IN THE SUPREME COURT OF OHIO

JAMES MIRACLE, Plaintiff-Appellee, v. OHIO DEPARTMENT OF VETERANS SERVICES, *et al.*, Defendants-Appellants.	Case No. 2018-0562 On Appeal From the Franklin County Court of Appeals, Tenth Appellate District, Case No. 16AP-885

BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE JAMES MIRACLE

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STATEMENT OF INTEREST

The Ohio Association for Justice (the "Association") is a statewide association whose mission is twofold: to preserve our constitutional rights and to protect meaningful access to the civil justice system for all residents of this state. The Association advances its mission by advocating in our courts, before our administrative agencies, and to our elected officials. The Association's members practice in almost every area of law, including employment law, workers' compensation law, personal injury law, professional negligence law, products liability law, family law, consumer law, insurance law, civil rights law, and environmental law. The Association is commonly known as an organization representing the plaintiffs' bar in the State of Ohio.

The Association has involved itself in this case because, respectfully, Defendants-Appellants have overreached with their two propositions of law. Specifically, their two propositions of law go far beyond what is necessary to decide this case. Moreover, Defendants-Appellants ask this Court to address arguments they never raised before the trial court and thus have waived for purposes of appellate review. Instead, this case is about two narrow issues only: (1) whether the public policy embodied in R.C. 124.27 satisfies the clarity element for the common law tort; and (2) whether the public policy embodied in R.C. 124.56 satisfies the jeopardy element for the common law tort.

As a result, the Association respectfully submits this brief to clarify the true scope of this appeal. Furthermore, on the two narrow issues before this Court, Plaintiff-Appellee has the better argument. The Association therefore offers him its support.

STATEMENT OF THE FACTS AND THE CASE

The Association adopts the Statements of Facts and Statement of the Case set forth in the brief of Plaintiff-Appellee James Miracle.

SUMMARY OF ARGUMENT

The Court should hold R.C. 124.27 satisfies the clarity element, and R.C. 124.56 satisfies the jeopardy element, for the common law tort of wrongful discharge in violation of public policy.

First, the propositions of law advanced by Defendants-Appellants are too broad. The first proposition of law asks for a vague pronouncement that "more generally, statutes about public employment ordinarily should not support *Greeley* claims." This is an invitation for the Court to render a prohibited advisory opinion because all other "statutes about public employment" are not at issue; only R.C. 124.27 and 124.56 are before the Court. Similarly, the second proposition of law is irrelevant because the trial court never made a ruling about the scope of who can be held liable as an "employer" under the tort. Appellate courts do not address arguments that the trial court did not rule upon. Stated plainly, this case is about the two narrow issues that the trial court actually decided: (1) whether the public policy embodied in R.C. 124.27 satisfies the clarity element for the common law tort; and (2) whether the public policy embodied in R.C. 124.56 satisfies the jeopardy element for the common law tort.

Second, Defendants-Appellants have significantly expanded their arguments on appeal before this Court. Count I of the Complaint alleged the tort based upon R.C. 124.27. At both the trial court level and before the court of appeals, Defendants-Appellants only challenged Count I on the clarity element. Count II in the Complaint alleged the tort based upon R.C. 124.56. At both the trial court level and before the court of appeals, Defendants-Appellants only challenged Count II on the jeopardy element. Now, on appeal before this Court, Defendants-Appellants have structured their merit brief to challenge Counts I and II on both the clarity and jeopardy elements. Stated plainly, they may not attack the jeopardy element for Count I and they may not attack the clarity element for Count II for the first time on this appeal.

Third, even where Defendants-Appellants focus on the elements of the tort they challenged below, they have made entirely new arguments before this Court. For instance, in the lower courts, Defendants-Appellants never argued that the availability of mandamus relief supposedly demonstrates Plaintiff-Appellee cannot satisfy the jeopardy element. Nor did they, in the courts below, argue the tort itself should not be available against any person or entity except the direct employer. Per longstanding precedent, this Court should not consider arguments raised for the first time on appeal.

Fourth, the Court should either affirm the court of appeals or dismiss this discretionary appeal as improvidently accepted. This case, at best, concerns two very narrow issues on two specific statutes—not the sweeping pronouncements that Defendants-Appellants suggest. The court of appeals correctly decided those issues as Plaintiff-Appellee contends.

ARGUMENT

Proposed Propositions of Law:

R.C. 124.27 Satisfies the Clarity Element for the Common Law Tort of Wrongful Discharge in Violation of Public Policy

R.C. 124.56 Satisfies the Jeopardy Element for the Common Law Tort of Wrongful Discharge in Violation of Public Policy

A. Propositions of Law: Defendants-Appellants Overreach

"It is the long-standing practice of Courts to decide only issues presented by the facts and to refrain from deciding issues that the facts do not place directly at issue." *Allen v. totes/Isotoner Corp.*, 123 Ohio St.3d 216, 2009-Ohio-4231, 915 N.E.2d 622, ¶ 9 (O'Donnell, J., concurring). Thus, "[i]t is well-settled law that this court will not issue advisory opinions." *Id.* (declining to decide an issue of employment law because it was unnecessary to resolve the appeal); *see also Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶¶ 26-27 (same) ("It is well settled that this court does not issue advisory opinions."); *Egan v. Nat'l Distillers & Chemical Corp.*, 25 Ohio St.3d 176, 177-78, 495 N.E.2d 904 (1986) (same) ("[I]t is well-settled that this court does not indulge itself in advisory opinions."). Consistent with this longstanding rule, Defendants-Appellants, with their broad propositions of law, are seeking prohibited advisory opinions from this Court.

First, Defendants-Appellants argue this Court should hold that "more generally, statutes about public employment ordinarily should not support *Greeley* claims." (*See generally* Appellant's Merit Br., pp. 17-23.) But this request by Defendants-Appellants goes against the "settled judicial responsibility for courts to refrain from giving opinions on abstract propositions . . . ." *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970); *see also Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 84 (declining to answer a

certified question) ("Every court must 'refrain from giving opinions on abstract propositions . . . .'"). All "statutes about public employment"—whatever that is meant to encompass—are not before this Court. Only R.C. 124.27 and 124.56 are before this Court.

Second, Defendants-Appellants also argue that this Court should hold an individual (i.e., Jai Chabria) or separate entity from the direct employer (i.e., the Office of the Governor) cannot be an "employer" potentially liable under the common law tort. (*See generally* Appellant's Merit Br., pp. 24-29.) The trial court, however, never ruled on these arguments. (*See* Ct. of Claims Entry of Dismissal, pp. 1-6.) Nor did the court of appeals. *See generally Miracle v. Ohio Dept. of Veterans Servs.*, 10th Dist. Franklin No. 16AP-885, 2018-Ohio-819. The courts below never ruled on these arguments because Defendants-Appellants never made them. *See infra*, pp. 8-9.

As a result, the scope of who is an "employer" for this tort is not before the Court. This is because, "[o]rdinarily, appellate courts refrain from deciding issues that the trial court has not yet considered." *Village of Oakwood v. Clark Oil & Refining Corp.*, 33 Ohio App.3d 180, 183-84, 515 N.E.2d 1 (8th Dist. 1986) (declining to address issues on appeal that the court below did not decide) ("[W]e reverse that decision and remand the case for a determination of other [related] issues which the trail court did not reach."); *see also Egan*, 25 Ohio St.3d at 177-78 (same); *Orange Barrel Media v. Columbus*, 10th Dist. Franklin No. 12AP-447, 2012-Ohio-6205, ¶ 14 (same) ("[T]he arguments the trial court determined to be moot will be restored, and a decision on appellants' [remaining] assignments of error would be premature at this juncture."); *Linden Med. Pharm. v. Ohio State Bd. of Pharm.*, 10th Dist. Franklin No. 02AP-1234, 2003-Ohio-6657, ¶¶ 29-32 (same); *Ross v. Maumee City Sch.*, 103 Ohio App.3d 58, 66-67, 658 N.E.2d 800 (6th Dist. 1995) (same) ("Accordingly, we . . . shall reserve judgment, if any, until such time that the trial court addresses this issue.").

Accordingly, the Court should only address (1) whether the public policy embodied in R.C. 124.27 satisfies the clarity element for the common law tort; and (2) whether the public policy embodied in R.C. 124.56 satisfies the jeopardy element for the common law tort.

B. Count I: Defendants-Appellants Only Challenged Count I On The Clarity Element

Count I of the Complaint alleged the common law tort premised on R.C. 124.27. (*See* Compl., ¶¶ 45-55.) When Defendants-Appellants moved to dismiss in the Court of Claims, they only argued that Count I supposedly failed to satisfy the clarity element. (*See* Defs. Mem. in Supp. of their Mot. to Dismiss, pp. 2-4.) They never argued the jeopardy element for Count I. (*See id.*) Similarly, before the court of appeals, Defendants-Appellants did not argue the jeopardy element for Count I. (*See* Br. of Defs.-Appellees in the Ct. of Appeals, pp. 15-17.)

Now, on appeal before this Court, Defendants-Appellants seek to expand their arguments. The argument for their first proposition of law groups together Counts I and II and argues the clarity and jeopardy elements for both. (*See* Merit Br. of Defs.-Appellants, pp. 9-23.) "It is well settled that '[a] party who fails to raise an argument in the court below waives his or her right to raise it here.'" *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶ 34; *State ex rel. Zollner v. Indus. Comm'n*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993) ("A party who fails to raise an argument in the court below waives his or her right to raise it here."). "These rules are deeply embedded in a just regard to the fair administration of justice [and] . . . they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal." *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (1997). Because Defendants-Appellants only challenged Count I on the clarity element in the courts below, they are confined to that specific issue before this Court.

C. Count II: Defendants-Appellants Only Challenged Count II On The Jeopardy Element

Count II of the Complaint alleged the common law tort premised on R.C. 124.56. (*See* Compl., ¶¶ 56-66.) When Defendants-Appellants moved to dismiss in the Court of Claims, they only argued that Count II supposedly failed to satisfy the jeopardy element. (*See* Defs. Mem. in Supp. of their Mot. to Dismiss, pp. 4-5.) They explicitly assumed the clarity element had been met for Count II. (*See id.*) ("[E]ven if the statute establishes such a public policy . . . ."). Similarly, before the court of appeals, Defendants-Appellants did not contest the clarity element for Count II. (*See* Br. of Defs.-Appellees in the Ct. of Appeals, pp. 18-19.) It is for this reason that the court of appeals appropriately found that Defendants-Appellants had conceded the clarity element for Count II. *See Miracle v. Ohio Dept. of Veterans Servs.*, 10th Dist. Franklin No. 16AP-885, 2018-Ohio-819, ¶ 12 ("[D]efendants conceded for purposes of their motion to dismiss that Miracle stated a clear public policy.").

Again, on appeal before this Court, Defendants-Appellants seek to expand their arguments by grouping together Counts I and Counts II and arguing both the clarity and jeopardy elements. (*See* Merit Br. of Defs.-Appellants, pp. 9-23.) This is not permitted. Consistent with the legal authority cited above for Count I, Defendants-Appellants may only challenge Count II, premised on R.C. 124.56, based upon the jeopardy element.

D. New Arguments Before This Court: Defendants-Appellants Waived Any Arguments Not Raised Below

First, Defendants-Appellants never argued in the courts below that the jeopardy element was supposedly not met because there were other adequate remedies. (*See* Defs.-Appellants Mem. in Supp. of their Mot. to Dismiss, pp. 2-5); (Br. of Defs.-Appellees in the Ct. of Appeals, pp. 15-19.) Now, on appeal, they extensively address other purported remedies such as mandamus relief.

(*See* Merit Br. of Defs.-Appellants, pp. 16-23.) This seems geared towards arguing for their overly broad proposition of law that "more generally, statutes about public employment ordinarily should not support *Greeley* claims." Because "[i]t is well settled that '[a] party who fails to raise an argument in the court below waives his or her right to raise it here,'" the issue of other adequate remedies is not properly before the Court. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶ 34.

Second, Defendants-Appellants never argued in the courts below that the tort itself may only be asserted against a direct employer. (*See* Defs.-Appellants Mem. in Supp. of their Mot. to Dismiss, pp. 2-5); (Br. of Defs.-Appellees in the Ct. of Appeals, pp. 15-19.) Instead, they contended that the public policy of R.C. 124.56 was not jeopardized because the "abuse of power" prohibited by the statute supposedly only applied to the direct employer. (*See id.*) There is a dramatic difference between (a) arguing that individuals or certain entities cannot be sued under the tort based upon any public policy because they are not the plaintiff's direct employer and (b) arguing that the public policy in a specific statute is not jeopardized because it only applies to the direct employer. The former is trying to curtail the scope of the tort itself regardless of what source of public policy is relied upon. The latter is only trying to curtail using the tort as to one specific source of public policy. While Defendants-Appellants only argued the latter in the courts below, they now argue the former before this Court.

As with their first new argument, it appears Defendants-Appellants seek to launch a broadside against the tort itself. Their merit brief contains some not-so-subtle language questioning the continued viability of the tort. (*See* Merit Br. of Defs.-Appellants, p. 23) ("*Greeley* was [allegedly] controversial at its birth . . . And questions [supposedly] remain today about *Greeley's* breadth."). They seem to suggest that this Court should significantly curtail the tort by

(a) eliminating individual liability and (b) holding that only a direct employer can be sued under the tort. Even if the Court were inclined to rule as Defendants-Appellants suggest, this case is not the proper vehicle for that result. This is because the courts below never addressed who is a proper defendant under the tort.

E. Proper Scope of Relief: The Court Should Affirm the Court of Appeals or Dismiss This Appeal as Improvidently Accepted

The Association need not repeat the arguments that Plaintiff-Appellee, or any other amicus curiae supporting him, made on the substantive issues properly before the Court. Their briefs adequately address those issues and the Association joins in urging that this Court affirm the court of appeals. Nevertheless, to the extent this appeal was accepted to address the broader issues advanced by Defendants-Appellants, or issues not raised in the courts below, the Association respectfully urges the Court to dismiss this discretionary appeal as improvidently granted. *See, e.g.*, *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶¶ 26-27 (deciding only what is necessary to resolve the specific dispute) ("Accordingly, we dismiss, sua sponte, the propositions of law concerning the jeopardy element of the claim of wrongful discharge in violation of public policy as having been improvidently accepted.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on October 9, 2018, I caused a copy of this document to be filed with the Clerk of Courts and that I served a copy of the foregoing on the following via electronic mail:

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