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IN THE SUPREME COURT OF OHIO

**MATTHEW P. CAIAZZA,**  
Plaintiff/Appellant,  
  
vs.  
  
**MERCY MEDICAL CENTER, INC.,**  
*et al.,*  
  
Defendants/Appellees.

**CASE NO. 14-1160**  
  
On Appeal from the  
Court of Appeals  
Fifth Appellate District  
Case No. 2013CA00181

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF  
MERCY MEDICAL CENTER, INC., ET AL.**

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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

The Fifth District Court of Appeals did nothing more than apply well-settled Supreme Court precedent to the issues Plaintiff/Appellant Matthew Caiazza (“Caiazza”) raises in his Memorandum in Support of Jurisdiction. Caiazza raises no new or novel issues for the Court to decide. Instead, he asks the Court to accept jurisdiction of this case and arrive at different conclusions in applying undisputed facts to accepted Supreme Court precedent. Caiazza asserts no substantial constitutional question, and this case is not of public or great general interest. Caiazza merely asks this Court to second-guess the court of appeals’ decision. This is demonstrated by the fact that he asserts four “assigned errors” that were previously addressed by the court of appeals.

Despite Caiazza’s claims otherwise, the court of appeals’ decision did not rewrite Ohio’s statutes for aiding and abetting discrimination and retaliation. Nor did the decision eviscerate a litigant’s right to subpoena documents by condoning those who withhold or destroy evidence. Instead, the court of appeals’ decision is based on well-settled Supreme Court precedent. As found by the court of appeals, Caiazza simply failed to assert allegations, in his Amended Complaint, that would support his claims under a Civ.R. 12(B)(6) analysis and failed to satisfy the required burden to oppose summary judgment under Civ.R. 56.

As alleged grounds of public or great general interest, Caiazza “assigns as errors” the appellate court’s affirmance of the dismissal of individual defendants, under Civ.R. 12(B)(6), for the claims of aiding and abetting and unlawful retaliation. Caiazza also “assigns as errors” the appellate court’s affirmance of summary judgment, in defendants’ favor, on his claims for fraud and spoliation of evidence. The Court has previously spoken on the issues Caiazza raises

in his Memorandum in Support of Jurisdiction. They are not issues of first impression, and Caiazza asserts no reason of public or great general interest explaining why the Court should revisit its prior precedent.

For example, Caiazza claims the court's decision, as to his claim for aiding and abetting, overturned Sections (I) and (J) of O.R.C. § 4112.02. In reaching its decision, the Fifth District Court of Appeals referenced *Genaro v. Cent. Transport, Inc.*, 84 Ohio St.3d 293, 1999-Ohio-353, 703 N.E.2d 782, which held that "for purposes of R.C. Chapter 4112, a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112." *Id.* at syllabus.

In accordance with *Genaro*, the court of appeals reinstated Caiazza's claim for aiding and abetting discrimination only against those defendants who were involved in the decision to terminate him. *Caiazza v. Mercy Med. Ctr., et al.*, 5th Dist. Stark No. 2013CA00181, 2014-Ohio-2290, ¶29. Since there were no allegations that any of the other defendants were involved in the discriminating act – the termination decision – they were not personally responsible. In reaching this conclusion, the court of appeals did not rewrite O.R.C. § 4112.02 or superimpose a higher standard, but merely followed prior Supreme Court precedent.

Caiazza also challenges the court of appeals' decision that he could only maintain his unlawful retaliation claim against MMC and none of the individual defendants. In making this argument, Caiazza completely overlooks the fact that the dismissal of the individual defendants resulted from his failure to assert any allegations against them in his Amended Complaint. As found by the court of appeals, the only allegation of retaliation was against MMC. *Id.* at ¶36.

Caiazza next challenges the court of appeals' decision affirming summary judgment of his fraud claim that was based on MMC's response to subpoenas duces tecum issued in a criminal case in which Caiazza was a defendant. The court of appeals reviewed this Court's decision, in *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69, 491 N.E.2d 1101 (1986), which sets forth the necessary elements of a claim for fraud. The court concluded Caiazza did not present a question of material fact regarding the justifiable reliance element of the claim. This does not present an issue of public or great general interest. *Id.* at ¶70.

In a related argument, Caiazza challenges the court of appeals' determination that MMC complied with the language of the criminal subpoenas by turning over the "official file." *Caiazza, supra*, at ¶67. Once again, Caiazza second-guesses the court of appeals' decision as a basis for this Court to exercise its discretionary jurisdiction. This is a factual matter that has absolutely nothing to do with any constitutional issue nor does it present an issue of public or great general interest.

Caiazza finally claims the Court must exercise jurisdiction in this matter because the court of appeals' decision altered the Court's definition of spoliation contained in *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 1993-Ohio-229, 615 N.E.2d 1037. Again, Caiazza's argument in support of jurisdiction requests expansion of this decision to fit the facts of his particular case. This Court specifically held, in *Smith*, that a necessary element of spoliation is the willful destruction of evidence. *Smith, supra*, at 29. Caiazza asks the Court to exercise jurisdiction in this matter so it may expand the elements of a spoliation claim to include "interference" with evidence.

Further, in contradiction of this Court's decision in *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 2001-Ohio-1593, 756 N.E.2d 657, Caiazza claims the Court should

exercise its discretionary jurisdiction because the court of appeals improperly determined he could not maintain his spoliation claim arising from his previous criminal case, in the present civil matter. The *Davis* court specifically addressed the timing issue for spoliation claims and held that “[c]laims for spoliation of evidence may be brought after the primary action has been concluded only when evidence of spoliation is not discovered until after the conclusion of the primary action.” (Emphasis added.) *Davis, supra*, at syllabus.

The evidence in this case established that Caiazza knew about the existence of the documents that formed the basis of his spoliation claim during the pendency of his criminal case. Therefore, the court of appeals properly concluded, under *Davis*, that Caiazza was required to pursue his spoliation claim in the criminal matter. *Caiazza, supra*, at ¶60. Caiazza fails to demonstrate how the Court’s decision, in *Davis*, “eviscerates” a litigant’s rights to effectively subpoena documents by condoning those who withhold or destroy evidence. Requiring a party to pursue a claim, in the case in which it arises, is by no means unconstitutional nor does it present an issue of public or great general interest since it comports with prior Supreme Court precedent.

None of Caiazza’s arguments in support of jurisdiction concern an open, unresolved legal issue. Instead, Caiazza’s appeal focuses on factual determinations and the manner in which the court of appeals applied existing Supreme Court precedent to the facts of his case. Caiazza is in essence arguing that the court of appeals was incorrect in the application of facts to legal precedents as to his claims for aiding and abetting discrimination, unlawful retaliation, spoliation and fraud. Such arguments do not present a proper basis for granting discretionary jurisdiction.

## **STATEMENT OF THE CASE AND FACTS**

Caiazza and Defendant Jennifer Jones (“Jones”) became friends through their employment at MMC. They were friendly with each other, found each other attractive and flirted. On Saturday, August 28, 2010, Caiazza asked Jones to go on a smoke break with him. Later that afternoon, Jones told her supervisor that Caiazza had inappropriately touched her. Thereafter, Jones and her boyfriend went to security, at MMC, and asked the police to be called. A detective from the Canton Police Department responded and interviewed Caiazza. Caiazza admitted touching Jones’s breast while on break together.

The following Monday, Defendant Lorraine Washington, Vice-President of Human Resources, decided to terminate Caiazza, a nurse, who admitted to touching the breast of a co-worker, an act of extremely poor judgment. On August 30, 2010, Caiazza was informed of Washington’s decision and accepted the opportunity to resign his employment. On this same date, Caiazza was criminally charged with sexual imposition. In November 2010, Caiazza pled no contest and was found guilty of the lesser charge of disorderly conduct in the Canton Municipal Court.

Thereafter, Caiazza filed suit against MMC and multiple individual defendants employed at MMC. Caiazza made claims for breach of contract, gender discrimination, sexual harassment, aiding and abetting discrimination under R.C. Chapter 4112, spoliation, fraud, unlawful retaliation, civil conspiracy, and negligent retention/supervision. All defendants except Jones moved to dismiss the complaint. The trial court granted the motion, in part, dismissing Caiazza’s breach of contract and aiding and abetting discrimination claims, and dismissed the individual defendants on Caiazza’s claims for sexual harassment, unlawful retaliation, and

negligent retention/supervision. Following extensive discovery, the trial court granted summary judgment to defendants on all of Caiazza's remaining claims.

On appeal to the Fifth District Court of Appeals, the court remanded Caiazza's claim for gender discrimination and aiding and abetting discrimination against Defendants MMC and Lorraine Washington, and affirmed the other rulings of the trial court.

## **LAW AND ARGUMENT**

### ***Response to Caiazza's Proposition of Law No. 1***

- I. **The appellate court's decision did not amend O.R.C. § 4112.02(I) and (J) but instead, properly applied this Court's decision in *Genaro v. Cent. Transport, Inc.*, 84 Ohio St.3d 293, 1999-Ohio-353, 703 N.E.2d 782.**

- A. The court of appeals' decision did not rewrite O.R.C. § 4112.02(J).

Caiazza claims the court of appeals rewrote O.R.C. § 4112.02(J), to require the individual defendants to be his employer in order to maintain a claim for aiding and abetting discrimination, because the court determined he could only maintain his claim against those defendants who made the decision to terminate him. (Memorandum in Support of Jurisdiction, p. 10) Caiazza cites the statute's language that provides it is unlawful "[f]or any person to aid, abet \* \* \* an unlawful discriminatory practice \* \* \*" Based on the "any person" language, Caiazza argues he is entitled to maintain a cause of action, for aiding and abetting discrimination, against multiple individual defendants. (*Id.*, pp. 9-10)

Caiazza's argument overlooks the fact that this Court previously held that "for purposes of R.C. Chapter 4112, a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112." (Emphasis added.) *Genaro, supra*, at syllabus. Thus, this Court has found that for an individual to have liability, they must engage in discriminatory conduct. Just being an

officer of the company or a supervisor of the individual does not create individual liability if that person did not engage in discriminatory conduct. The court of appeals concluded, based on undisputed facts, that Defendant Lorraine Washington alone made the decision to terminate Caiazza. *Caiazza, supra*, at ¶29. As to the remaining individual defendants, the court found there were no allegations that they participated in or made the actual decision to terminate Caiazza. *Id.* at ¶27-¶28. In other words, they did not engage in discriminatory conduct by participating in the decision to terminate Caiazza, or in any other manner, and thus they did not aid or abet discrimination.

In reaching this decision, the court of appeals did not rewrite O.R.C. § 4112.02(J). Instead, the court followed the language of the statute, this Court's decision in *Genaro*, and reviewed the factual allegations contained in the Amended Complaint. Caiazza asserted no allegations that the other individual defendants engaged in activities which aided and abetted discriminatory conduct by participating in the decision to terminate him or in any other action.

B. The court of appeals' decision did not rewrite O.R.C. § 4112.02(I).

Caiazza makes a similar argument regarding his retaliation claim under O.R.C. § 4112.02(I). The language of this statute makes it unlawful “[f]or any person to discriminate in any manner against any other person \* \* \*” This particular claim centered on MMC's alleged refusal to provide Caiazza with a reference. *Id.* at ¶36. Caiazza contends Defendant Kathy Casler provided him with a reference and then repudiated it. (Memorandum in Support of Jurisdiction, p. 11) Caiazza maintains that based on the language of the statute, which prohibits “any person” from unlawfully retaliating, he is entitled to maintain his claim for retaliation against Defendant Kathy Casler.

Caiazza's argument ignores the fact that the court of appeals based its decision not on a misreading of the statutory language contained in O.R.C. § 4112.02(I), but on the fact that he only pled an allegation of retaliation against MMC in his Amended Complaint. *Caiazza, supra*, at ¶36. On this basis, the court found the trial court properly dismissed the unlawful retaliation claims against all of the individual defendants, including Kathy Casler, because the Amended Complaint did not state a claim against any individual. *Id.* ¶37.

***Response to Caiazza's Proposition of Law No. 2***

**II. The appellate court's decision did not condone withholding or destroying documents thereby impacting a litigant's right to subpoena documents.**

**A. The court of appeals properly affirmed the trial court's grant of summary judgment, in MMC's favor, regarding Caiazza's fraud claim.**

Caiazza asserted a fraud claim on the basis that MMC only turned over its "official file" in response to two subpoenas duces tecum that he issued for personnel files. Caiazza argues a recipient of a subpoena duces tecum has a duty to notify the subpoenaing party of any non-compliance with the subpoena and where a party fails to do so, and the issuer of the subpoena relies to his or her detriment on the false response, the issuer of the subpoena is entitled to recover in damages for fraud. (Memorandum in Support of Jurisdiction, pp. 11-12) The court of appeals reviewed the elements of a fraud claim as set forth in *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69, 491 N.E.2d 1101 (1986):

- (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading

another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

*Id.* at paragraph two of the syllabus.

Caiazza claims that in response to the subpoena, had MMC produced what he alleges to be the complete personnel files, the files would have contained information about a previous sexual harassment complaint made by Jones. Based on this information, Caiazza alleges he would have gone to trial, in his criminal case, rather than entering a plea. *Caiazza, supra*, at ¶66. MMC produced evidence, in the trial court, indicating it followed its normal procedure for responding to subpoenas, which has never been called into question in the past, and that MMC believed they produced all responsive documents. Even if Plaintiff were correct that all responsive documents were not produced, the court of appeals failed to see how conforming to the language of the subpoena was fraudulent when the undisputed facts were that Caiazza knew about Jones's previous sexual harassment complaint before he entered into the criminal plea deal. *Id.* ¶67, ¶70. In other words, Caiazza did not justifiably rely on this lack of information since he knew about the previous complaint.

Caiazza argues the court of appeals' decision creates an incentive to fraudulently misrepresent compliance with a subpoena. (Memorandum in Support of Jurisdiction, p. 13) The court of appeals created no such incentive. Instead, the court reviewed the evidence in the case, under the applicable Civ.R. 56 standard of review, and concluded Caiazza failed to satisfy one of the necessary elements of a fraud claim; namely, that he justifiably relied on the information produced in response to the subpoenas. For these reasons, the appellate court properly affirmed the trial court's summary judgment dismissal of Caiazza's fraud claim.

B. The court of appeals properly affirmed the trial court's grant of summary judgment, in MMC's favor, regarding Caiazza's spoliation claim.

Caiazza presents two separate arguments regarding his spoliation claim. First, Caiazza contends the court of appeals improperly determined that he could not maintain his spoliation claim arising from his previous criminal case, in the present civil matter. In direct contradiction of this Court's holding in *Davis v. Wal-Mart Stores, Inc.*, *supra*, Caiazza claims this Court has not determined that a claimant must assert an unknown civil claim inside criminal litigation. Although addressed on a more general basis, the *Davis* court explained that “[c]laims for spoliation of evidence may be brought after the primary action has been concluded only when evidence of spoliation is not discovered until after the conclusion of the primary action.” (Emphasis added.) *Id.* at syllabus.

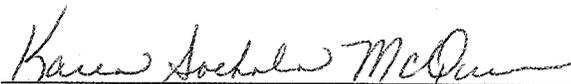
The *Davis* decision leaves no doubt that a spoliation claim must be asserted, in the case in which it occurred, unless discovered after the fact. The focus of this claim, as was Caiazza's fraud claim, concerns documents allegedly not produced in response to subpoenas duces tecum issued in his criminal case. However, the court of appeals determined, based on undisputed facts, that Caiazza knew about the existence of these documents prior to entering his plea in the criminal matter. Therefore, under the mandate of *Davis*, the court of appeals properly concluded Caiazza was required to pursue his spoliation claim in his criminal case. *Caiazza*, *supra*, at ¶60.

Second, Caiazza maintains the court of appeals should have applied a decision, from the Eleventh District Court of Appeals, that held a spoliation claim exists for “interference” or destruction of evidence. *See Drawl v. Coricelli*, 124 Ohio App.3d 562, 706 N.E.2d 849 (11th Dist.1997). In its opinion, the Fifth District Court of Appeals relied on its previous decision, in *Allstate Ins. v. QED Consultants, Inc.*, 5th Dist. Knox No. 09CA14, 2009-Ohio-4896, finding the

Ohio Supreme Court has not extended its decision in *Smith v. Howard Johnson Co., Inc.*, *supra*, to cases that do not involve the willful destruction or alteration of physical evidence. *Id.* at ¶19. Indeed, the *Smith* decision remains the current status of the law in Ohio and requires “willful destruction of evidence by defendant designed to disrupt the plaintiff’s case[.]” *Smith, supra*, at 28. In this case, there is no allegation of destruction of any documents and in fact, all documents in question were timely provided to Caiazza in response to document requests. Therefore, the court of appeals properly affirmed the trial court’s summary judgment dismissal of Caiazza’s spoliation claim.

### CONCLUSION

Caiazza’s Memorandum in Support of Jurisdiction presents no substantial constitutional questions nor is this a case of public or great general interest. Rather, existing Ohio Supreme court case law applies to the various points of law argued by Caiazza. The Memorandum in Support of Jurisdiction does not present the Court with any new or novel issues to be decided. Instead, Caiazza merely wants this Court to exercise its discretionary jurisdiction in order to review the facts of this case and the court of appeals application of the law to those facts. For the foregoing reasons, MMC respectfully requests that the Court decline to accept this case for review.



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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by Ordinary U.S. Mail  
this 5<sup>th</sup> day of August 2014 upon:

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