ORIGINAL

IN THE SUPREME COURT OF OHIO

ANITA HAUSER,	:	Supreme Court Case Nos. 2013-0291 and 2013-0493
Plaintiff-Appellee,	:	
v.	:	Appeal from Montgomery County Court of Appeals, Second District
CITY OF DAYTON POLICE DEPT., et al.	:	Court of Appeals Case No. CA 24965
Defendant-Appellant.	:	

APPELLANT MAJOR E. MITCHELL DAVIS'S MEMORANDUM IN OPPOSITION TO APPELLEE ANITA HAUSER'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

Pursuant to S. Ct. Prac. R. 11.3, Appellant Major E. Mitchell Davis ("Davis") respectfully submits his Memorandum in Opposition to Appellee Anita Hauser's ("Hauser") Motion for Reconsideration. Because Hauser fails to highlight any error by the Court, her motion should be denied. As the Court correctly reasoned, the General Assembly deliberately elected the definition of "employer" because it desired to impose *respondeat superior* liability. Almost every federal circuit interpreting practically the same language in the context of Title VII has reached the same conclusion. Hauser's new argument that affirmance is warranted under R.C. 4112.02(J) is improperly raised, has been abandoned and should not be considered. The Court correctly concluded that R.C. 4112.01(A)(2) and 4112.02(A) do not expressly impose civil liability on political subdivision employees so as to exempt them from immunity pursuant to R.C. 2744.03(A)(6)(c).

II. LAW AND ARGUMENT

A. Standard of Review

Pursuant to S. Ct. Prac. R. 11.2 (B)(4), a party may file a motion for reconsideration of the Court's decision on the merits provided that the motion does not constitute a reargument of the case. This Court has reconsideration authority to "correct decisions, which, upon reflection, are deemed to have been made in error." *Buckeye Community Hope Found. v. Cuyahoga Falls,* 82 Ohio St. 3d 539, 541 (1998) (quoting *State ex rel. Huebner v. W. Jefferson Village Council,* 75 Ohio St. 3d 381, 383 (1995)). It is not proper to use a motion for reconsideration to raise entirely new arguments. *E. Liverpool v. Columbiana Cty. Budget Comm.,* 2007-Ohio-5505, 116 Ohio St. 3d 1201, 1201-02 (citing *Household Fin. Corp. v. Porterfield,* 24 Ohio St. 2d 39, 46

(1970)). When an argument not presented in the merit briefs is raised via a motion for reconsideration, it is "deemed to be abandoned." *Id.*

Hauser fails to highlight any legal error in the Court's decision, or that it failed to consider the issues before it. Instead, she argues what she believes the Court *should* have decided. Because there is no error in the Court's decision, Hauser's motion should be denied.

B. *Packard* Supports the Court's Decision

Hauser first argues that the Court missed the mark in relying on the historical relevance of the United States Supreme Court's decision in *Packard Motor Car Co. v. National Labor Relations Board,* 330 U.S. 485, 488 (1947). Relying on mere conjecture, Hauser argues that it is unlikely that the General Assembly considered the initial NLRA definition of "employer" in crafting its definition of "employer" in R.C. Chapter 4112. But as the Court correctly pointed out, the original definition of "employer" in the NLRA – "any person acting in the interest of an employer, directly or indirectly" – utilized the "same language...in what continues to be the essence of current R.C. 4112.01(A)(2)." *Id; Hauser v. Dayton Police Dept.,* 2014-Ohio-3636, ¶11. Thus, in light of *Packard,* it is very likely that the General Assembly's use of the same language was not a mere coincidence, but rather, a deliberate election to impose *respondeat superior* liability.

Hauser argues that the Court's reliance on *Packard* is misplaced because 12 years prior to the enactment of R.C. Chapter 4112, Congress changed the NLRA definition of "employer" to "any person acting as an agent of an employer." *Friend v. Union Dime Sav. Bank,* 79 CIV. 5450 (KTD), 1980 WL 227, *4 (S.D.N.Y. Aug. 18, 1980). But this change actually makes it more likely that the General Assembly utilized the original NLRA definition of "employer" because the original NLRA language is used in R.C. 4112.01(A)(2). *Hauser,* at ¶11. In addition, the

slight change in the NLRA definition has little effect on the Court's reasoning here. The NLRA definition of "employer" – "any person acting as an agent of an employer" - is fundamentally the same as that used in Title VII, which the Court expressly stated is not materially different from "R.C. 4112.01(A)(2)'s use of the phrase 'person acting...in the interest of any employer.'" *Hauser*, at ¶14.

Hauser suggests, without evidentiary support, that the General Assembly more likely looked to the FLSA's definition of "employer" in enacting R.C. Chapter 4112. Hauser points out that federal case law interpreting the FLSA's definition of "employer" – "any person acting directly or indirectly in the interest of an employer in relation to an employee" – has resulted in the imposition of liability on supervisors. 29 U.S.C. § 203(d). But unlike the first iteration of "employer" in the NLRA and discussed in *Packard*, the FLSA's definition is markedly different from that in R.C. 4112.01(A)(2). The phrase "in relation to an employee" does not appear in the R.C. 4112.01(A)(2) definition, nor in Title VII's definition, and is more akin to the "employer" definitions contained in the EPA and the FMLA. *Dixon v. Univ. of Toledo,* 638 F. Supp. 2d 837, 854-55 (N.D. Ohio July 31, 2009). This additional language fundamentally limits the scope of liability in a manner that R.C. 4112.01(A)(2) does not. Combine that with the utter lack of evidence that the General Assembly relied on the FLSA definition, and Hauser's argument fails.

Hauser next contends that FLSA case law is more persuasive than Title VII case law. But, as this Court correctly explained, it is well-established that "federal case law interpreting Title VII has persuasive value in cases like this one, which involves comparable provisions in R.C. Chapter 4112." *Hauser,* at ¶14 (citing *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.,* 66 Ohio St. 2d 192, 196 (1981)). *See also Genaro v. Cent. Transp., Inc.,* 84 Ohio St. 3d 293, 300 (1999) (stating that "federal case law interpreting and

applying Title VII is generally applicable to cases involving R.C. Chapter 4112"). In addition, the Court noted that there is "no material difference" between R.C. 4112.01(A)(2)'s definition of employer and that listed in Title VII. *Id.* The Court noted that "[b]oth phrases reflect the purpose of exposing employers to vicarious liability under the doctrine of *respondeat superior.*" *Id.* Nevertheless, Hauser asks the Court to depart from well-established legal precedent and apply federal case law interpreting a wholly different definition of "employer" contained in an unrelated federal statute. Hauser offers no compelling reason why this Court should substitute her self-serving analysis for its well-considered judgment.

C. R.C. 4112.02(J) does not Support Affirmance

1. R.C. 4112.02(A) does not Expressly Impose Liability on Political Subdivision Employees

Hauser argues that R.C. 4112.02(I) and (J) speak in terms of "persons" because they "cover retaliation and aiding-and-abetting not just in the realm of employment, but also in the realms of housing and public accommodations," not because the General Assembly was attempting to limit the scope of R.C. 4112.02(A) liability. Actually, as the Court rightly reasoned, the opposite is true. If the General Assembly desired to extend liability to individuals under R.C. 4112.02(A), then it would not have limited its reach solely to employers. *Hauser,* at ¶12. As the Court succinctly explained, "[T]he General Assembly knows how to expressly impose liability on individuals, and it has done so elsewhere in R.C. 4112.02." *Id.* If the Court adopted Hauser's logic, then there would be no practical difference between the use of the term "person" and "employer" in the statute - even though each term is expressly defined - rendering "the aiding-and-abetting provision in R.C. 4112.02(J) largely superfluous." *Id;* R.C. 4112.01(A)(1) and (2).

2. *Hauser's R.C. 4112.02(J) Argument has been abandoned*

Hauser contends that the Court should nevertheless affirm the Court of Appeals' judgment on the separate and independent basis that R.C. 4112.02(J) expressly imposes liability on Davis so as to abrogate R.C. Chapter 2744 immunity. R.C. 2744.03(A)(6)(c). However, Hauser never argued that Davis was subject to liability pursuant to R.C. 4112.02(J) in her briefs to this Court, the Court of Appeals or the trial court.[1] She never expressly pled that Davis was subject to liability pursuant to R.C. 4112.02(J). (Amended Complaint.) Under the Court's precedent, this entirely new argument has been abandoned and should not be considered. *E. Liverpool,* 166 Ohio St. 3d at 1201-02. A motion for reconsideration is not an opportunity for a party to raise arguments for the first time. *Id. See also* S. Ct. Prac. R. 11.2; *Waller v. Waller,* 7th Dist. No. 04JE27, 2005-Ohio-5632, ¶3.

Moreover, while the Court stated in dicta that political subdivision employees may be subjected to liability pursuant to R.C. 4112.02(J), that issue was neither argued nor briefed by the parties and requires consideration of a multitude of issues not before the Court, including but not limited to: (1) whether the conduct that subjects an employer to liability pursuant to R.C. 4112.02(A) is different from that which subjects a person to liability pursuant to R.C. 4112.02(J); (2) whether liability is expressly imposed on political subdivision employees pursuant to R.C. 4112.02(J) in light of the fact that R.C. 4112.01(A)(1) defines "person" to include political subdivisions but not their employees; (3) whether liability is expressly imposed on political subdivision employees pursuant to R.C. 4112.02(J) in light of the fact that this Court previously held in *Cramer v. Auglaize Acres,* 113 Ohio St. 3d 266, 2007-Ohio-1946, ¶32, that the term "person" was too general to expressly impose liability on county employees under the Patients' Bill of Rights so as to abrogate R.C. Chapter 2744 immunity; and (4) whether liability is

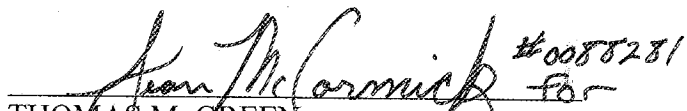
[1] While both Amicus Curiae argued this point in their briefs to the Court, Hauser did not.

expressly imposed on political subdivision employees pursuant to R.C. 4112.02(J) even though R.C. 2744.03(A)(6)(c) expressly states that "civil liability shall not be construed to exist…because of a general authorization that an employee may sue and be sued."

III. CONCLUSION

Because Hauser fails to highlight any error by the Court, her motion should be denied. As the Court correctly reasoned, the General Assembly deliberately elected the language from the original NLRA definition of "employer" because it desired to impose *respondeat superior* liability. Almost every federal circuit interpreting practically the same language in the context of Title VII has reached the same conclusion on the scope of the definition. Hauser's new argument that affirmance is warranted under R.C. 4112.02(J) is improperly raised, has been abandoned and should not be considered. The Court correctly concluded that R.C. 4112.01(A)(2) and 4112.02(A) do not expressly impose civil liability on political subdivision employees so as to exempt them from immunity pursuant to R.C. 2744.03(A)(6)(c).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing has been served on Plaintiff/Appellee by forwarding copy of same to her attorneys of record, John J. Scaccia, Esquire, SCACCIA & ASSOCIATES, LLC, 1814 East Third Street, Dayton, Ohio 45403, and Frederick M. Gittes, THE GITTES LAW GROUP, 723 Oak Street, Columbus, Ohio 43205, and to counsel for amicus curiae Ohio Association for Justice, Alphonse A. Gerhardstein, GERHARDSTEIN & BRANCH CO. LPA, 432 Walnut Street, Suite 400, Cincinnati, Ohio 45202, by ordinary U.S. Mail on this 11th day of September 2014.

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