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IN THE SUPREME COURT OF OHIO

TREMCO INCORPORATED, et al., Appellants, v. **WILLIAM WHOLF,** Appellee.	: : : : : : : : : :	Supreme Court Case No.:_____ On Appeal from the Cuyahoga County Court of Appeals, Eight District, Case No. CA 13 100771

MEMORANDUM IN SUPPORT OF JURISDICTION BY APPELLANTS TREMCO INCORPORATED, EDWARD NOWAK, AND TIMOTHY SWORNEY

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I. THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The Eighth District Court of Appeals joined the Tenth District in ruling that retaliation claims under R.C. 4112 are subject to a "but-for" causation standard consistent with *Univ. of Tex. Southwestern Med. Ctr. v. Nassar,* __ U.S. __, 133 S. Ct. 2517 (2013), which addressed retaliation claims under Title VII. This Court has not yet addressed this legal issue, nor have most of the district appellate courts. This case presents this Court with the unique opportunity to provide the much needed guidance as to *how* to apply this but-for causation standard.

The issues presented by Appellants compare in significance to the employment law issues raised in *Meyer v. UPS*, 122 Ohio St. 3d 104, 909 N.E.2d 106 (2009) (clarifying the tangled web of age discrimination causes of action under R.C. 4112); *Leininger v. Pioneer Nat'l Latex*, 115 Ohio St. 3d 311, 875 N.E.2d 36 (2007) (holding that a plaintiff could not maintain a common law wrongful discharge claim based on public policy against age discrimination because O.R.C. 4112 provides an adequate remedy); *Genaro v. Central Transport*, 84 Ohio St. 3d 293, 703 N.E.2d 782 (1999) (holding that 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. 4112); and *Henkel v. Educational Research Council*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976) (holding that an employment contract which provides for an annual rate of compensation but makes no provision as to the duration of the employment is terminable at will by either party). Each of these cases addressed threshold issues in the area of Ohio employment law, and provided long-standing guidance as to the types of employment law causes of action provided for under Ohio law and the burdens of proof required to prevail on those claims. Similarly, this case raises the pertinent issue of the distinction between proving causation under a "motivating factor" standard versus the more exacting "but for" standard for retaliation claims under R.C. 4112.

Nassar concluded that the ordinary meaning of the phrase "because," as it appears in the Title VII anti-retaliation provision compels the conclusion that "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *Nassar*, 133 S. Ct. at 2528. Likewise, the trial and appellate courts in this case both held that the Title VII but-for standard articulated in *Nassar* is applicable in R.C. 4112 retaliation claims because the language in both provisions is nearly identical. Even so, the time is ripe for this Court to articulate how a plaintiff proves but-for causation. Accordingly, the following propositions of law are presented in this appeal

1. A plaintiff cannot establish but-for causation to support a retaliation claim under R.C. 4112 where the alleged retaliatory conduct commenced prior to any protected activity.

2. An anonymous complaint is insufficient to substantiate but-for causation in a R.C. 4112 retaliation claim absent evidence that the decision-maker knew the identity of the complainant.

3. Contrary to the lesser "motivating factor" standard, a plaintiff must prove that his protected activity was a determinative factor behind the adverse employment action to prove but-for causation under R.C. 4112.

II. STATEMENT OF THE CASE

This lawsuit arises from Plaintiff/Appellee William Wholf's employment with Defendant/Appellant Tremco Incorporated. In February 2010, Wholf complained to co-Defendant/Appellant Edward Nowak that Nowak looked at Wholf's wife's chest at a company luncheon five months earlier, and that he made some inappropriate comments in the workplace. After this complaint was investigated, Wholf reported these same allegations *anonymously* to a Tremco hotline and *anonymously* by email to Tremco's President in June 2010. Wholf contends that Nowak retaliated against him for this complaint by pushing him off projects and out of meetings, and that Nowak and co-Defendant/Appellant Timothy Sworney took additional retaliatory acts – including a change in his job description, title, and duties; placing him on a performance

improvement plan; and no longer paying for Wholf's personal cell phone and services – starting in November 2010. Based on these allegations, Wholf asserted a claim of retaliation under R.C. 4112 and an intentional infliction of emotional distress ("IIED") claim under Ohio common law.

In its Opinion and Order dismissing Wholf's claims, the trial court concluded that Wholf could not prove that his protected activity was the but-for cause of the alleged retaliatory acts because the very acts Wholf alleges were retaliatory – being pushed off projects and out of meetings – occurred *before* the protected activity. The trial court also dismissed Wholf's IIED claim.

Wholf appealed the trial court's dismissal of his retaliation claim only, contending that (1) the trial court erred in following the but-for causation standard set forth in *Nassar*, and (2) he had produced sufficient evidence to withstand summary dismissal under the lesser "substantial or motivating factor" standard. The appellate court correctly held that retaliation claims under R.C. 4112 are subject to the but-for causation standard; however, it misapplied that standard in determining that but for Wholf's *anonymous* complaints in June 2010 (of which Tremco had no knowledge Wholf was the source of those complaints), Tremco would not have made certain decisions regarding Wholf's employment in the fall of 2010. Moreover, the appellate court cited no evidence (nor did Wholf) that could causally connect Wholf's protected activity to the subsequent employment actions.

III. STATEMENT OF UNDISPUTED FACTS

A. William Wholf's employment with Tremco

Wholf worked for Tremco from January 3, 2006 until his resignation on May 20, 2011. (R. 28, Wholf Dep. 16). Tremco manufactures and sells, in relevant part, a full line of roofing services, including on-site roofing inspections and preventative maintenance services, which are supported through an Online Information System ("OLI"). The employees in Tremco's OLI department are responsible for uploading data from roof inspection reports into the OLI database so that the data can

be easily accessed and understood by customers. (R. 31, Sworney Dep. 45-46, 161, 171, 137; R. 33, Garcia Dep. 118; R. 27, Nowak Aff. ¶¶2-3; R. 32, Tierney Dep. 129). Wholf was Tremco's OLI trainer, responsible for educating Tremco customers and sales representatives on how to use OLI. (R. 28, Wholf Dep. 15, 55-57, Ex. 2; R. 27. Nowak Aff. ¶¶2-3; R. 33, Garcia Dep. 67, 118; R. 31, Sworney Dep. 45-46, 74-75, 161, 171, 173).

When hired, Wholf reported to the Inspection and Maintenance Service Manager. Tremco hired Edward Nowak as the Inspection Maintenance Service Manager in May, 2009; Nowak reported to then Business Operations Manager Jim Solether. (R. 28, Wholf Dep. 29; R. 29, Nowak Dep. 24, 32; R. 27, Nowak Aff. ¶1).

B. Tremco responds to complaints about Nowak

In 2009 and early 2010, Nowak learned that Wholf was spending work time fixing employee computers for personal compensation, a task that was not part of his job duties. Nowak twice advised Wholf to devote business hours to Tremco responsibilities, not personal work on computers, but Wholf ignored these directives. (R. 28, Wholf Dep. 131-134, Ex. 10; R. 29, Nowak Dep. 159-166).

Nowak met with Wholf on February 9, 2010 ("February 2010 meeting") to discuss Wholf's misuse of his workday, again instructing him that he could no longer spend paid company time fixing employee computers. (R. 28, Wholf Dep. 131-134, Ex. 10).[1] Wholf's response was to accuse Nowak of previous retaliatory acts – pushing him off of projects and out of meetings – because of Wholf's friendships with other employees, because of office politics, and because of comments that other employees had made about Nowak. (R. 54, Ex. 66 at 15:30, 16:59, 23:00, and 51:28). Wholf further accused Nowak of "leering at [Wholf's] wife's breasts" (Melissa Wholf was also a Tremco employee) during a department luncheon several months earlier in November, 2009. (R. 28, Wholf

[1] Wholf secretly recorded this meeting. (R. R. 54, Ex. 66).

Dep. 31, 78-79; R.54, Ex. 1). He also told Nowak that some of the women in the office believed Nowak had made inappropriate comments in the workplace and that he had "leered" at their chests too. (*Id.*).

Around March, 2010, Lisa Garcia, who also worked in the OLI Department, reported to Human Resources that two of her direct reports – Valerie Giampietro and Wholf's wife Melissa – had made comments about Nowak looking at their chests. (R. 33, Garcia Dep. 12, 74-76; R. 34, Halkovics Dep. 51-55). Around this same time, Wholf also told Cindy Cicigoi, a Company Vice President, that Nowak had looked at Melissa Wholf's chest inappropriately – again referencing the luncheon from November 2009 – and had made inappropriate comments at work. (*Id.* at 86). Cicigoi reported the allegations to James Tierney, Tremco's then General Counsel and Vice President of Human Resources. (R. 32, Tierney Dep. 34).

Tierney instructed Human Resources ("HR") Manager Karen Halkovics to investigate the allegations regarding Nowak. (R. 34, Halkovics Dep. 98, 134; R. 32, Tierney Dep. 37). Halkovics interviewed Garcia, Giampietro, and Melissa Wholf. (R. 34, Halkovics Dep. 62-64). She also interviewed Maureen Greeves, another Tremco manager who worked with Nowak, to see if she had any similar experiences, which she had not. (*Id.* at 51-52). Halkovics then met with Nowak, told him about the complaints; advised him that any behavior of the type reported was not acceptable; and counseled him on the Company's non-harassment policy. (*Id.* at 63, 107-108; R. 29, Nowak Dep. 175-177). After Halkovics' investigation and meeting with Nowak, there were no further reports of inappropriate behavior by Nowak. (R. 34, Halkovics Dep. 116-131).

Despite this resolution, Wholf filed an *anonymous* complaint with "the Network" – a compliance hotline operated by a third party service contracted by Tremco – on June 13, 2010, repeating his allegations that Nowak had made sexual comments towards unnamed female employees. (R. 28, Wholf Dep. 158-166, Ex. 16). He further alleged that Halkovics failed to

properly investigate the harassment allegations because she was having an alleged affair with Solether. (*Id.*). Wholf later admitted that he had *no knowledge* about any personal relationship between Solether and Halkovics. (*Id.* at 164-165). Rather, while on a smoking break at work, he overheard a rumor from a Tremco employee, whose name he does not know, that Halkovics'scar was seen outside Solether's home. Based on this rumor, Wholf reported to the compliance hotline that Halkovics and Solether were having an affair. (*Id.*).

Five days later, on June 18, 2010, Wholf made another *anonymous* complaint, this time by email to then Tremco President Randall Korach (Wholf set up a Gmail account, using the address "tremco.employed@gmail.com"), again alleging that Halkovics failed to properly investigate Nowak's behavior because she was having an affair with Solether. (R. 28, Wholf Dep. 170-175, Exs. 17-18). Korach responded to the email and offered to meet with Wholf (although he did not know Wholf's identity), but Wholf declined. (*Id.*). Wholf never identified himself as the source of the Network Complaint or the email to Korach until he was deposed in connection with this lawsuit. (R. 28, Wholf Dep. 158-159, 171). Notably, Wholf testified that he could not recall a single adverse employment action between the February 2010 meeting with Nowak and these anonymous complaints. (R. 28 Wholf Dep. 171-172).

C. The Roofing Division undergoes a reorganization in November 2010

Solether reorganized the Tremco roofing division in November 2010, including assigning Nowak additional departments and staff. (R. 27, Solether Aff. ¶¶2-5; R. 29, Nowak Dep. 33, 52-53, 57-58, 72). Among other changes, Sworney took on the supervision of the quality control and training personnel, including Wholf and Frank Jones (Jones moved out of his position as a manager); and Garcia (who also complained about Nowak's conduct) took on the supervision of the data entry personnel, a promoted position. (R. 27 Solether Aff. ¶¶2-5; R. 29, Nowak Dep. 55-60; R. 31, Sworney Dep. 43-44, 49, 233). At the time Solether reorganized his division, he had *no knowledge*

of any of the complaints previously lodged against Nowak, the subsequent investigation, or that Wholf was the source of the *anonymous* complaints to the Network and Solether. (R. 27, Solether Aff. ¶7; R. 28, Wholf Dep. 158-159, 171).

As part of this reorganization, Nowak updated the job descriptions of Sworney, Garcia, Jones, and Wholf, and Wholf and Jones were given new job titles. (R. 27, Nowak Dep. 59-60). Wholf's job grade level also changed from a 10 to a 9, which more accurately reflected the fact that he had no direct reports. (R. 30, Nowak II Dep. 61-63, Ex. 36).

D. Sworney places Wholf on a Performance Improvement Plan

When Sworney started supervising Wholf and Jones, he met with each of them on a daily basis to get an understanding of their respective workloads and work habits. (*Id.* at 99, 154, 164-165). Sworney quickly determined that Wholf did not have enough work to fill his day, and that he had no way to determine how much, if any, training Wholf was actually performing.[2] (*Id.* at 228-229). Sworney therefore assigned Wholf measurable "production work" – data entry of 50 roof inspection forms per day – so that Wholf had at least a half-day of measurable work to perform, with the expectation that he would spend the second half of his day focusing on increasing his training workload. (*Id.* at 100, 198).

Wholf did not meet his production goals, nor did he increase his training workload. (R. 31, Sworney Dep. 222). As a result, Sworney notified Wholf in January 2011 that he would be placed on a Performance Improvement Plan ("PIP") to help him improve his performance. (R. 28, Wholf Dep. 252; R. 31, Sworney Dep. 221-222, 245-246, 255). Wholf immediately complained to Tierney about the PIP and his data entry goals, alleging that he believed someone had directed Sworney to

[2] Wholf's supervisors had no objective metrics by which to determine what, if any, training or other work Wholf was completing. (R. 29, Nowak Dep. 219-220; R. 31, Sworney 61-62). Solether raised this issue with Wholf in his 2009 evaluation and directed him to develop metrics so that his supervisor could objectively evaluate his output. Wholf never did this. (R. 28, Wholf Dep. 134-135, 138, Ex. 11).

retaliate against him and that he did not trust Halkovics to be fair during the PIP process. (R. 28, Wholf Dep. 229, 231; R. 32, Tierney Dep. 110-115).

Tierney immediately met with Sworney to inquire about Wholf's complaints. (R. 32, Tierney Dep. 126-136, 143-145). Sworney told Tierney that he had personally observed Wholf's poor work habits for years (they previously shared a cubicle when they were peers), that he believed Wholf was significantly underperforming, and that the PIP was intended to help Wholf improve his productivity and efficiency at work. (*Id.;* R. 31, Sworney Dep. 20, 23, 99-100, 160). Sworney further explained that Wholf's data entry goal of 50-forms per day was based on the production of a data entry specialist with similar OLI experience as Wholf; she averaged over 100 forms per day on a full-time basis. (R. 32, Tierney Dep. 126-136, 143-145; R. 31, Sworney Dep. 205-206, 212; R. 28, Wholf Dep. Ex. 30). Tierney asked Sworney to reduce Wholf's production goals from 50 forms a day to 40 forms a day, and Sworney agreed. (R. 32, Tierney Dep. 129-130; R. 31, Sworney Dep. 212-213; R. 28, Wholf Dep. 234). Tierney also assigned another HR Manager, Nancy Suhoza, to work with Sworney and Wholf on the PIP. (R. 32, Tierney Dep. 120, 137-138; R. 31, Sworney Dep. 275). Tierney met with Wholf again to inform him how he had addressed his concerns. (R. 32, Tierney Dep. 139-140).

Starting in March 2011, Sworney and Suhoza met with Wholf weekly to discuss his PIP progress. (R. 28, Wholf Dep. 252; Ex. 39). On March 9, Wholf's data entry responsibilities were halted so that he could spend time learning the "mail" responsibilities. (R. 28, Wholf Dep. 268, Ex. 39; R. 31, Sworney Dep. 66, 250). The mail coordinator was going out on maternity leave in mid-March, and Sworney and Garcia decided to have Wholf fill-in for her while she was out, because he was the only member of the production department who had the flexibility to temporarily assume these duties. (R. 31, Sworney Dep. 275-259; R. 33, Garcia Dep. 115-116, 129-130).

E. Wholf resigns from Tremco to accept a higher paying position with another company

In November 2010, Wholf started looking for other employment, including updating his resume and compiling letters of recommendation. (R. 28, Wholf Dep. 254-258, 289, 291). On April 9, 2011, Wholf applied for a position with Aclara. The Company offered Wholf a position on May 3, with an annual salary of $57,500 – $5,535 more than what he was earning at Tremco. (R. 28, Wholf Dep. 256, 271-275, 288 Ex. 38, 41, 42). Wholf submitted his resignation to Sworney on May 9, and gave 12-days of notice. (R. 28, Wholf Dep. 286, 294, Ex. 44).

Wholf's resignation letter, drafted with the assistance of legal counsel, alleged that he had been the subject of retaliation while at Tremco. (R. 28, Wholf Dep. 289, Ex. 44). The Company attempted to investigate the allegations in his letter, but Wholf declined to participate. (R. 28, Wholf Dep. 150).

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Civil Rule 56(C) provides that summary judgment shall be granted when the pleadings and discovery "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." This Court recognizes the important role Rule 56 plays in the legal system, noting that the rules relating to summary judgment were "enacted with a view to eliminating from the backlog of cases which clog our courts awaiting jury trials, those [cases] in which no genuine issues of fact exists. The availability of this procedure and the desirability of its aims are so apparent that its use should be encouraged in proper cases." *North v. Pennsylvania Railroad Co*., 9 Ohio St.2d 169, 224 N.E.2d 757, 760 (1967). To that end, it is the plaintiff's burden to come forward with admissible evidence demonstrating that specific facts exist that raise genuine issues for trial. *Wing v. Anchor Media, Ltd*., 59 Ohio St.3d 108, 570 N.E.2d 1095, 1099 (1991). Wholf failed to do so.

The crux of a retaliation claim is causation, and, at the summary judgment stage, the relevant inquiry is whether there is sufficient evidence from which a jury could conclude that the employer would not have made the relevant employment decisions but-for the protected activity. If there is not, as the trial court found in this case, then there is no material issue of fact necessitating a trial, and the retaliation claim fails as a matter of law. In this case, the Eighth District reversed the trial court's order granting summary judgment based on its conclusion that a jury could render a verdict in Wholf's favor on his retaliation claim based on his anonymous complaints in June 2010. However, there is no evidence that anyone at Tremco knew the source of those complaints. Instead, the undisputed record shows that all of the employment actions about which he complained were made for legitimate business reasons and that there is not a shred of evidence on which to causally connect those decisions to Wholf's *known* protected activity at the February 2010 meeting. Accordingly, the Eighth District misapplied the but-for causation standard and request that the Court accept jurisdiction to address the following propositions of law.

A. PROPOSITION OF LAW 1: A plaintiff cannot establish *but-for* causation to support a retaliation claim under R.C. 4112 where the alleged retaliatory conduct commenced prior to the protected activity.

It is axiomatic that for a plaintiff to satisfy his burden of proof that but for his protected activity he would not have been subject to the same employment actions, the protected activity must have occurred before the employment actions. But Wholf's secretly recorded conversation with Nowak at the February 2010 meeting – the first time Wholf complained about Nowak's behavior (R. 28, Wholf Dep. 74-75) - demonstrates that these acts occurred *before* the protected activity and, according to Wholf, for reasons having nothing to do with his complaints of harassment:

<u>Starting at 15:30</u>:

> Wholf: To be perfectly honest, you know, what I feel like right now with this computer [unintelligible] is I feel that I'm being retaliated against for comments made by other people in the department regarding you and

certain things that are happening here and what people should or shouldn't pay attention to.

Starting at 16:59:

Wholf: 100% I feel like I'm being singled-out or picked-on or retaliated against because everything in the department is not going right.

Starting at 23:00:

Wholf: Because of my work friendship with some of the people out there who I know who have had problems with you, and I thought that because of my friendship with some of those people, that I'm being retaliated against simply because I associate with those people.

Starting at 51:28:

Wholf: Well, like I said, I can't be a 100% certain, but I believe that my performance is outstanding. [unintelligible] … especially in the last year.

Nowak: [unintelligible]

Wholf: Right, but then but then I [unintelligible] and I get I pushed out of here. I get pushed out of here. Not included over here. Not you know…. Where does that leave a person to feel?

Nowak: What are you being pushed out of? Just uh…

Wholf: Anything to do with training. I mean. We just talked about that.

(R. 54, Ex. 66). Further, Wholf testified that he could not identify a single occasion after the February 9, 2010 meeting in which he was pushed off any projects or excluded from any meetings. (R. 28, Wholf Dep. 171-172). And even if he could, there is no evidence from which a trier-of-fact could isolate the alleged differentiating factors behind Nowak's motivations pre and post meeting, thereby precluding a finding of but-for causation.

Accordingly, where the undisputed evidence shows that the adverse employment actions precede the protected activity, as was the case with Wholf, the plaintiff cannot prove but-for causation, and his retaliation claim fails as a matter of law.

B. PROPOSITION OF LAW 2: An anonymous complaint is insufficient to demonstrate but-for causation in a R.C. 4112 retaliation claim absent evidence that the decision-maker knew the identity of the complainant.

The Eighth District held that there was a genuine issue of material fact as to causation because, following Wholf's February 2010 complaint to Nowak, he "continued to lodge complaints against Nowak and made his first complaints against Halkovics and Solether during this nine-month period," and that the alleged "retaliatory acts became increasingly more harsh as Wholf persisted with his complaints." (Journal Entry and Op. ¶¶51, 55).[3] The Eighth District's rationale is fundamentally flawed, however, because these complaints were *anonymous.* The undisputed record demonstrates that *nobody* at Tremco knew the source of these complaints until Wholf testified that he was the complainant during his deposition in connection with this lawsuit. (R. 28, Wholf Dep. 158-159, 171).[4]

It is axiomatic that for an employer to retaliate against an employee because of the employee's protected activity, the employer must first know about the protected activity. *Tracy v. Northrop Grumman Sys. Corp.,* 6th Cir. No. 10-3930, 2011 U.S. App. LEXIS 26123, *3-4 (Dec. 20,

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[3] The Eighth District failed to address the lapse of time between Wholf's known protected activity and the alleged retaliatory acts that began nine months later, starting in November 2010. Instead, the appellate court cited *Smith v. Superior Prod.,* 10th Dist. Franklin No. 13AP-690, 2014-Ohio-1961, ¶33, 13 N.E.3d 664 for the proposition that "retaliation has been found when termination followed the protected activity by over one year." The Eight District, however, notably omitted the next sentence of the 10th District's opinion: "In order to overcome a lack of temporal proximity, 'where some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality.'" *Id.* (quoting *Gibson v. Shelly Co*., 314 Fed. Appx. 760 (6th Cir. 2008)). The evidentiary record in this case is void of any indicia of retaliatory conduct – a fact that the Eighth District erroneously overlooked.

[4] The Eighth District also erred in determining that Wholf's "complaints against Halkovics and Solether" were protected activity. (See Journal Entry and Op. ¶55). Even assuming that Tremco knew Wholf was the source of these anonymous allegations, the allegations are nothing more than a spiteful, workplace rumor. Wholf conceded in his deposition he had *no* factual basis to substantiate this rumor when he reported it to the Tremco hotline and to the President of the Company. (R. 28, Wholf Dep. 164-165). No trier of fact could reasonably conclude that this report was activity protected by R.C. 4112.

2011) (affirming summary judgment where the plaintiff had insufficient evidence to establish that the decision-makers responsible for her adverse employment action knew of the protected activity prior to their decision); *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 832 (6th Cir. 1999) (same); *Schmalz v. Northrop Grumman Corp.*, S.D. Ohio No. 3:11-CV-145, 2012 U.S. Dist. LEXIS 68983, *38-39 (May 17, 2012) (same).[5] Accordingly, and contrary to the Eighth District's conclusion, an anonymous complaint cannot be the but-for protected activity in a R.C. 4112 retaliation claim where the decision-maker had no knowledge of the identity of the complainant.

C. PROPOSITION OF LAW 3: Contrary to the lesser "motivating factor" standard, a plaintiff must prove that his protected activity was a determinative factor behind the adverse employment action to prove but-for causation under R.C. 4112.

Under *Nassar*, it is not enough that the plaintiff prove that the adverse employment action was one of the factors motivating the decision-maker. Rather, the plaintiff most prove that the retaliatory acts would not have occurred in the absence of the protected activity. *Nassar*, 133 S. Ct. at 2533. Nassar explained the importance of adopting the but-for standard:

> Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage. It would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and

[5] See also *Mitchell v. Weyerhaeuser NR Co.,* 587 Fed. Appx. 837, 838 (5th Cir. 2014) (explaining that "there is no dispute of material fact regarding whether there is a causal link between the protected activity and the adverse act because there is no evidence that [the defendant's] management knew [that the plaintiff] wrote the anonymous letter"); *Frevert v. Ford Motor Co.,* W.D. Mo. No. 08-0385-CV-W-ODS, 2009 U.S. Dist. LEXIS 45600, *16 (June 1, 2009) (explaining that the decision-makers "lack of knowledge demonstrates, conclusively, that the fact that [the plaintiff] made the hotline call could not have been . . . the exclusive cause . . . of [the plaintiff's] termination").

> reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent.

Id. at 2532.

The Eighth District erred in concluding that Wholf could prove but-for causation because there is no evidence in the record to show that the employment actions would not have occurred had he not complained to Nowak in February 2010. Wholf alleges that the following retaliatory adverse employment actions occurred after the February 2010 meeting:

- Tremco stopped paying for Wholf's cell phone service;
- Wholf was reassigned to Sworney's supervision in a department wide reorganization;
- Following the reorganization, Tremco updated Wholf's job description, and changed his job title and job grade;
- Wholf had daily meetings with Sworney, his supervisor;
- Sworney placed Wholf on a PIP; and
- Sworney provided production work to Wholf's day-to-day job responsibilities.

Notably absent from the evidentiary record (and the Eighth District's opinion) is any evidence that these decisions would not have been made but-for Wholf's *known* complaint against Nowak. Wholf does not refute that Tremco decided it would no longer pay for his and Frank Jones' personal cell phone services due to a need to control costs. (R. 28, Wholf Dep 181 – 182; R. 27 Nowak Dep. 123). Nor is there any evidence to contradict that Wholf and Jones were reassigned to Sworney's supervision because of a division-wide reorganization, and that Wholf's job title, job description, and job grade were revised to reflect the work he was actually performing. (R. 29, Nowak Dep. 59-60, 73, 103, Exs. 17-18, 30; Nowak II Dep. 54-55, 61-65, 68, Ex. 36; R. 31, Sworney Dep. 50). Likewise, there is no evidence to show that Nowak's sole-motivation behind re-writing Wholf's job description was retaliatory, but his motivation in re-writing the job descriptions of Sworney, Garcia, and Jones at the same time was non-retaliatory. (See R. 29, Nowak Dep. 59-60). Wholf also cannot

dispute that Sworney met with him (and Jones) on a daily basis following the reorganization to better understand their work habits and work load. (R. 31, Sworney Dep. 99, 154, 164-165). There is likewise no evidence that Sworney placed Wholf on a PIP for any reason other than to improve his performance, or that he provided Wholf with additional duties (i.e., production work) because Wholf did not have enough work to fill his workday. (R. 31, Sworney Dep. 100, 198, 221-222, 245-246, 255). Absent admissible evidence to dispute these non-retaliatory reasons for these decisions, Wholf cannot prove to a jury that these decisions would not have been made but for his protected activity.

V. CONCLUSION

Eliminating the alleged adverse actions that began prior to Wholf's protected activity (being pushed off of projects and out of meetings) and his anonymous complaints in June 2010, the evidentiary record shows that Wholf engaged in protected activity in February 2010 (the meeting with Nowak) and March 2010 (the conversation with Cicigoi), and that Nowak and Sworney took employment actions affecting his employment starting nine months later in November 2010 (a change in his job description, title, and duties; placing him on a performance improvement plan; and no longer paying for Wholf's personal cell phone and services). There is no evidence, however, that causally connects the protected activity to the employment actions such that a jury could conclude that but for Wholf's complaint at the February 2010 meeting, he would not have been subject to the subsequent employment actions starting nine months later.

Ohio trial and appellate courts require guidance on the application of Rule 56 in retaliation claims. If jurisdiction is accepted, this case can provide that much needed guidance. Accordingly, Defendants-Appellants respectfully request that this Court accept jurisdiction so that the aforementioned errors can be reviewed on the merits. The Eighth District Court of Appeals' Journal Entry and Opinion should be upheld as to the use of but-for causation in R.C. 4112 retaliation claims, and reversed as to its decision that Wholf proffered sufficient evidence to meet that standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction by Appellants Tremco Inc., Edward Nowak, and Timothy Sworney* was served upon Attorneys for Plaintiff: Charles V. Longo (cvlongo@cvlongolaw.com) and Matthew D. Greenwell (matt@cvlongolaw.com), at Charles V. Longo Co., L.P.A., 25550 Chagrin Boulevard, Suite 320, Beachwood, OH 44122, via email delivery, on this 6th day of March, 2015.

/s/ *Amy Ryder Wentz*
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