and the allegations in Complaint ¶9), the Ohio EPA had cleared the Village of any wrongdoing relative to the operation of its wastewater treatment plant. Likewise, by Plaintiff-Appellant's own testimony (and the allegations in Complaint ¶10), it was undisputed that by spring 2008, the Federal EPA had reached the same conclusion. Thus, for purposes of the "whistleblower" statute, whatever alleged oral reports had been made to EPA officials, *i.e.* "any other appropriate public official or agency that has regulatory authority over the employer," they had been completed by spring of 2008 and the Village exonerated by the Federal EPA:

Q At any point in time after Mr. Barlow came on the scene from the Federal EPA, are you aware of the Village of Cardington being **threatened in terms of loss of their permit or penalties or fines to the Village itself?**

A **I'm not aware that there were any.**

Lee depo. at 60., l. 13-17 (emphasis added).

The court of appeals decision is reported at 2013-Ohio-3108. Utilizing the paragraph numbers therein, in ¶7, the court of appeals observed that:

On September 15, 2008, Appellant attended the Village Council meeting to inform the Council of the glycol entering the WWTP pump and other problems. He informed the council the Village had a material coming into the plant killing the bacteria, and as a result, toxic water was potentially being sent down stream. He informed council this was an EPA violation, and the contaminant was causing deterioration in the propellers of the pumps. He informed council the chemical was killing WWTP bacteria necessary in water treatment, and as a result was sending toxic water downstream.

The problem and what the court of appeals failed to recognize is that these allegations, even if construed most favorably to Plaintiff-Appellant as the non-moving party, fail to establish that he was telling Village Council that the Village was committing an EPA

violation, *i.e.* a felony criminal or environmental nature which presents an imminent threat to public health or safety. Indeed, it is apparent that Village Council was being told that the source was coming from outside the Village. As such, Plaintiff-Appellant was not reporting a felony criminal or environmental nature which presents an imminent threat to public health or safety which the Village was committing and could correct within 24 hours.

To the contrary, Plaintiff-Appellant's Complaint focuses almost entirely upon a dispute between himself and the Village Administrator over the cost of attempts to remedy the problem. See Complaint ¶¶11-12. In ¶8 of the Decision, as a predicate to application of the statute, the court of appeals observed:

Appellant also indicated to council and his superior he did not agree with some aspects of engineering reports and estimates to repair the WWTP. He indicated some of the items were a waste of taxpayer money and could be accomplished more cheaply. He questioned the practicality and expense of the repairs. Appellant further continued to report other violations of law involving CYT to his supervisor, including use of more than five percent of the total of the Village's water production. He further informed his superior he suspected CYT was using a separate well as a source of fresh water.

However, budget and costs disputes are not one of the "reports" or subject matters upon which a "whistleblower" statute claim can be based.

Finally, in Decision ¶9, the court of appeals states:

Prior to his termination, Appellant provided a written supervisor's report to Dan Ralley. The document set forth specific equipment failures and damage occurring as a result of the dying bacteria caused by the glycol in the waste water. Appellant outlined the equipment needing repair and replacement.

This alleged written report did not address felony criminal or environmental activity by the Village which presented an imminent threat to public health or safety. Indeed, when

Plaintiff-Appellant was asked the equipment failures he allegedly filed a written report about, Lee testified as follows:

Q That's not something the Village could correct within 24 hours, is it?

A **There isn't anything they can correct in 24 hours....**

Lee depo. at 218, l. 8-18 (emphasis added). If that's the case, then how could the statute apply? In other words, if the statute speaks in terms of an "imminent" risk to public health or safety, which is capable of correction within 24 hours, then how would the statute apply to this aspect of Plaintiff-Appellant's claim? It couldn't.

Essentially, the court of appeals rewrote the whistleblower statute, ignored undisputed facts which defeated Plaintiff-Appellant's claim and made the statute inapplicable, and reached a result-oriented decision. This Court should not permit the whistleblower statute to be interpreted in this fashion as it potentially has far ranging effects for employers, particularly public ones, beyond this case.

Proposition of Law No. 2:

R.C. § 4113.52(A)(2) only applies to the environmental statutes specifically enumerated in the statute.

In cases involving specific environmental statutes, R.C. § 4113.52(A)(2) provides that "If an employee becomes aware in the course of the employee's employment of a violation of chapter 3704., 3734., 6109., or 6111. of the Revised Code that is a criminal offense, the employee directly may notify, either orally or in writing, any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged." Essentially, this Section allows the

employee to bypass the employer and go directly to an outside authority regarding alleged violations of the aforementioned statutes.

Perhaps, the most notable thing about Plaintiff-Appellant's lawsuit is the complete absence of any allegation in the Complaint that he either notified the Village, the Ohio EPA, or Federal EPA, that the Village was allegedly polluting the water supply in violation of a state statute or administrative code section. Indeed, there is a complete absence of any such allegation in the Complaint. Such a claim was only raised after Plaintiff-Appellant faced summary judgment.

In any event, after the Village's operations were cleared by both the Ohio EPA in 2007 and the Federal EPA in spring of 2008, Plaintiff-Appellant could not reasonably believe that the Village had or was committing any environmental crime. Indeed, as set forth above, Village Council was not made aware that Plaintiff-Appellant was claiming that the Village itself was doing anything wrong.

In an effort to overcome the complete absence of such evidence, Plaintiff-Appellant argued that R.C. § 2927.24(B)(1) makes it a crime to "knowingly place a poison, hazardous chemical, biological, or radioactive substance, or other harmful substance in a spring, well, reservoir, or public water supply, if the person knows or has reason to know that the food, drink, nonprescription drug, prescription drug, pharmaceutical product, or water may be ingested or used by another person." The court of appeals seized on this argument in its Decision.

Even though Plaintiff-Appellant presented no evidence whatsoever that he reported this particular concern to either the Ohio EPA or the Federal EPA, which would be a necessary predicate for him to be a "whistleblower," a further examination of that

statute establishes that it does not apply to substances placed in the wastewater treatment system by anyone. Indeed, R.C. § 2927.24(B)(1) also provides, in relevant part, that “For purposes of this division, a person *does not know or have reason to know* that water may be ingested or used by another person *if it is disposed of as waste* into a household drain including the drain of a toilet, sink, tub, or floor.” (Emphasis added). If it is not a crime for a person to place such substances into the wastewater treatment system, then surely the Village cannot “knowingly place” (or, for that matter, “place” at all), such substances into a “spring, well, reservoir, or public water supply.” Indeed, the Village’s wastewater treatment plant would simply receive and process such material. Thus, in concluding that the Village itself had committed a crime, which Plaintiff-Appellant reported, the court of appeals not only misapplied the statute, but interpreted R.C. § 4113.52(A)(2) as covering a statute not specifically enumerated therein.

CONCLUSION

This is a case of great and general public interest to employers, especially public employers which have prosecutorial authority, given the court of appeals dramatic expansion of whistleblower liability from employer and co-employee conduct to third party conduct. Accordingly, given the importance of this issue of first impression, the Court should accept this discretionary appeal.

Respectfully submitted,

John D. Latchney

JDL

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CERTIFICATE OF SERVICE

A copy of Appellant Village of Cardington's Memorandum in Support of Jurisdiction was served via regular U.S. Mail on this 29th day of August 2013 upon: D. Wesley Newhouse and Michael S. Kolman, Newhouse, Prophater, Letcher & Moots, LLC, 5025 Arlington Centre Blvd., Suite 400, Columbus, Ohio 43220, *Attorney for Appellee*.

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COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DONALD LEE

Plaintiff-Appellant

-vs-

VILLAGE OF CARDINGTON, OHIO

Defendant-Appellee

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 12CA0017

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Morrow County Common
Pleas Court, Case No. 2009 CV 00469

JUDGMENT:

Affirmed in part; Reversed in part;
and Remanded

DATE OF JUDGMENT ENTRY:

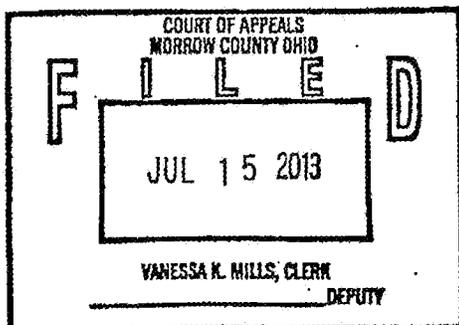
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Hoffman, P.J.

{¶1} Plaintiff-appellant Donald Lee appeals the October 1, 2012 Judgment Entry entered by the Morrow County Court of Common Pleas granting summary judgment in favor of Defendant-appellee the Village of Cardington, Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant was employed as the Crew Chief for the Village of Cardington Waste Water Treatment Plant (WWTP) from 2000, until his termination in 2009. His duties included supervision and oversight of street maintenance work, sewer maintenance work, and the operation of the water treatment plant and waste water treatment plant. Appellant also served as a Township Trustee for Cardington Township. His duties included supervision of the licensed operator of the waste water treatment plant.

{¶3} Cardington Yutaka Technologies ("CYT") is a manufacturer of car parts, and the Village's largest employer.

{¶4} WWTP uses two waste water pump stations to lift raw sewage from the Village's water supply. Bacteria in the pumps digest the solids in the effluent. Operators sample the effluent and decide how long the material stays in tank one before moving to tank two. Once the effluent is pumped into tank two, the bacterium continues to digest and break down the solids. The effluent is sampled and then pumped into tank three where the bacterium continues to break down the solids. When the process in tank three is completed the effluent is pumped on to clarifiers. In the clarifiers, the heavier particles drop to the bottom of the tank, and the process continues in the digester where a bacterium continues to clean the water of harmful materials.

The clear fluid is removed from the tanks and is recycled through the plant. The dry material is known as sludge and is shoveled out to a storage area.

{15} WWTP began to experience a problem with the bacteria used to treat the raw sewage, including frothing and foaming. Testing determined CYT was releasing a toxic substance into the wastewater known as glycol at the time of the plant shutdowns. The toxic substance problem occurred twice a year and coincided with the shut downs of CYT. Testing determined the sludge produced at the WWTP was also contaminated.

{16} Appellant had a permit with WWTP and the Ohio EPA to use the sludge produced at the WWTP on his farm as fertilizer. However, due to the release of the glycol chemical into the water by CYT, he would no longer use the sludge. Ultimately the sludge was taken to a landfill.

{17} On September 15, 2008, Appellant attended the Village Council meeting to inform the Council of the glycol entering the WTP pump and other problems. He informed the council the Village had a material coming into the plant killing the bacteria, and as a result, toxic water was potentially being sent down stream. He informed council this was an EPA violation, and the contaminant was causing deterioration in the propellers of the pumps. He informed council the chemical was killing WWTP bacteria necessary in water treatment, and as a result was sending toxic water downstream.

{18} Appellant also indicated to council and his superior he did not agree with some aspects of engineering reports and estimates to repair the WWTP. He indicated some of the items were a waste of taxpayer money and could be accomplished more cheaply. He questioned the practicality and expense of the repairs. Appellant further continued to report other violations of law involving CYT to his supervisor, including use

of more than five percent of the total of the Village's water production. He further informed his superior he suspected CYT was using a separate well as a source of fresh water.

{¶19} Prior to his termination, Appellant provided a written supervisor's report to Dan Ralley. The document set forth specific equipment failures and damage occurring as a result of the dying bacteria caused by the glycol in the waste water. Appellant outlined the equipment needing repair and replacement.

{¶10} On April 27, 2009, Appellant was placed on administrative leave and told he had two weeks to resign his employment.

{¶11} Appellant filed the within action on October 16, 2009, after termination from his position at Village WWTP, alleging violations of the Ohio's Whistleblower statute, R.C. 4113.52(A)(1)(a) and 4113.52(A)(2), and wrongful termination in violation of public policy due to complaints of criminal conduct which violated EPA laws. The Village filed an answer on March 3, 2010.

{¶12} The Village filed a motion for summary judgment on June 25, 2012. The trial court granted the motion for summary judgment and dismissed the action on October 1, 2012 holding Appellant was not entitled to whistleblower protection because he did not report any criminal act of an environmental nature. The court dismissed the wrongful termination claim because Appellant did not meet the jeopardy element as the whistleblower statute provides parallel remedies.

{¶13} Appellant now appeals, assigning as error:

{¶14} "I. THE COURT BELOW ERRED BY FINDING THAT PLAINTIFF DID NOT STATE A WHISTLEBLOWER CLAIM PURSUANT TO ORC 4113.52(A)(1)(a)

BECAUSE PLAINTIFF DID NOT COMPLAIN ABOUT WHAT HE BELIEVED IN GOOD FAITH TO BE A CRIMINAL ACT.

{¶15} "II. THE COURT BELOW ERRED BY IGNORING PLAINTIFF'S WHISTLEBLOWER CLAIM PURSUANT TO R.C. 4113.52(A)(2) WHICH DOES NOT REQUIRE PLAINTIFF TO FILE A REPORT WITH HIS EMPLOYER RELATED TO ENVIRONMENTAL ILLEGAL MISCONDUCT.

{¶16} "III. THE COURT BELOW ERRED BY FINDING THAT PLAINTIFF FAILED TO SATISFY THE JEOPARDY ELEMENT OF HIS TORT CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY."

I. and II.

{¶17} In the first and second assignments of error, Appellant asserts the trial court erred in granting summary judgment finding Appellant did not state a whistleblower claim pursuant to R.C. 4113.52(A).

{¶18} As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Porter v. Ward*, Richland App. No. 07 CA 33, 2007–Ohio5301, 2007 WL 2874308, ¶ 34, citing *Smiddy v. Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 30 OBR 78, 506 N.E.2d 212. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the nonmoving party has no evidence to prove its case. The moving party must specifically point to some evidence that demonstrates that the nonmoving party cannot support its

claim. If the moving party satisfies this requirement, the burden shifts to the nonmoving party to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264. A fact is material when it affects the outcome of the suit under the applicable substantive law. See *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304, 733 N.E.2d 1186.

{¶19} R.C. 4113.52 reads, in pertinent part,

{¶20} "(A)(1)(a) If an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employee's employer has authority to correct, and the employee reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, a felony, or an improper solicitation for a contribution, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if the violation is within the inspector general's jurisdiction, or with any

other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged.

{¶21} "(b) If an employee makes a report under division (A)(1)(a) of this section, the employer, within twenty-four hours after the oral notification was made or the report was received or by the close of business on the next regular business day following the day on which the oral notification was made or the report was received, whichever is later, shall notify the employee, in writing, of any effort of the employer to correct the alleged violation or hazard or of the absence of the alleged violation or hazard.

{¶22} "(2) If an employee becomes aware in the course of the employee's employment of a violation of chapter 3704., 3734., 6109., or 6111. of the Revised Code that is a criminal offense, the employee directly may notify, either orally or in writing, any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged."

{¶23} Appellant indicated to his supervisor and to the Village Council the glycol was not being filtered out of the water and was being returned to the creek by the WWTP, where it would then become a hazard to the drinking water for all users situated below the plant. He indicated the glycol was upsetting the operation of the WTP as it upset the bacteria balance in the plant causing the good bacteria to die and changing the consistency of the effluent material which damaged the pumps and other equipment. The dumping of the glycol threatened to cause the Village to violate its permit; thereby exposing the Village and its officials to criminal liability.

{¶24} The Village's permit was governed by R.C. 3745 and 6111, specifically provisions of R.C. 6111.60 and OAC 3745-33 and/or 3745-38. The permit specifies the

levels of various compounds, chemicals or elements permitted in the water and returned to the state's water supply following treatment. If the levels are exceeded, the Village is violating the law. R.C. 2927.24(B)(1) makes it unlawful to knowingly place a hazardous chemical or harmful substance in a public water supply. The statute provides for criminal penalties. Accordingly, we find Appellant complained of criminal conduct.

{¶25} The statute provides the employee "may notify, either orally or in writing, any appropriate public official or agency." There is no requirement Appellant actually file an additional written report with an enforcement agency in order to obtain protection under R.C. 4113.51(A). Oral disclosures are afforded protection under the statute, and the employer may not retaliate against the employee on account of the oral report.

{¶26} Furthermore, we find the Village has authority to correct the alleged illegal activity of CYT, even if the Village was not directly involved in criminal activity.

{¶27} Based upon the above, we conclude, when construing the evidence most favorably toward Appellant as required for purposes of summary judgment, the trial court erred in granting summary judgment in favor of Appellee Village.

{¶28} The first and second assignments of error are sustained.

III.

{¶29} In the third assignment of error, Appellant maintains his public policy claim for wrongful discharge lies in addition to his whistleblower claim. We disagree.

{¶30} In *Leininger v. Pioneer National Latex*, 115 Ohio St.3d 311, 875 N.E.2d 36, 2007-Ohio-4921, the Supreme Court of Ohio re-examined prior decisions involving the jeopardy analysis for public policy wrongful discharge claims. Justice Lanzinger, writing for the majority, stated the following at ¶ 27:

{¶31} "It is clear that when a statutory scheme contains a full array of remedies, the underlying public policy will not be jeopardized if a common-law claim for wrongful discharge is not recognized based on that policy. The parties question what should happen if a statutory scheme offers something less than complete relief. Appellants urge this court to follow *Wiles [v. Medina Auto Parts]*, 96 Ohio St.3d 240, 2002-Ohio-3994], while appellee and her amici curiae advocate reliance on *Kulch [v. Structural Fibers, Inc.]* (1997), 78 Ohio St.3d 134]; both *Wiles* and *Kulch* are plurality opinions with regard to the issue pertinent to this case. After considering our prior decisions, we conclude that it is unnecessary to recognize a common-law claim when remedy provisions are an essential part of the statutes upon which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct."

{¶32} We find the remedies provided in Appellant's statutory whistleblower claims adequately protect society's interest in discouraging the wrongful conduct at issue.

{¶33} In *Carpenter v. Bishop Well Services Corp.*, 2009 Ohio 6443, this Court held,

{¶34} "Appellant re-argues that the jeopardy standard as applied in *Leininger* does not apply when there are multiple-source public policies involved. Although it is true that *Leininger* addresses the issue of only one statute, its dicta cannot be overlooked.

{¶35} "Here, the statutes for 'whistle blowers' offer a statutory scheme for complete relief (R.C. 4115.35). In discussing multiple-source public policies, Justice

Lanzinger in *Leininger* at ¶ 26 noted the court's decision in *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 773 N.E.2d 526, 2002-Ohio-3994, ¶ 15:

{¶36} "We noted that '[a]n analysis of the jeopardy element necessarily involves inquiring into the existence of any alternative means of promoting the particular public policy to be vindicated by a common-law wrongful-discharge claim.' * * *Simply put, there is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interests."

{¶37} Based upon the above, Appellant's third assignment of error is overruled.

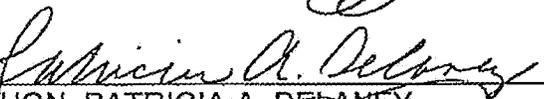
{¶38} The judgment of the Morrow County Court of Common Pleas is affirmed in part; reversed in part; and the matter remanded for further proceedings in accordance with the law and this opinion.

By: Hoffman, P.J.

Delaney, J. and

Baldwin, J. concur


HON. WILLIAM B. HOFFMAN


HON. PATRICIA A. DELANEY


HON. CRAIG R. BALDWIN

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DONALD LEE

Plaintiff-Appellant

-vs-

VILLAGE OF CARDINGTON, OHIO

Defendant-Appellee

JUDGMENT ENTRY

Case No. 12CA0017

For the reasons stated in our accompanying Opinion, the judgment of the Morrow County Court of Common Pleas is affirmed in part; reversed in part; and the matter remanded for further proceedings in accordance with the law and our opinion. Costs to be divided equally.


HON. WILLIAM B. HOFFMAN


HON. PATRICIA A. DELANEY


HON. CRAIG R. BALDWIN