Supreme Court of Ohio Clerk of Court - Filed October 09, 2018 - Case No. 2018-0434

IN THE SUPREME COURT OF OHIO

CHRISTINE HOUSE,

Plaintiff-Appellee,

v.

BRUCE IACOVELLI, *et al.*,

Defendants-Appellants.

Case No. 2018-0434

On Appeal From the Medina County Court of Appeals, Ninth Appellate District, Case No. 16CA0087-M

BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE CHRISTINE HOUSE

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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 proposed proposition of law. Specifically, their proposition of law goes far beyond what is necessary to decide this case. Moreover, they explicitly ask this Court to overrule settled precedent on the common law tort of wrongful discharge in violation of public policy. Instead, this case is about one narrow issue: whether the public policy of R.C. Chapter 4141 requiring employers to accurately report an employee's income and make the requisite contributions would be jeopardized if employees could be fired in retaliation for opposing their employer's non-compliance.

As a result, the Association respectfully submits this brief to clarify the true scope of this appeal. Furthermore, on the one narrow issue before this Court, Plaintiff-Appellee has the better argument. The Association therefore offers her 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 Christine House.

SUMMARY OF ARGUMENT

The Court should hold that the public policy of R.C. Chapter 4141 requiring employers to accurately report an employee's income and make the requisite contributions would be jeopardized if employees could be fired in retaliation for opposing their employer's non-compliance.

First, this case is not about refashioning the common law tort of wrongful discharge in violation of public policy. It is about whether the specific public policy asserted by Plaintiff-Appellee would be jeopardized absent the right to sue on the tort. Defendants-Appellants, however, ask this Court to broadly hold that "the jeopardy element is not met even if there is no relief available to the individual employee." This is an invitation for the Court to render a prohibited advisory opinion because only the specific public policies articulated by Plaintiff-Appellee are at issue. Moreover, the broad proposition of law proposed by Defendants-Appellants would require this Court to overrule several of its prior cases on important issues such as workers' compensation retaliation and sexual harassment in the workplace.

Second, Defendants-Appellants raise a new argument never addressed by the courts below. Specifically, they contend that R.C. 4113.52—commonly known was the "whistleblower statute"—provided Plaintiff-Appellee an adequate remedy. But Defendants-Appellants waived this argument by not making it below. Appellate courts do not address arguments raised for the first time on appeal.

Third, the Court should either affirm the court of appeals or dismiss this discretionary appeal as improvidently accepted. This case, at best, concerns one very narrow issue on a set of specific statutes—not the sweeping pronouncement that Defendants-Appellants suggest. The court of appeals correctly decided the issue as Plaintiff-Appellee contends.

ARGUMENT

Proposed Proposition of Law: The public policy of R.C. Chapter 4141 requiring employers to accurately report an employee's income and make the requisite contributions would be jeopardized if employees could be fired in retaliation for opposing their employer's non-compliance.

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 proposition of law, are seeking a prohibited advisory opinion from this Court.

First, the proposition of law advanced by Defendants-Appellants is not necessary to decide the issue before this Court. Defendants-Appellants argue this Court should hold no public policy may satisfy the jeopardy element of the tort if there is any statutory remedy even if not for the aggrieved employee. (*See generally* Appellants' Merit Br., p. 4-12.) 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 . . . .'"). Instead, this Court may properly decide this issue by deciding whether the specific public policies articulated by Plaintiff-Appellee satisfy the jeopardy element. For instance, Defendants-Appellants focus their arguments on the administrative procedures available under R.C. Chapter 4141. (*See* Merit Br. of Defs.-Appellants, pp. 7-8.) Those administrative procedures may not necessarily be applicable in other contexts where a plaintiff relies upon a public policy without a remedy.

Second, the proposition of law advanced by Defendants-Appellants would require this Court to overrule several of its prior cases. Defendants-Appellants posit that the jeopardy element is not met if "there is a statutory scheme to protect the public's interest" even if "there is no relief available to the individual employee." *See id.*, ¶¶ 25-28. Yet, in *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, there was a statutory scheme to protect the public's interest under R.C. 4123.90, but no relief available to the plaintiff because he lost the "footrace" to pursue a claim before he was fired and thus was not protected by the statute. *See id.*, ¶¶ 15-17, 25-28. Likewise, in *Collins v. Rizkana*, 73 Ohio St.3d 65, 652 N.E.2d 653 (1995), there was a statutory scheme under R.C. Chapter 4112 to protect the public's interest in preventing sexual harassment but no relief available to the plaintiff because she had too few co-workers to be protected by the statute. *See id.*, 73 Ohio St.3d at 74. There is no meaningful distinction between the rationales of these cases and the rationale this Court would have to use to accept the proposition of law advanced by Defendants-Appellants. Respectfully, the Associates contends the Court would have to overrule these cases to agree with Defendants-Appellants.

B. New Arguments on Appeal: Defendants-Appellants Did Not Argue R.C. 4113.52 in the Courts Below

Defendants-Appellants contend that Plaintiff-Appellee's claim supposedly fails on the jeopardy element because R.C. 4113.52—commonly known as the "whistleblower statute"—

allegedly provided a remedy. (*See* Merit Br. of Defs.-Appellants, p. 11.) When Defendants-Appellants moved for a pre-trial determination by the trial court, they never made this argument. (*See* Defs. Br. in Supp. of Pre-Trial Determination Filed 10/21/16); (Defs. Mot. for Pre-Trial Determination Filed 10/16/16.) Similarly, before the court of appeals, Defendants-Appellants did not make this argument. (*See* Br. of Defs.-Appellees in the Ct. of Appeals, pp. 6-10.)

Now, on appeal before this Court, Defendants-Appellants "would point out that in this case [Plaintiff-Appellee] was not without remedies [because] had [she] gone to her employer under the Whistleblower Statute . . . [she] would have been protected under the Whistleblower Statute." (*See* id., pp. 11-12.) This argument is not properly before the Court. "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 did not raise this argument in the courts below, they may not argue it to this Court nor may it be considered.

Moreover, R.C. 4113.52 is limited in the conduct it covers and it would not cover the circumstances of this case. The statute requires a violation of a law that "[(a)] is a criminal offense that is likely to cause an imminent risk of physical harm or a hazard to public health or safety, [(b)] a felony, or [(c)] an improper solicitation for a contribution." *See* R.C. 4113.52(A)(1)(a); *see also* R.C. 4113.52(A)(3). The other type of conduct covered is criminal violations of R.C. Chapter

3704, 3734, 6109, or 6111. *See* R.C. 4113.52(A)(2). It seems unlikely that failing to contribute on unemployment insurance could cause "an imminent risk of physical harm or a hazard to public health or safety." Further, the penalty for an employer failing to make insurance contributions is a rather tame fine of five hundred dollars; not a felony. *See* R.C. 4141.99(C). Finally, no violation of R.C. Chapter 4141 would lead to an "improper solicitation for a contribution." Nor would it lead to a criminal violation of R.C. Chapter 3704, 3734, 6109, or 6111. In other words, the public policies at issue here would not be covered by the whistleblower statute and Plaintiff-Appellee would be without a remedy.

C. 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 her, made on the substantive issues properly before the Court. Their briefs adequately address those issues and the Association joins in urging that this Court, to the extent it reaches the substantive issues, affirm the court of appeals. Nevertheless, to the extent this appeal was accepted to address the broader proposition of law advanced by Defendants-Appellants, or the argument 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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