

ORIGINAL

IN THE SUPREME COURT OF OHIO

Donald Lee	:	Case No. 13-1400
	:	
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.	:	

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APPELLANT VILLAGE OF CARDINGTON'S MERIT BRIEF

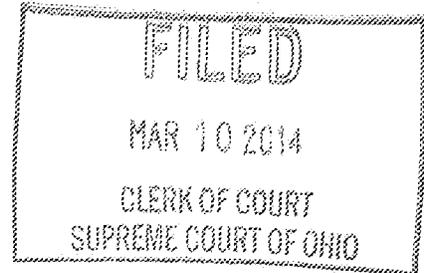
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John D. Latchney (0046539)  
O'Toole, McLaughlin, Dooley & Pecora, Co. LPA  
5455 Detroit Road  
Sheffield Village, Ohio 44054  
(440) 930-4001

COUNSEL FOR APPELLANT  
VILLAGE OF CARDINGTON, OHIO

D. Wesley Newhouse (0022069)  
Michael S. Kolman (0031420)  
Newhouse, Prophater, Letcher & Moots LLC  
5025 Arlington Centre Blvd., Suite 400  
Columbus Ohio 43220  
(614) 255-5441

COUNSEL FOR APPELLEE  
DONALD LEE



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**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.....*

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## I. STATEMENT OF FACTS

### A. Background.

The Village of Cardington (the “Village” or “Cardington”) is a municipal corporation located in Morrow County, Ohio. Complaint ¶ 3; Answer ¶ 3. 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, Cardington Yutaka Technologies (hereafter “CYT”) came to the Village. 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 Lee wasn’t entirely certain, he believed that CYT was the source of the problem. *Id.* at 24, l. 14 to 25, l. 6.

In fall of 2004, Dan Ralley was appointed as the Village Administrator. Ralley depo. at 16, l. 3-5. Ralley graduated from the University of Chicago in political science and held a combined master’s degree in public administration and law from Syracuse University. *Id.* at 6-7. Ralley also passed the New York bar examination. *Id.* at 6, l. 3-25. Suffice to say, Ralley was not the typical small town village administrator.

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.

**B. Lee knew that the Village's sludge samples sent to the EPA had passed the tests, so there were no permit violations by the Village.**

Neither the EPA nor the Village knew what contaminant was in the sludge. Lee depo. at 33, l. 17 to 34, l. 12. Indeed, in 2007, Lee admitted that the Village kept passing the EPA's tests of sludge samples, which meant there was no permit violation. *Id.* at 39, l. 4-21; at 41, l. 5-9.

**C. In spring 2007, Lee knew that the Ohio EPA ruled out the Village as a source of the contaminant in the wastewater treatment plant.**

Mike Sapp was a regional District Manager with the Ohio EPA, who handled wastewater treatment plants. Lee depo. at 21, l. 23 to 22, l. 4. Village Administrator Ralley testified that there was a "very cooperative relationship between the state EPA, and in particular Mike Sapp, and the Village of Cardington. It was not at all an adversarial relationship. And so my experience has been if you proactively contact them or if you are working toward a solution for a problem, that they're very cooperative in working with the municipality." Ralley depo. at 36, l. 17-23.

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).<sup>1</sup>

Consistent with Lee's admissions, Village Administrator Ralley had also been told by the EPA that everything was being done properly and that whatever problems there were, they were not the fault of Village employees. Ralley depo. at 40, l. 8-12. Thus, there was no genuine issue of material fact as to whether the Village had committed any environmental violation or felony criminal act which was an imminent threat to public health or safety.

**D. CYT denies it was the source of the contaminant and stonewalls the Ohio EPA's investigation.**

CYT continuously denied that it was the source of the problems at the Village's wastewater treatment plant. Lee depo. at 49, l. 12 to 50, l. 2. Over the next few months, via the process of elimination of other potential sources of contamination, the Ohio EPA concluded that CYT was the source of the problem. *Id.* at 44, l. 10 to 45, l. 15. When the Ohio EPA attempted

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<sup>1</sup> In fact, once the Village was ruled out as the source of the problem, and CYT was identified as the perpetrator in 2007, subsequently, Lee knew the Village didn't face any fines, penalties, permit revocations, or any other EPA sanctions relating to the CYT discharging a substance into the Village's wastewater treatment system. When asked whether there was anything after 2007, Lee did not identify water pollution or discharges into Whetstone Creek, but only the issue of stormwater infiltration into the sanitary sewers. Lee depo. at 152, l. 12 to 154, l. 18. Lee conceded that this was a completely separate issue from CYT contamination problem. *Id.* at 158, l. 1-4.

to investigate CYT, the Ohio EPA was stonewalled by CYT, who refused to provide information concerning chemicals utilized at the plant. *Id.* at 52, l. 20 to 53, l. 7; at 53, l. 22 to 54, l. 12.

**E. The federal EPA Criminal Division commences an investigation and Lee knew that the federal EPA had ruled out the Village's operations and employees as the source of the contaminant in the wastewater treatment plant.**

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. Thereafter, through investigator Dave Barlow, the federal EPA Criminal Division became involved in the investigation of CYT. Lee depo. at 54, l. 18-25. However, the federal EPA had to rule out the Village as the source of the problem. *Id.*

After interviewing Lee and license holder Mike Chapman, according to Lee, Barlow quickly determined that the Village's procedures and operations were **not** the problem. *Id.* at 55, l. 1-10; at 56, l. 5-14. 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.<sup>2</sup> Lee also admitted that during the entire time he was employed, the Village never lost any of its EPA permits. *Id.* at 17, l. 15-25.

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<sup>2</sup> On April 3, 2008, the Village was served with a subpoena by the U.S. Attorney to produce wastewater treatment logs relating to CYT on April 17, 2008. Exhibit J, Lee depo. at 66, l. 20 to 67, l. 3. Lee has admitted that he was not aware of any communications between the Village Administrator Ralley and/or Village Solicitor Dietz and the Justice Department. *Id.* at 76, l. 21 to 78, l. 14.

**F. Although not privy to the Village's interactions with the U.S. Attorney and Justice Department, Lee knew the Village was seeking restitution from CYT.**

Lee had no knowledge of any communications between the U.S. Attorney's office and the Village, nor the Justice Department and the Village. Lee depo. at 79, l. 1-13. However, Lee did know that the Village was seeking restitution from CYT:

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.**

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On April 7, 2008, ten days before the Village's response to the subpoena was due, Lee mistakenly thought the subpoena was a "court order" and turned over all the Village's original logs, not just the ones relating to CYT, without making or keeping copies. *Id.* at at 75, l. 21 to 76, l. 12. When Village Administrator Ralley and Village Solicitor Dietz intervened, Lee advised them that he had already turned over the originals. See, generally, Lee depo. at 68 to 73, l. 4. The problem was that the Village also had a public records request from CYT, which it could not fulfill because of Lee's actions.

Lee depo. at 79, l. 15 to 80, l. 25 (emphasis added). Indeed, the Village of Cardington was the victim of environmental contamination of its wastewater treatment plant, not the violator.

**G. Lee admits that he never prepared a written report to Village Council or Village Administrator Ralley regarding his concerns about glycol as a pollutant, nor the Village's potential responsibility for same.**

At his February 13, 2012 deposition, Lee twice admitted that everything he did was verbal and that he never prepared a written report to either Village Council or Village Administrator Ralley regarding his concerns about glycol because he didn't "do that sort of thing":

Q Did you ever prepare a written report to Village Council which addressed these concerns about Glycol?

A *Everything I did was verbal.*

Q Okay.

Is there any particular reason why you never prepared a written report to Village Council?

A I grew up at the wrong time. My understanding is when I sit down and I look at you and I talk to you what we're talking about is the way it is. But in today's world I'm behind, so that's my fault that *I don't do that sort of thing.*

Q Did you ever prepare a written report to Mr. Ralley?

A *No*; only talk.

Lee depo. at 107, l. 2-19 (emphasis added); at 143, l. 4-10 ("No written report....Just verbal").

When Lee gave his verbal report to Village Council, it was about the damaged wastewater treatment plant equipment, not anything the Village was allegedly doing wrong in terms of pollution or environmental contamination:

Q And when you gave your verbal report did you tell them that \$750,000 worth of damage was done to the wastewater treatment plant?

A No.

Q Okay. How come?

A *All I was doing is telling them about the pieces of equipment that were damaged*, hoping there would be some discussion about them asking me.

Lee depo. at 143, l. 12-21 (emphasis added); at 221, l. 12-21 (damage was to multiple pumps).

When Lee was pressed for specifics about what he verbally told Village Council, Lee testified that the damage was “[d]ue to the chemical that was being put into our plant from Yutaka the equipment was deteriorating, floors were falling apart, cement was breaking down, pumps were becoming inoperative and the sludge was then a material that we could not use at the farm. Lee depo. at 144, l. 4-9. Lee told them it needed to be fixed [*id.* at l. 11-13], but agreed that the problems could not be resolved by Village Council in a 24 hour period.

For all Village Council knew, it was CYT that was being investigated, not the Village:

Q Did you indicate in any way, shape, or form to Village Council that either the Ohio EPA or Federal EPA was investigating Cardington Yutaka Technologies?

A Yes.

Q All right. And what did you tell them in that regard?

A That we were being—we were *working with* Ohio then it turned into the Federal EPA Criminal Division to resolve the problem that we were trying to solve.

Lee depo. at 144, l. 15 to 145, l. 1 (emphasis added).

Again, nothing verbally from Lee to Village Council about the Village violating any environmental laws. Nothing about the Ohio or federal EPA targeting the Village. Of course, that makes sense because the Village had been ruled out as the cause of the contaminant by both the Ohio and federal EPA in 2007. Based upon what Lee told Village Council, there was no reason for the Village to believe that it was doing anything wrong—let alone violating environmental laws.

**H. The only alleged written report was to Village Administrator Ralley about equipment failures, not alleged environmental or felony criminal violations by the Village.**

The only written report Lee allegedly prepared had to do with equipment failures at the wastewater treatment plant, not any alleged violations of environmental laws by the Village:

Q What written report did you give Mr. Ralley that identified a specific EPA violation?

A What I gave him was the *equipment failures* that we know we've got to replace in that plant due to the destruction from Yutaka that we now know.

Lee depo. at 218, l. 8-14 (emphasis added). Lee agreed it was an operational or equipment failure problem. *Id.* at l. 16-18.

Q So as I understand your testimony, the *only written report* that you gave to Mr. Ralley had to do with dealing with the *equipment failures* in the wastewater treatment plant?

A *Correct.*

Lee depo. at 219, l. 18-22 (emphasis added). By his own admission, Lee never presented a written report to either Village Council or Village Administrator Ralley, which alleged the Village was itself a polluter in violation of the Ohio Revised Code or Ohio Administrative laws.

**I. Lee never made a written report to the Ohio EPA or federal EPA regarding any alleged environmental or felony criminal acts committed by the Village.**

Lee never submitted a written report to the Ohio EPA which identified with sufficient detail a violation being committed by the Village of Cardington that it was failing to correct. In fact, Lee never submitted a written report at all. See detailed Affidavit of Ohio EPA representative Mike Sapp and Exhibit OEPA-1 attached to the Village's Motion for Summary Judgment. In fact, as the Sapp Affidavit establishes, the only written documentation the Ohio EPA ever received was from Village license holder Mike Chapman and Village Administrator Dan Ralley, not Appellant.

Additionally, the Ohio EPA was also requested to provide “Any notes of any telephone conversations Mike Sapp had with Don Lee relating to Lee’s **verbal complaints** or allegations of 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,” that provided “sufficient detail to identify and describe the violation,” which the Village of Cardington failed to make “a reasonable and good faith effort to correct the violation within twenty-four hours” or otherwise address. Sapp Affidavit, Exhibit OEPA-1. Sapp confirmed in Affidavit ¶8 that no such documents exist.

Likewise, Lee never submitted a written report to the United States EPA which identified with sufficient detail a violation being committed by the Village of Cardington that it was failing to correct. Again, Lee never submitted a written report at all. See subpoena and Authentication/Certification from the federal EPA that such documents do not exist, which was attached to the Village’s Motion for Summary Judgment.

**J. At the December 1, 2008 Village Council meeting, Lee tells Village Council “we still meet permit,” not that that the Village has violated any environmental laws, nor any felony criminal acts.**

On December 1, 2008, Village Council had a Council Committee Work Session. Although the primary reports are from Village Administrator Ralley and class 3 license holder Chapman, there were some comments attributed to Lee. The Minutes indicated “Don Lee pointed out that because Mike has always done a good job and *we still meet permit*, it is being used against us. The EPA has seen the plant and the mess, have pictures, the foam, etc. It is disruption of a Public owned treatment plant. Someone should pay for this. We had a good operating program before this.” Graham depo. at 40, l. 18 to 41, l. 20; Plaintiff’s Exhibit 4 (emphasis added).

**K. A summary of what Lee and the Village knew prior to Lee's termination.**

1. Lee admits that in 2007, the Village keeps passing the Ohio EPA's sludge tests and there are no permit violations.
2. Lee admits that in 2007, the Village had been "ruled out" by the Ohio EPA as the source of the environmental contamination.
3. Lee admits that in 2007, the Ohio EPA found nothing wrong with Village wastewater treatment plant operations.
4. Lee knows that in 2007, the Ohio EPA is investigating Cardington Yutaka Technologies, not the Village of Cardington.
5. Lee tells Village Council that the Ohio EPA was "working with" the Village. (Ralley confirms that the relationship is cooperative, not adversarial.)
6. Lee admits that later in 2007 or early 2008, the Village had been "ruled out" by the federal EPA as the source of the environmental contamination.
7. Lee admits that later in 2007 or early 2008, the federal EPA found nothing wrong with Village wastewater treatment plant operations.
8. Lee knows that later in 2007 or early 2008, the federal EPA Criminal Division has launched an investigation of Cardington Yutaka Technologies, not the Village of Cardington.
9. Lee admits that he never presented a written report to Village Council or Village Administrator Ralley regarding his concerns about the glycol infiltration.
10. Lee claims that the only written report he presented to Ralley involved "equipment failures."
11. In December 2008, Lee tells Village Council that "we still meet permit."

Beyond the totally irrational, why would either Village Council or the Village Administrator be concerned about either the Ohio EPA's or federal EPA Criminal Division's investigation? Since the Village had been ruled out in 2007 and still met its EPA permit as of December 2008, then what did the Village have to fear from the EPA? Given all the foregoing, how could any rational person, including Lee, reasonably believe that the Village had committed "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 either 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 or is a felony**" or had violated the environmental statutes enumerated in R.C. § 4113.52(A)(2)? Why then would either Village Council or the Village Administrator perceive Lee as a "whistleblower" and retaliate against him?

**L. Why Lee's at will employment was terminated in June 2009.**

Pursuant to R.C. § 731.10, only Village Council has the authority to terminate Village employees. A village administrator does not have such authority. Village Administrator Ralley did recommend to Village Council that Lee be terminated for job performance reasons. However, as the testimony of Village Council members Garner and Fox, and Mayor Wise established, they all had personal observations of problems with Lee's performance. In other words, Ralley was not the sole source of information.

1. Council members and the Mayor had their own issues with Lee.

Garner told Ralley that Lee "needs to go." Garner depo. at 44, l. 1-2. Village Council member Garner was made aware that Lee was being insubordinate to and badmouthing Village Administrator Ralley. Garner depo. at 69, l. 11-70, l. 1. Village Council member Graham

recalls being told there were problems with Lee's job performance, *i.e.* just not completing jobs. Graham depo. at 14, l. 18-25; at 17, l. 13-20. Mayor Wise recalls Village Council being told there were problems with Lee's job performance and jobs not getting done. Wise depo. at 27, l. 17-21. Mayor Wise also recalled that there were times when Lee just "took off" from his work at the Village without making arrangements to "go farm at his farm." Wise depo. at 29, l. 9-10.

2. Lee's use of Village equipment and the Village's van for personal purposes.

Generally, Ralley also recalled that "[a]t least one of the council members raised his own concerns, specifically about the use of village property for non-village business and the storing of equipment at Don's farm." Ralley depo. at 85, l. 10-13. Specifically, Village Council member Garner brought forth an allegation that Lee was taking the Village van, going to a fertilizer supply company called Smitty's which was located outside the Village in Iberia, and picking up personal items. Garner depo. at 41, l. 1-8, 18-22. Mayor Wise also recalled the issue of Lee using the Village van for his own personal use being brought up Village Administrator Ralley and other employees. Wise depo. at 28, l. 17-25; Ralley depo. at 99, l. 25 to 100, l. 2.

3. Lee commences an improvement project on private property at the church that he attends and, in the process, damages the church's property, which causes costly repairs.

Village Council had instructed Ralley to "be careful in situations where we were doing improvements that looked like they could be private improvements" because before he had started working at the Village, the village apparently paved a parking area on the other side of town for a church and that that was seen as an inappropriate use of tax dollars for improvements." Ralley depo. at 90, l. 23 to 91, l. 2. As a result, the area by the Methodist church drew some scrutiny because of that. *Id.* at l. 3-4.

There was standing water in front of the Methodist Church due to a storm sewer pipe being clogged. Although the Village was putting in full size catch basin, in this particular instance, a four inch pipe was used, which was too small. That upset Village Administrator Ralley because a four inch tile is easily clogged and difficult to maintain. Ralley depo. at 91, l. 10-15

Lee was operating the backhoe on the sidewalk for no apparent reasons; indeed, the storm sewer drain in question was 30 to 40 feet away. Garner depo. at 44, l. 19-25; at 67, l. 4-13. The employees told Garner there was no reason to be using a backhoe to clean out the pipe and that the Jetter truck should have been used instead. *Id.* at 45 to 46, l. 18. Village Council member Garner personally observed the broken sidewalk. Garner depo. at 67, l. 4-7; Ralley depo. at 94, l. 11-22. Mayor Wise was also aware and it was “costly to the Village.” Wise depo. at 29, l. 2-4.

Ralley explained that the issue was that Lee decided on his own to fix a standing water problem in a private parking lot (at the Methodist Church) that was generally for private benefit rather than public. Ralley depo. at 93, l. 14-16. The implication was that Lee had commenced the work at the Methodist Church because he attended there. Garner depo. at 67, l. 14-18.

4. The Village Fire Chief makes requests at three different Village Council meetings for repair of a fire hydrant and the job doesn't get done.

There was a broken fire hydrant outside the Stahl facility. Fox depo. at 14, l. 1-2; Wise depo. at 28, l. 5-6; Ralley depo. at 84, l. 18-21. Fire Chief Ullom said he needed a fire hydrant repaired, came to Village Council three times in three different Council meetings, but Lee, who was the Street Superintendent, wasn't getting the job done. Fox depo. at 14, l. 3-6; Garner depo. at 68, l. 8-19; Wise depo. 28, l. 3-5. After the third time the Fire Chief came to Village Council, Council was adamant that it get fixed. Fox depo. at 16, l. 1-5. Fox and Wise indicated Village

Council felt that not fixing the fire hydrant was a safety issue and the repair took too long. Fox depo. at 14, l. 5-6; Wise at 28, l. 6-8.

5. A stormwater drainage project isn't completed in a proper manner and has to be re-done.

There was a stormwater drainage ditch that required maintenance and the job wasn't getting done. Garner depo. at 68, l. 20 to 69, l.10. Since the project wasn't finished when it was originally started, it caved in and had to be re-done. Wise depo. at 28, l. 11-16; Fox depo. at 15, l. 2-6.

6. Lee unilaterally tells Ralley he's going to take a third week of vacation.

Ralley explained that Lee had "taken a trip to Haiti and he was scheduled to be gone for two weeks and toward the end of those two weeks he called me and *didn't ask so much as tell me* that he was going to take a third week of vacation. Ralley depo. at 84, l. 2-6; at 87, l. 18 to 88, l. 4. Fox indicated that Lee was on a two-week vacation and then took an extra week's vacation, which was in violation of the Village's personnel policy manual. Fox depo. at 19, l. 8-14. Garner and Graham also recalled having been advised of the unauthorized additional week of vacation. Garner depo. at 50, l. 1-3; Graham depo. at 15, l. 2-4.

7. While Lee is on vacation, more work gets done and employee morale is better.

Ralley also advised Village Council that during the three weeks Lee was on vacation, the staff was getting more work done and there was less bickering among employees. Garner depo. at 70, l. 2-11; Ralley depo. at 89, l. 9-16; at 100, l. 7-9. Fox recalls being told by Ralley that in Lee's absence, things had been getting done quicker and in a more reasonable time. Fox depo. at 23, l. 1-5.

8. Lee is placed on administrative leave, then terminated effective June 30, 2009.

In April 2009, due to the aforementioned dissatisfaction with Lee's job performance, he was placed on paid administrative leave. In interim, the Parties attempted to negotiate an amicable resolution, which based upon Ohio Evidence Rule 408, will not be set forth herein.

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.

**M. CYT is indicted, which eventually results in a plea bargain agreement between CYT and the U.S. Attorney where the Village is to receive over \$500,000 toward repairs and improvements to the Village's wastewater treatment plant.**

CYT was eventually indicted. Lee depo. at 198, l. 15-20. In contrast, no official, employee, nor the Village itself, was indicted. *Id.* at 199, l. 17-20.

Ultimately, CYT entered into a plea bargain arrangement which required CYT to pay a \$1.2 Million fine to the United States, \$115,000 in restitution to the Village of Cardington, and as community service in the form of payment, an additional \$400,000 to the Village of Cardington within 90 days for repair, maintenance, improvement, and renovation of the Village's wastewater treatment plant. See Motion for the Court to Take Judicial Notice, filed in the Fifth District Court of Appeals<sup>3</sup>, and the September 12, 2012 Plea Agreement attached thereto, United States District Court, Southern District of Ohio, Case No. 2:11-cr-00140, PageID# 1012.

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<sup>3</sup> The legal basis for the Motion for the Court to Take Judicial Notice is set forth within the body of that Motion, which is part of the record before this Court.

## II. ARGUMENT

### 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.*

#### A. The statute was designed to regulate an employer's own offenses or violations, not that of third parties.

Generally, 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.* (5<sup>th</sup> Dist.), 2009 Ohio 5951, ¶22, discr. app. not allowed (2010), 124 Ohio St.3d 1508, 2010 Ohio 799, 922 N.E.2d 970. There is nothing in the statute which suggests employer responsibility for the illegal activity of third parties outside the employment relationship.

R.C. § 4113.52(A)(1)(a) provides, in relevant part, as follows: “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 either is a **criminal offense** that is likely to cause an **imminent<sup>4</sup> risk of physical harm to persons or a hazard to public health or**

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<sup>4</sup> “‘**Imminent**’ is defined in Webster's New International Dictionary (2 Ed.1957) 1245, as ‘near at hand, impending, **threatening to occur immediately.**’” *Cincinnati v. Baarlaer* (1st Dist. 1996), 115 Ohio App.3d 521, 526-527, 685 N.E.2d 836, 840. “Although no Ohio case has specifically determined the scope or meaning of the word ‘**imminent,**’ **it has been defined** as an action or event ‘**on the point of happening**’ or one that is ‘impending.’” *State ex rel. Bond v. Montgomery* (1<sup>st</sup> Dist. 1989), 63 Ohio App.3d 728, 737, citing Black's Law Dictionary (5<sup>th</sup> Ed. 1979) 676. “The Revised Code does not define the word ‘imminent.’ Therefore, because the word is not defined by statute, we must apply the plain, ordinary meaning in the English language. Webster's II New Riverside University Dictionary (1984) 611, defines the word

**safety or is a felony**, 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.” (Emphasis added).

The “employer has authority to correct” language suggests that it is the employer’s own conduct which is at issue. This subsequent phrase “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,” means that it is the employer’s violation which is at issue.

If the employer fails to act, then the employee may “blow the whistle” by involving a third party who has “regulatory authority over the employer,” *i.e.* “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.**” (Emphasis added).<sup>5</sup> By referring to employer regulation, the employer’s authority to correct, and by placing a relatively

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‘imminent’ as ‘**about to occur at any moment.**’” *In re Jenkins* (5<sup>th</sup> Dist. 2004), 2004 Ohio 2657, ¶14.

<sup>5</sup> As the Fifth District had previously observed in *Jamison v. American Showa* (5<sup>th</sup> Dist.), 1999 Ohio App. LEXIS 6212, “R.C. 4113.52(A)(1) protects an employee for reporting certain information *to outside authorities* only if the following requirements have first been satisfied: (1) the employee provided the required oral notification to the employee's supervisor or other responsible officer of the employer, (2) the employee filed a written report with the supervisor or other responsible officer, and (3) the employer failed to correct the violation or make a reasonable and good faith effort to correct the violation.” Thereafter, if the employer does not correct the violation or make a reasonable and good faith effort to correct the violation, **the employee may “blow the whistle.”** (Emphasis added).

immediate time frame on the action to be taken, *i.e.* 24 hours or less, it is clear that the Ohio General Assembly was placing a restriction on employers, not third parties to the employment relationship.

Likewise, 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.” (Emphasis added). Again, the “regulatory authority over the employer” language indicates that the Ohio General Assembly recognize that whistleblowing concerning criminal violations to a regulator who has authority or jurisdiction over the employer would be protected activity.

**B. The Fifth District expanded the scope of the whistleblower statute beyond its plain language.**

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. Notwithstanding the undisputed evidence in the record which established the lack of any violation of a criminal environmental statute by the

Village, the Fifth District expanded the law beyond the plain language of the whistleblower statute to illegal third party activity. Indeed, the court of appeals stated “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.” *Lee*, 2013-Ohio-3108, ¶26.

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.

In fact, due to CYT’s stonewalling the Ohio EPA, the Ohio EPA decided to bring in the federal EPA Criminal Division to take over the investigation. If CYT was thumbing its nose at the State of Ohio EPA, an organization with far more human and financial resources than the Village, how can one legitimately claim that the Village could have done something within 24 hours? It doesn’t make sense.

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.

Essentially, the court of appeals rewrote the whistleblower statute, ignored undisputed facts which defeated Lee'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.

**C. Relative to the Village's alleged potential violation of R.C. § 2927.24, the Fifth District erred in applying R.C. § 4113.52(A)(2), instead of R.C. § 4113.52(A)(1).**

In the case *sub judice*, in the Motion for Summary Judgment, the Village relied almost exclusively upon Lee's deposition testimony where he made various admissions. Based upon Lee's testimony as outlined in the Statement of Facts, it is clear that the "regulatory authorities," *i.e.* the Ohio EPA and federal EPA Criminal Division, were not alleging that the Village of Cardington had done anything wrong and, in fact, both had "ruled out" the Village as being the source of the contaminant. To the contrary, according to Lee, he was told by the Ohio EPA: "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." Lee depo. at 26, l. 17-20.

In concluding that Lee had reported potential (not actual) criminal conduct by the Village, the Fifth District states "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.” *Lee*, 2013-Ohio-3108, ¶24.

The statute that Lee and the Fifth District relied upon to conclude that Lee complained about criminal conduct is not covered by R.C. § 4113.52(A)(2). Indeed, R.C. § 2927.24 is not among the expressly enumerated Ohio Revised Code Chapters [3704, 3734, 6109, or 6111], in R.C. § 4113.52(A)(2). As such, that statute does not apply to any allegation by Lee that the Village violated that R.C. § 2927.24. Instead, Lee would have had to comply with R.C. § 4113.52(A)(1), to report Village conduct allegedly in violation of R.C. § 2927.24.

**D. Lee did not comply with the mandatory requirements of R.C. § 4113.52(A)(1).**

In *Contreras v. Ferro Corp.* (1995), 73 Ohio St. 3d 244, 652 N.E.2d 940, the Ohio Supreme Court outlined the specific procedures that **must** be followed under R.C. 4113.52(A)(1)(a) for an employee to gain statutory protection for reporting certain information to outside authorities. In *Contreras*, the Court stated "Ohio's Whistleblower Statute, R.C. 4113.52, provides specific procedures an employee **must** follow to gain statutory protection as a whistleblower." The statute "**mandates** that the employer be **informed** of the violation both orally **and in writing**. An employee who **fails** to provide the employer with the required oral notification and written report is **not entitled to statutory protection** for reporting the information to outside authorities." *Id.* For the statute to apply, an employee must provide a written report regarding a violation that is either "a **criminal offense** that is likely to cause an **imminent risk of physical harm to persons or a hazard to public health or safety or is a felony.**"

"Protection as a whistleblower requires an employee's **strict compliance** with the dictates of R.C. 4113.52." *Miller v. Rodman Public Library Bd. of Trustees* (5<sup>th</sup> Dist.), 2009-Ohio-573, ¶17 (emphasis added); see also *White v. Fabiniak* (11<sup>th</sup> Dist.), 2008 Ohio 2120, ¶30; *Grove v. Fresh*

*Mark, Inc.* (7<sup>th</sup> Dist.), 156 Ohio App.3d 620, 2004-Ohio-1728, ¶19, 808 N.E.2d 416; *Poluse v. City of Youngstown* (7<sup>th</sup> Dist. 1999), 135 Ohio App.3d 720, 729; *Davidson v. BP America, Inc.* (8<sup>th</sup> Dist. 1997), 125 Ohio App.3d 643, 654. “Failure to strictly comply with the notice requirements of the Whistleblower statute will defeat a claim under R.C. § 4113.52.” *Naples v. Rossi* (7<sup>th</sup> Dist.), 2005-Ohio-6931, ¶40.

The Fifth District, at ¶23 of its Opinion, states “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 WWTP 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 problem is that the Village was not the source of the glycol infiltration; indeed, that was CYT.

Furthermore, at his February 13, 2012 deposition, Lee twice admitted that everything he did was verbal and that he never prepared a written report to either Village Council or Village Administrator Ralley regarding his concerns about glycol because he didn’t “do that sort of thing”:

Q Did you ever prepare a written report to Village Council which addressed these concerns about Glycol?

A ***Everything I did was verbal.***

Q Okay.

Is there any particular reason why you never prepared a written report to Village Council?

A I grew up at the wrong time. My understanding is when I sit down and I look at you and I talk to you what we’re talking about is the way it is. But in today’s world I’m behind, so that’s my fault that ***I don’t do that sort of thing.***

Q Did you ever prepare a written report to Mr. Ralley?

A *No*; only talk.

Lee depo. at 107, l. 2-19 (emphasis added); at 143, l. 4-10 (“No written report....Just verbal”).

When Lee gave his verbal report to Village Council, it was about the damaged wastewater treatment plant equipment, not anything the Village was allegedly doing wrong in terms of pollution or environmental contamination:

Q And when you gave your verbal report did you tell them that \$750,000 worth of damage was done to the wastewater treatment plant?

A No.

Q Okay. How come?

A *All I was doing is telling them about the pieces of equipment that were damaged*, hoping there would be some discussion about them asking me.

Lee depo. at 143, l. 12-21 (emphasis added); at 221, l. 12-21 (damage was to multiple pumps).

When Lee was pressed for specifics about what he verbally told Village Council, Lee testified that the damage was “[d]ue to the chemical that was being put into our plant from Yutaka the equipment was deteriorating, floors were falling apart, cement was breaking down, pumps were becoming inoperative and the sludge was then a material that we could not use at the farm. Lee depo. at 144, l. 4-9. Lee told them it needed to be fixed [*id.* at l. 11-13], but agreed that the problems could not be resolved by Village Council in a 24 hour period.

For all Village Council knew, it was CYT that was being investigated, not the Village:

Q Did you indicate in any way, shape, or form to Village Council that either the Ohio EPA or Federal EPA was investigating Cardington Yutaka Technologies?

A Yes.

Q All right. And what did you tell them in that regard?

A That we were being—we were *working with* Ohio then it turned into the Federal EPA Criminal Division to resolve the problem that we were trying to solve.

Lee depo. at 144, l. 15 to 145, l. 1 (emphasis added).

Again, nothing verbally from Lee to Village Council about the Village violating any environmental laws. Nothing about the Ohio or federal EPA targeting the Village. Of course, that makes sense because the Village had been ruled out as the cause of the contaminant by both the Ohio and federal EPA in 2007. Based upon what Lee told Village Council, there was no reason for the Village to believe that it was doing anything wrong—let alone violating environmental laws.

The only written report Lee allegedly prepared had to do with equipment failures at the wastewater treatment plant, not any alleged violations of environmental laws by the Village:

Q What written report did you give Mr. Ralley that identified a specific EPA violation?

A What I gave him was the *equipment failures* that we know we've got to replace in that plant due to the destruction from Yutaka that we now know.

Lee depo. at 218, l. 8-14 (emphasis added). Lee agreed it was an operational or equipment failure problem. *Id.* at l. 16-18.

Q So as I understand your testimony, the *only written report* that you gave to Mr. Ralley had to do with dealing with the *equipment failures* in the wastewater treatment plant?

A *Correct.*

Lee depo. at 219, l. 18-22 (emphasis added). By his own admission, Lee never presented a written report to either Village Council or Village Administrator Ralley, which alleged the Village was itself violating R.C. § 2927.24.

Although the Fifth District further stated “The dumping of the glycol *threatened to cause* the Village to violate its permit; thereby exposing the Village and its officials to criminal

liability,” [*Id.* at ¶23 (emphasis added)], the supposed exposure to “criminal liability” was via R.C. § 2927.24. However, the language of the statute does not support the Fifth District’s conclusion.

The flaw in the Fifth District’s analysis is the language of R.C. § 2927.24(B)(1) itself. That Section 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.”

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 Lee allegedly reported, the court of appeals not only misapplied the statute, but again, incorrectly interpreted R.C. § 4113.52(A)(2) as covering R.C. § 2927.24 when it was not specifically enumerated therein.

**E. None of the statutes cited by Lee and/or the Fifth District were criminal in nature such that R.C. § 4113.52(A)(2) would apply.**

Although not referenced in his Complaint, Lee cited some Ohio Revised Code and Ohio Administrative Code Sections in both his Opposition to the Motion for Summary Judgment and Court of Appeals Brief at 16. However, for R.C. § 4113.52(A)(2) to apply, Lee must identify and report to the regulatory authority, *i.e.* the Ohio EPA or federal EPA, that the Village had violated a criminal provision contained in one of the enumerated Ohio Revised Code Chapters.

As a threshold matter, R.C. § 6111.40, is simply a permitting statute. It is not criminal in nature, nor referenced in the criminal penalty statute—R.C. § 6111.99.

R.C. § 6111.04(B) provides, in relevant part, “If the director of environmental protection administers a sludge management program pursuant to division (S) of section 6111.03 of the Revised Code, both of the following apply except as otherwise provided in division (B) or (F) of this section: (1) No person, in the course of sludge management, *shall place on land* located in the state or release into the air of the state *any sludge* or sludge materials. (2) An action prohibited under division (B)(1) of this section is hereby declared to be a public nuisance.” However, that Section also states that “Divisions (B)(1) and (2) of this section do not apply *if the person placing* or releasing *the sludge* or sludge materials *holds a valid, unexpired permit*, or renewal of a permit, governing the placement or release as provided in sections 6111.01 to 6111.08 of the Revised Code or if the person's application for renewal of such a permit is pending.”

Lee has admitted that any sludge that he hauled from the Village's Wastewater Treatment Plant was done pursuant to a permit from the EPA. Lee depo. at 32, l. 20-21. Thus, there is no genuine issue of material fact whether the exception contained in R.C. § 6111.04(B) applied; indeed, Lee held a valid unexpired permit.

When the Ohio EPA ran tests on the sludge in 2007, according to Lee, the Village's sludge was *passing the EPA's tests*:

Q So the EPA, their position in 2007, which was communicated to you, was that they didn't find anything wrong with the sludge at that time?

A They knew from what I described and they saw there was something wrong, but they also knew *we were passing the permits* that we'd been issued by the EPA, so *they did not know what it was that was causing the problem*.

Q All right. When you used the phrase "passing the permits", what does that mean?

A Every month we send samples of the operation of the plant. Every time we unload the storage of the sludge we take samples that's analyzed and that's sent in to EPA so they know exactly the amount of sludge and whether we pass their tests, which is what the permits are based on.

Lee depo. at 39, l. 4-21 (emphasis added).

Lee's testimony begs the question: If even the EPA didn't know what was causing the problem, then how could Lee know or reasonably believe that he was reporting an environmental crime committed by the Village? Furthermore, given that the Village was passing the EPA tests, Lee's position that he believed the Village had committed a crime makes no sense. This is especially true given his braggadocio that in 2007, Ohio EPA representative Mike Sapp allegedly told him **"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."** Lee depo. at 25, l. 16 to 27, l. 22. Such a statement is incompatible with a belief that the Village was operating the plant illegally.

In fact, Lee was more concerned with his own potential liability exposure. Lee testified that, as the sludge application permit holder, *he* would have been the one committing the crime by placing contaminated sludge on his land.

A They didn't tell me I had to take it. They said, "We've never seen a guy decide that it's not worth taking on this basis but you do have a valid reason for not taking it and if you continued to take it and this problem is ignored,

then we have drawn (*sic*) a line as to you knew there's a problem and until we get it resolved you're subject to penalty."

Q This would have been a penalty at your farm?

A It would have been a *penalty to me personally*.

Lee depo. at 36, l. 4-12 (emphasis added).

In any event, once the problem of contaminated sludge was identified, there is no evidence, nor any allegation, that the Village subsequently disposed of contaminated sludge in a manner that violated R.C. § 6111.04 or any other law. There was no genuine issue of fact on this point. Indeed, Lee admitted that the Village made arrangements to have the contaminated sludge hauled to an approved landfill. Lee testified as follows:

Q I take it, then, that no contaminated sludge was delivered to your farm after the spring of '07; is that correct?

A. That is correct.

Q And no contaminated sludge was delivered to this other farmer's farm, either?

A Ever, **no, none**.

Q. Okay. So the contaminated sludge, where did it go?

A. Then we had to go through a process to take it **to a landfill** which had to be approved by the EPA, and the landfill that—it was material that could go into a **regular landfill** instead of a highly [toxic] landfill.

Lee depo. at 33, l. 9-23 (emphasis added). That action is also reflected in the Village's official

Record of Proceedings for August 6, 2007:

Wise moved for 1<sup>st</sup> reading of Ordinance #2007-20; an ordinance authorizing the transfer of funds, appropriations, and supplemental appropriations; namely for the disposal of sludge and the purchase of a sampling machine, and declaring an emergency. Garner seconded. Under discussion, Dan added that this transfer was necessary to dispose of current sludge **to a landfill** instead of land application. Due to industrial contamination into our Wastewater Treatment Plant, the sludge has no

biological activity. The Village will not be able to do the land application with this sludge as we normally do. We are awaiting test results to see what landfill can be used to dispose of this contaminated sludge. Estimated cost of disposal will be \$7000 to \$7500. (Emphasis added).

Sherry L. Graham depo. at 36, l. 2-5; Lee's Plaintiff Exhibit 2 thereto. According to Lee, even today, the sludge continues to go to a landfill:

Q And did it continue going to a landfill until you left your employ in June '09?

A. Still is today.

Lee depo. at 34, l. 21-23. Thus, there was **never** any criminal activity by the Village for Lee to report.

Without there being any "*actus reus*" by the Village, *i.e.* the actual application of contaminated sludge without an EPA permit, there can be no crime or other unlawful activity. As the Ohio Supreme Court has recognized "Under fundamental concepts of criminal law, a person is not guilty of an offense unless both of the following apply: "(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing [*i.e.*, the *actus reus*]; "(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense [*i.e.*, the *mens rea*]." R.C. 2901.21(A). *State v. Cargile* (2009), 123 Ohio St.3d 343, 344, 2009 Ohio 4939, ¶¶9-10; 916 N.E.2d 775.

Simply put, because Lee knew that the Village's sludge was **passing** EPA tests and because Lee knew that the Village had **not** applied sludge to land without a permit from the EPA, **Lee knew that no criminal or unlawful act by the Village had occurred.** Absent the *actus reus*, Lee could not reasonably have believed the Village was in violation of any law, including R.C. § 6111.04(B). Indeed, the only evidence in the record is undisputed; namely, once the problem was identified, the

Village made arrangements to properly dispose of contaminated sludge. Thus, to the extent Lee's so-called "whistleblower" claim is predicated upon R.C. Chapter 6111 or otherwise, it fails as a matter of both fact and law. Indeed, relative to "sludge disposal," there was no criminal or unlawful act by the Village for Lee to "blow the whistle" upon.

At ¶24 of its Opinion, the Fifth District also cited Ohio Admin. Code §§ 3745-33 and/or 3745-38, but they are simply permitting regulations, and not criminal in nature. The court of appeals also references another permitting statute, R.C. § 6111.60, but that statute is not referenced in the penalties provision—R.C. § 6111.99. In sum, Lee did not report to the Ohio EPA or federal EPA any criminal conduct which was covered by R.C. § 4113.52(A)(2).

### III. CONCLUSION

Proposition of Law No. 1 should be adopted to prevent employer liability exposure under the whistleblower statute for third party conduct. The trial court's granting of summary judgment was correct. The decision of the Fifth District should be reversed and the trial court's judgment reinstated.

Respectfully submitted,

*John D. Latchney* 

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John D. Latchney (0046539)  
Counsel of Record for  
Appellant Village of Cardington, Ohio

### CERTIFICATE OF SERVICE

A copy of Appellant Village of Cardington's Merit Brief was served via regular U.S. Mail on this 10<sup>th</sup> of March 2014 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*.

*John D. Latchney* 

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John D. Latchney (0046539)

**DONALD LEE, Plaintiff-Appellant -vs- VILLAGE OF CARDINGTON, OHIO, Defendant-Appellee**

Case No. 12CA0017

**COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, MORROW COUNTY***2013-Ohio-3108; 2013 Ohio App. LEXIS 3157; 36 I.E.R. Cas. (BNA) 401***July 15, 2013, Date of Judgment Entry**

**SUBSEQUENT HISTORY:** Discretionary appeal allowed by, in part *Lee v. Cardington, 2013-PDOMOHIO-5678, 2013 Ohio LEXIS 3023 (Ohio, Dec. 24, 2013)*

**PRIOR HISTORY:** [\*\*1]

**CHARACTER OF PROCEEDING:** Appeal from the Morrow County Common Pleas Court, Case No. 2009 CV 00469.

**DISPOSITION:** Affirmed in part; Reversed in part; and Remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant former employee filed a complaint against appellee village, alleging violations of the Ohio's Whistleblower statute, *R.C. 4113.52(A)(1)(a)* and (2), and wrongful termination in violation of public policy due to complaints of criminal conduct which violated the Environmental Protection Agency (EPA) laws. The Morrow County Court of Common Pleas (Ohio) granted summary judgment for the village. The employee appealed.

**OVERVIEW:** The former employee argued that the trial court erred in granting summary judgment finding that he did not state a whistleblower claim pursuant to *R.C. 4113.52(A)*. The appellate court held that the trial court erred in granting summary judgment for the village. Because *R.C. 2927.24(B)(1)* made it unlawful to knowingly place a hazardous chemical or harmful substance in a public water supply, the employee complained of criminal conduct. Also, there was no requirement the employee actually file an additional written report with an enforcement agency in order to obtain whistleblower protection under *R.C. 4113.51(A)*. Furthermore, the village had authority to correct the alleged illegal activity of the manufacturer, even if the village was not directly involved in criminal activity. However, the trial court properly denied the wrongful termination in violation of public policy claim because the remedies provided in the em-

ployee's statutory whistleblower claims adequately protected society's interest in discouraging the wrongful conduct at issue.

**OUTCOME:** The portion of the trial court's judgment denying the employee's wrongful termination in violation of public policy claim was affirmed. Denial of the claim of violations of the Whistleblower statute was reversed and the case was remanded for further proceedings.

**LexisNexis(R) Headnotes*****Civil Procedure > Summary Judgment > Appellate Review > Standards of Review***

[HN1] An appellate court reviewing summary judgment issues must stand in the shoes of the trial court and conduct its review on the same standard and evidence as the trial court.

***Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants******Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants******Civil Procedure > Summary Judgment > Standards > Materiality***

[HN2] 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. A fact is material when it affects the outcome of the suit under the applicable substantive law.

**Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview**  
[HN3] See *R.C. 4113.52(A)*.

**Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview**  
**Environmental Law > Water Quality > Safe Drinking Water Act > General Overview**  
[HN4] *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.

**Labor & Employment Law > Discrimination > Retaliation > General Overview**  
**Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Coverage & Definitions > Protected Activities**  
[HN5] *R.C. 4113.52* provides that an employee may notify, either orally or in writing, any appropriate public official or agency of criminal conduct. There is no requirement the employee actually file an additional written report with an enforcement agency in order to obtain whistleblower 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.

**Labor & Employment Law > Wrongful Termination > Public Policy**  
[HN6] 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.

**Labor & Employment Law > Wrongful Termination > Public Policy**  
[HN7] In a wrongful termination claim, 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.

**Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview**  
[HN8] The statutes for "whistle blowers" offer a statutory scheme for complete relief.

**Labor & Employment Law > Wrongful Termination > Public Policy**

[HN9] In a wrongful termination claim, an 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.

**COUNSEL:** For Defendant-Appellee: JOHN D. LATCHNEY, Tomino & Latchney, LLC, LPA, Medina, OH.

For Plaintiff-Appellant: D. WESLEY NEWHOUSE, MICHAEL S. KOLMAN, Newhouse, Prophater, Letcher & Moots, LLC, Columbus, OH.

**JUDGES:** Hon. William B. Hoffman, P.J., Hon. Patricia A. Delaney, J., Hon. Craig R. Baldwin, J. Delaney, J. and Baldwin, J. concur.

**OPINION BY:** William B. Hoffman

#### OPINION

*Hoffman, P.J.*

[\*P1] 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

[\*P2] 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 [\*2] of the waste water treatment plant.

[\*P3] Cardington Yutaka Technologies ("CYT") is a manufacturer of car parts, and the Village's largest employer.

[\*P4] 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.

[\*P5] 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 [\*\*3] 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.

[\*P6] 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.

[\*P7] 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.

[\*P8] Appellant also indicated to council and his superior he did not agree with some aspects of engineering reports [\*\*4] 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.

[\*P9] 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.

[\*P10] On April 27, 2009, Appellant was placed on administrative leave and told he had two weeks to resign his employment.

[\*P11] 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 [\*\*5] violated EPA laws. The Village filed an answer on March 3, 2010.

[\*P12] 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.

[\*P13] Appellant now appeals, assigning as error:

[\*P14] "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.

[\*P15] "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.

[\*P16] "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.

[\*P17] In the first and second [\*\*6] 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)*.

[\*P18] [HN1] 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 Ohio 5301, 2007 WL 2874308, ¶ 34, citing Smiddy v. Wedding Party, Inc. (1987), 30 Ohio St.3d 35, 30 OBR 78, 506 N.E.2d 212.* [HN2] 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, 1997 Ohio 259, 674 N.E.2d 1164, [\*\*7] citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 1996 Ohio 107, 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.

[\*P19] R.C. 4113.52 reads, in pertinent part,

[\*P20] [HN3] "(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 [\*\*8] 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.

[\*P21] "(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 viola-

tion or hazard or of the absence of the alleged violation or hazard.

[\*P22] "(2) If an employee becomes aware in the course of the employee's employment of a violation of chapter 3704, [\*\*9] 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."

[\*P23] 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.

[\*P24] 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 [\*\*10] water supply following treatment. If the levels are exceeded, the Village is violating the law. [HN4] 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.

[\*P25] [HN5] 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.

[\*P26] 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.

[\*P27] 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.

[\*P28] The first and second assignments of error are sustained.

### III.

[\*P29] In [\*\*11] the third assignment of error, Appellant maintains his public policy claim for wrongful discharge lies in addition to his whistleblower claim. We disagree.

[\*P30] 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:

[\*P31] [HN6] "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, 773 N.E.2d 526], while appellee and her amici curiae advocate reliance on *Kulch [v. Structural Fibers, Inc. (1997)]*, 78 Ohio St.3d 134, 1997 Ohio 219, 677 N.E.2d 308]; both *Wiles* and *Kulch* are plurality opinions with regard to the issue pertinent to this case. After considering our prior decisions, we conclude that [HN7] it is unnecessary to recognize a common-law claim when [\*\*12] 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."

[\*P32] We find the remedies provided in Appellant's statutory whistleblower claims adequately protect society's interest in discouraging the wrongful conduct at issue.

[\*P33] In *Carpenter v. Bishop Well Services Corp.*, 2009 Ohio 6443, this Court held,

[\*P34] "Appellant re-argues that the jeopardy standard as applied in *Leininger* does not apply when there are multiple-source public policies involved. Alt-

hough it is true that *Leininger* addresses the issue of only one statute, its dicta cannot be overlooked.

[\*P35] "Here, [HN8] 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:

[\*P36] "We noted that [HN9] '[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 [\*\*13] 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."

[\*P37] Based upon the above, Appellant's third assignment of error is overruled.

[\*P38] 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

### JUDGMENT ENTRY

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

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O'TOOLE MCLAUGHLIN DOOLEY & PECORA  
5455 DETROIT RD  
SHEFFIELD VILLAGE, OH 44054-2904

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.	:	

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APPELLANT VILLAGE OF CARDINGTON'S  
NOTICE OF DISCRETIONARY APPEAL

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John D. Latchney (0046539)  
Tomino & Latchney, LLC, LPA  
803 E. Washington Street, Suite 200  
Medina, Ohio 44256  
(330) 723-4656  
[john.latchney@frontier.com](mailto:john.latchney@frontier.com)

COUNSEL FOR APPELLANT,  
VILLAGE OF CARDINGTON, OHIO

D. Wesley Newhouse (0022069)  
Michael S. Kolman (0031420)  
Newhouse, Prophater, Letcher & Moots LLC  
5025 Arlington Centre Blvd., Suite 400  
Columbus Ohio 43220  
(614) 255-5441

COUNSEL FOR APPELLEE,  
DONALD LEE

FILED  
AUG 20 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

**NOTICE OF APPEAL**

Now comes Defendant-Appellant Village of Cardington, Ohio who, pursuant to Article IV, Section 2(B)(2)(e) of the Ohio Constitution and in accordance with S.Ct.Prac.R. 5.02(A)(3), hereby gives notice of its discretionary appeal to the Ohio Supreme Court from the July 15, 2013 decision in Fifth District Court of Appeals Case No. 12CA0017, which reversed (in part), in a 3-0 decision, the Morrow County Common Pleas Court's grant of summary judgment to Defendant-Appellant on Plaintiff's "whistleblower" claim contained in Plaintiff-Appellee Donald Lee's Complaint. The case involves an issue of great and general public interest to all public employers in the state of Ohio, which is of first impression. A copy of the Fifth District's Opinion and Judgment Entry, from which the Appeal is being taken, are attached hereto.

Respectfully submitted,

*John D. Latchney* JDL

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John D. Latchney (0046539)  
Counsel of Record for  
Appellant Village of Cardington, Ohio

**CERTIFICATE OF SERVICE**

A copy of Appellant Village of Cardington's Notice of Discretionary Appeal 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*.

*John D. Latchney* JDL

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John D. Latchney (0046539)

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

DONALD LEE

Plaintiff-Appellant

-vs-

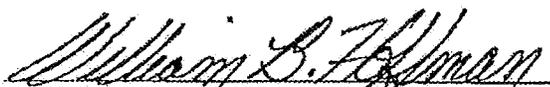
VILLAGE OF CARDINGTON, OHIO

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. HOFFMANN

  
HON. PATRICIA A. DELANEY

  
HON. CRAIG R. BALDWIN