

IN THE SUPREME COURT OF OHIO

ANITA HAUSER, : Supreme Court Case Nos. 2013-0291,  
 : 2013-0493

Plaintiff-Appellee, :

v. : Appeal from Montgomery County Court  
 : of Appeals, Second District

CITY OF DAYTON POLICE DEPT., : Court of Appeals  
 et. al. : Case No. CA 24965

Defendant-Appellant. :

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REPLY BRIEF OF APPELLANT E. MITCHELL DAVIS

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## ARGUMENT

### **I. The Merits of Hauser’s Discrimination Claim are Not Material to the Issue Before the Court**

Appellee Anita Hauser (“Hauser”) devotes much of her brief arguing the merits of her discrimination claim against Appellant E. Mitchell Davis (“Davis”). But the factual allegations of Hauser’s claim are not material to the issue before this Court; that liability is not expressly imposed on political subdivision employees pursuant to R.C. 4112.01(A)(2) so as to lift R.C. 2744.03(A)(6)(c) immunity. Analysis of this purely legal issue requires limited consideration of the facts of this case.

### **II. R.C. 4112.01(A)(2) Does Not Expressly Impose Liability on Political Subdivision Employees**

Hauser and Amicus Curiae argue that the agency language of R.C. 4112.01(A)(2) expressly imposes liability on political subdivision managers and supervisors to trigger the R.C. 2744.03(A)(6)(c) immunity exception. They rely heavily on this Court’s decision in *Genaro v. Cent. Transp., Inc.*, 84 Ohio St. 3d 293 (1999), arguing that *Genaro* is binding precedent in this case.

The issues with the *Genaro* decision notwithstanding, that case is not binding here. *Genaro* addressed the liability of private sector managerial employees under R.C. Chapter 4112; there was no discussion or application of political subdivision employee immunity. The immunity issue distinguishes this case from *Genaro*, and the Court need not revisit its

holding in *Genaro* to decide this case. See *Satterfield v. Karnes*, 736 F. Supp 2d 1138, 1153-54 (S.D. Ohio 2010) (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).

Hauser and Amicus Curiae are correct; R.C. 4112.01(A)(2) is clear and unambiguous. A plain reading of the plain language of the statute leads one to the conclusion that liability is not expressly imposed on political subdivision employees to satisfy the applicable immunity exception. R.C. 2744.03(A)(6)(c). See *Stachura v. Toledo*, 6th Dist. No. L-12-1068, 2013-Ohio-2365, ¶¶ 23-28 (J. Yarbrough dissenting) (arguing that if the legislature had intended for R.C. 4112.02 to expressly impose liability on political subdivision employees it would have said so “in direct and unambiguous language”). Political subdivision employees are mentioned nowhere in any of the definitions relied on by Hauser and Amicus Curiae.

As previously argued, it took the *Genaro* decision to extend liability to private sector managers and supervisors under R.C. 4112.01(A)(2). The *Genaro* Court interpreted the definition of “employer” to include private sector managerial employees. If managers and supervisors had been expressly referenced in the statute, the Court would not have “superimpose[d] the qualifying word ‘supervisory’ on R.C. 4112.01(A)(2).” *Genaro*, at 304 (J. Cook dissenting). Hauser asks this Court to take the *Genaro* analysis a step further and

find that the statute satisfies the immunity exception here. But the fact that it requires extensive interpretation to read political subdivision employee immunity into R.C. 4112.01(A)(2) necessarily means that liability is not expressly imposed.

Hauser and Amicus Curiae both point to the definition of “person” as further support for their argument that liability is expressly imposed on political subdivision employees. R.C. 4112.01(A)(1). However, that subsection speaks in terms of individuals generally and does not reference political subdivision employees. The omission of political subdivision employees from the definition is conspicuous because political subdivisions are, again, expressly listed.

Hauser and Amicus Curiae appear to argue that because political subdivisions are subject to liability, and because the definition of “employer” includes the word “person,” political subdivision employees are expressly subject to liability. This belabored cross-referencing of various statutory provisions to reach a desired result is not what the General Assembly intended when it required that liability be expressly imposed on political subdivision employees to lift the general grant of immunity. If the Court were to adopt this reasoning, it would arguably subject political subdivision employees to liability under any Ohio law imposing liability on individuals generally; thereby eviscerating political subdivision employee immunity. *See e.g. Howard v. Beavercreek*, 276 F. 3d 802, 808 (6th Cir. 2002) (finding that R.C. 4112.99, which imposes civil liability for unlawful discrimination

does not expressly impose liability on political subdivisions because it applies to “whoever” violates the statute).

Hauser argues that the Court’s decision in *Campbell v. Burton*, 92 Ohio St. 3d 336, 341 (2001), stands for the principle that the requirement that liability be expressly imposed on political subdivision employees to circumvent immunity does not require “magic words” imposing liability. However, in *Campbell*, this Court did not analyze the phrase “expressly impose.” Rather, it determined that liability was expressly imposed on public school employees for failing to report child abuse because school teachers, school employees and school authorities were included in the list of entities expressly subject to liability. *Id.* There is no such express imposition of liability on political subdivision employees here. R.C. 4112.01(A)(2). *Campbell* is distinguishable.

Hauser and Amicus Curiae argue that individual liability for political subdivision employees is necessary to protect wronged employees. But there is a long-standing policy in Ohio that political subdivision employees are generally immune from liability. *Rankin v. Cuyahoga Cty. Dept. Of Children & Family Serv.*, 118 Ohio St. 3d 392, 2008-Ohio-2567, ¶ 36. A plain reading of the immunity statutes shows that political subdivision employees enjoy greater immunity protection than their employers. *Compare* R.C. 2744.02 *with* R.C. 2744.03. Though a political subdivision can “be liable where immunity does not extend,” its

employees are shielded by R.C. 2744.03(A)(6). *Hauser v. Dayton Police Dept.*, 2d Dist. No. 24965, 2013-Ohio-11, ¶ 30 (J. Hall dissenting).

If one of the R.C. 2744.03(A)(6) exceptions does not apply, a political subdivision employee is immune from liability. Shielding political subdivision employees from liability except under a few specific circumstances protects them and allows them to perform their official duties without fear of liability. As previously argued, private sector employees enjoy no such safeguards because they are not tasked with enforcing and administering Ohio law. Because liability is not expressly imposed on political subdivision employees pursuant to R.C. 4112.01(A)(2), they are entitled to immunity. R.C. 2744.03(A)(6)(c); *Campolieti v. Cleveland*, 184 Ohio App. 3d 419, 430 (8th Dist. 2009).

### **III. The Additional Political Subdivision Employee Immunity Exceptions are Not Before the Court**

Amicus Curiae argue that Davis's immunity is also abrogated because his conduct was "with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(a-b). However, Hauser does not argue that Davis's immunity is lifted under either of those exceptions. The issue is not before the Court.

In addition, when this Court certifies a conflict, the parties "shall only brief those issues identified in the order...." S. Ct. Prac. R. 4.2. Amicus' argument is wholly unrelated to the aforementioned proposition of law, is improper and should not be considered.

Assuming *arguendo* the applicability of these exceptions were before the Court, which they are not, the record is utterly devoid of any evidence showing that Davis acted in a malicious, wanton and/or reckless manner. The argument lacks merit.

#### IV. The Applicability of R.C. 4112.02(J) is Not Before the Court

Amicus Curiae further argue that liability is expressly imposed on political subdivision managers and supervisors under R.C. 4112.02(J). Again, this issue is not before the Court, has nothing to do with the proposition of law at issue, and is improperly raised.

Assuming *arguendo* R.C. 4112.02(J) was at issue here, which it is not, its language does not expressly impose liability on political subdivision employees. It speaks in terms of persons, which are defined as “individuals...and the state and all political subdivisions.” The definition expressly includes political subdivisions but makes no reference to their employees.

### CONCLUSION

R.C. § 4112.01(A)(2) does not expressly impose liability on political subdivision employees so as to lift immunity under R.C. § 2744.03(A)(6)(c). If the General Assembly intended for R.C. 4112.02 to expressly impose liability on political subdivision employees to abrogate immunity it could have “said so expressly;” it did not. *Hauser*, 2013-Ohio-11, at ¶ 32 (J. Hall dissenting). Accordingly, this Court should answer the certified question in the negative, and the decision below should be reversed.

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, on Amicus Curiae Ohio Employment Lawyers Association, Ohio New Education and Legal Defense Fund and The Ohio Poverty Law Center by forwarding copy of same to their attorney of record, Frederick M. Gittes, THE GITTES LAW GROUP, 723 Oak Street, Columbus, Ohio 43205, on Amicus Curiae Ohio Association for Justice by forwarding copy of same to its attorney of record Alphonse A. Gerhardstein, GERHARDSTEIN & BRANCH CO., LPA, 432 Walnut Street, Suite 400, Cincinnati, Ohio 45202, by ordinary U.S. Mail on this 6<sup>th</sup> day of September, 2013.

  
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