ORIGINAL

In the

Supreme Court of Ohio

RICHARD CORDRAY, OHIO ATTORNEY GENERAL, et al., Plaintiffs-Appellants, v. THE INTERNATIONAL PREPARATORY SCHOOL, et al., Defendant-Appellees.	:	Case No. 2009-1418 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 91912

MERIT BRIEF OF APPELLANTS RICHARD CORDRAY AND THE OHIO DEPARTMENT OF EDUCATION

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INTRODUCTION

Community schools are public schools that function as part of the State's public education plan, and they receive significant amounts of state and federal funding to provide parents with alternative education options for their children. Unfortunately, these schools have had a history of fiscal mismanagement, and audits frequently reveal the misappropriation and improper receipt of public funds. This case concerns the State's right to recover these funds from the individuals who run community schools and manage their assets, specifically the school treasurers. Both the relevant statutes and the common law hold public officials liable for public funds in their control, and community school treasurers are indisputably officers of public bodies who control public funds. As such, community school treasurers should be subject to the same strict liability for public funds that is imposed on officials handling the finances of other public bodies.

Appellee Hasina Shabazz is the former treasurer of The International Preparatory School ("TIPS"), a now-defunct community school with a long history of fiscal mismanagement. The State Auditor found that TIPS overbilled the Department of Education for over a million dollars and that Shabazz was liable for that money given her position as treasurer. The Attorney General and the Department (collectively, "the State") sued to recover from her after TIPS became insolvent. Though the trial court entered summary judgment against Shabazz, the Eighth District reversed, finding that genuine issues of material fact existed regarding Shabazz's personal involvement in TIPS's operation. That decision was wrong for several reasons.

Most fundamentally, the Eighth District ignored direct statutory mandates that make treasurers responsible, as public officials, for public funds in their control. R.C. 9.39, like the common law it codifies, holds public officials liable for all funds their offices receive, regardless of whether they personally committed any misdeeds. R.C. 117.01(E) defines a "public official" in this context as an "officer . . . of a public office," and R.C. 117.01(D) defines "public office"

as including "political subdivisions" and entities "established by the laws of this state for the exercise of any function of government." Both statutes and applicable precedent establish that a treasurer is an "officer" and that a community school is a "political subdivision" and an entity established to accomplish a governmental function. Because Shabazz was a "public official" in this regard, she is strictly liable for the public funds TIPS wrongfully obtained.

No principled basis exists for exempting community school officials from R.C. 9.39. That statute explicitly applies to *all* public officials and protects *all* public funds, and the community school laws provide no exemption. R.C. 9.39 is unrelated to educational innovation, and nothing distinguishes a community school's public funding from that received by other public schools—both come from the taxpayers, and both therefore deserve the fullest possible protection.

The fact that private corporations operate community schools does not affect this conclusion. R.C. 3314.01(B) plainly states that "a community school . . . is a public school," and that such schools are "part of the state's program of education." They operate on the same public funding as school districts, and they have the same defining characteristics as other public entities. See *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512, ¶ 72. Thus, the officers who oversee their operations are public officials, the same as their peers in traditional school districts. And those officers remain liable under R.C. 9.39. Further, R.C. 1702.55(A), which protects corporate officers from corporate debts, is immaterial because the State is enforcing a public, not a corporate, liability.

Settled law and sound policy show that community school treasurers hold the same obligations as their counterparts at other public schools, and that the public funds in their control warrant the same protection as the funds held by traditional schools. As such, the decision below should be reversed.

STATEMENT OF THE CASE AND FACTS

A. Community schools are public schools that exist within the State's education program.

Because this Court must evaluate the duties that community school officials have in regard to public funds in their control, a brief explanation of community school funding will help to put the underlying facts in the proper perspective.

Community schools, also known as charter schools, are public schools that function as part of the State's education program. R.C. 3314.01(B); *Ohio Congress*, 111 Ohio St. 3d 568, 2006-Ohio-5512, at ¶ 7. Although they are operated by non-profit corporations pursuant to contracts with state-approved entities known as sponsors, see R.C. 3314.03(A), they are, in all meaningful respects, public entities that receive funding directly from the State, see R.C. 3314.08(D). The amount of funding that a community school receives is based on the number of students that it reports to the Ohio Department of Education on a regular basis. See *Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.* (1st Dist.), 176 Ohio App. 3d 157, 2008-Ohio-1434, ¶¶ 4–7. Pursuant to R.C. 3314.08(C), that money is redirected from the traditional school districts where the community school students live. Thus, any public funds paid to these schools are subtracted the public funds paid to those traditional school districts.

B. Shabazz was the treasurer of TIPS, a community school that imploded after years of fiscal mismanagement.

This case arises from the many problems at TIPS, a community school. Appellee Hasina Shabazz and her husband founded TIPS in 1999 and played key roles in its operation; both served on the school's board of directors, and, as discussed more fully below, Shabazz was also the school's treasurer. (Trial Record ["T.R."] 2, Verified Complaint, Exhibit A, at p. 7, 14; Appellant's Supplement ["Supp."] at S-16, S-23.) Although the State sought to recover from both Shabazz and her husband in the case below, he has since passed away, and the issues on

appeal only refer to her liability. In the interest of clarity, then, the facts generally only refer to her, even though both she and her husband were heavily involved in the school's operation.

At the jurisdictional stage of this case, Shabazz maintained that she served as a board trustee and the treasurer of the corporation that ran the school, and not as the school's treasurer. (Shabazz Memorandum in Opposition to Jurisdiction at 1.) When the State filed its amended complaint below, however, the State attached a certified copy of an audit performed by the Auditor of State that found that Shabazz was TIPS's treasurer (T.R. 94, Verified Amended Complaint, Ex. 1 at Findings 2005-001 and 2005-006; Supp. at S-107, S-110), and R.C. 117.36 states that a "certified copy of any portion of the [Auditor's] report containing factual information is prima-facie evidence in determining the truth of the allegations of the petition." Shabazz offered no evidence to rebut the Auditor's conclusion in this regard, as the trial court noted in granting summary judgment for the State. (T.R. 139, attached as Ex. 3; Supp. at S-127) ("Defendants have failed to present any rebuttal evidence to defeat this standard and what is stated in the 2005 Certified Auditor's Report.").

The State also affirmatively pled that TIPS was a public school and that Shabazz was TIPS's treasurer in its amended complaint. (T.R. 94 at ¶ 6; Supp. at S-92.) Although Shabazz answered that she was "treasurer of the International Preparatory School Corporate Board," she did not deny the State's assertion that she was also *the school's* treasurer (T.R. 126, Answer to First Amended Complaint, at ¶ 6; Supp. at S-124). Because she did not issue a specific denial to that averment, she admitted it as a matter of law. See Civ.R. 8(D) ("Averments in a pleading to which a responsive pleading is required . . . are admitted when not denied. . . .").

TIPS faced numerous financial issues under Shabazz's leadership. Over the years, the Auditor found that the school had persistent problems maintaining accurate financial records,

that it ran up significant deficits, and that it failed to pay funds withheld from its staff for taxes and pensions. (T.R. 2, Verified Complaint, at Exs. A, B; Supp. at S-7–S-70.) The Auditor also found that Shabazz improperly diverted TIPS's public funding to businesses in which she had financial interests and noted other seemingly suspect uses of school funds. (T.R. 2 at Ex. A, Findings 2001-01 and 2001-02, and Ex. B, findings 2002-01, 2002-02, 2002-03, and 2002-04; Supp. at S-19, S-59–S-60.) In addition, and of particular interest here, TIPS fell deeply in debt to the Ohio Department of Education in 2004 and 2005. It overstated its enrollment during those school years and hence obtained significant amounts of public money that it was not entitled to receive. (T.R. 2 at Ex. A, p. 10, and Ex. B. at p. 10; Supp. at S-19, S-50.)

TIPS imploded in the fall of 2005. Its sponsor terminated its contract after the school refused to cooperate with the sponsor's supervision, and TIPS abruptly closed after classes had started for the year. (T.R. 2 at ¶ 7 and Ex. C; Supp. at S-2, S-71–S-74; T.R. 10 at ¶ 7; Supp. at S-79.) The State filed the case below, seeking a receiver to secure TIPS's assets. (T.R. 5, 6.) The trial court granted that request, (T.R. 8), and the receiver worked diligently to liquidate TIPS's assets, but the process was hindered by the school's chaotic condition and a lack of cooperation from Shabazz. Very little of value was left after the school was abandoned, and what was liquidated did not cover the receiver's expenses.

The Auditor completed the final audit of TIPS following its collapse and determined that TIPS improperly sought and received $1,407,983 from the Department of Education by submitting inflated enrollment figures. (T.R. 94 at Ex. 1, Finding 2005-001; Supp. at S-107.) Based on these overpayments, the Auditor issued a finding in favor of the Department against TIPS as an entity, and Shabazz and her husband individually. (*Id.*)

C. The State obtained a judgment against Shabazz based on the Auditor's findings that Shabazz was strictly liable because she was TIPS's treasurer when the school received substantial overpayments from the State.

Once the Auditor's findings were released, the State filed an amended complaint against Shabazz and her husband under R.C. 117.28 and 117.36, which authorize the State to institute a civil action to reduce audit findings to a judgment. (T.R. 94; Supp. at S-90.) The parties filed cross motions for summary judgment. (T.R. 129, 133.) Shabazz's motion did not contest the accuracy or validity of the audit, nor did it object to or attempt to rebut the affidavit and deposition testimony supporting the State's motion. (T.R. 133.) Instead, her sole argument was that, given her positions as a corporate officer, R.C. 1702.55 and R.C. 3314.071 insulated her from liability. (*Id.*)

The trial court granted the State's summary judgment motion and denied Shabazz's cross motion. (T.R. 139; Supp. at S-127.) It held that the State proved its claim because the audit was prima facie evidence of the facts underlying the claim, and Shabazz did not produce any evidence rebutting the Audit. (*Id.*) The court also concluded that (1) R.C. 1702.55 did not shield Shabazz from liability because that statute relates only to corporate debts, while debts arising under R.C. 117.28 are personal obligations, and (2) R.C. 3314.071 did not bar the State's claim because it addresses contractual debts, whereas the liability at issue here arose via statute. (*Id.*)

D. The Eighth District reversed, holding that Shabazz was not a "public official" under a dictionary definition of the term, and therefore was not strictly liable for the overpayment TIPS obtained.

On Shabazz's appeal, the Eighth District reversed, holding that Shabazz was not a "public official" and therefore could not be held strictly liable for the overpayments to TIPS. Rather than applying the controlling definition of "public official" found in R.C. 117.01(E), the Eighth District devised a narrow, dictionary-based definition that did not encompass Shabazz's role as treasurer. *Cordray v. Int'l Preparatory Sch.* (8th Dist.), 2009-Ohio-2634, ¶¶ 31-35 (attached as

Ex. 2). Based on its analysis, the court found summary judgment inappropriate because Shabazz could only be liable if there was evidence of personal wrongdoing sufficient to pierce the corporate veil, and genuine issues of material fact existed as to whether she "actively . . . facilitated the [misappropriations.]" *Id.* at ¶ 50.

The State moved for reconsideration, pointing out that Shabazz fell under the definition of public official in R.C. 117.01(E) and R.C. 9.38(1), but the Eighth District denied that relief. This Court accepted jurisdiction. 123 Ohio St. 3d 1470, 2009-Ohio-5704.

ARGUMENT

Appellants Richard Cordray and the Department of Education's Proposition of Law No. I:

Treasurers of community schools are "public officials" who are strictly liable for all public money received or collected by them during their time in office.

In Ohio, public officials are strictly liable for all public funds entrusted to them under color of law. R.C. 9.39. The only issue in this case is whether community-school treasurers qualify as public officials within the meaning of the liability provisions. The answer is straightforward. Because community schools are public institutions, and because community-school treasurers are officers of those institutions, the treasurers fall within the definition of public officials. Therefore, Shabazz is strictly liable for the public funds that TIPS improperly received from the Department of Education given her role as treasurer, and this Court should reverse the Eighth District's contrary decision.

A. R.C. 9.39 and the common law hold public officials strictly liable for funds received in their official capacities, regardless of culpability.

For more than a century, this Court has consistently held that public officials in general, and public treasurers specifically, are strictly liable for all public funds entrusted to them by virtue of their positions of trust in the community. Tracing the shape of that common law rule,

which has since been codified in R.C. 9.39, highlights the importance of strict public-official liability.

Long ago, this Court found it "pretty well settled under the American system of government that a public office is a public trust," and that individuals that control public money or property through those positions "should be held responsible to the same degree as the trustee of a private trust fund." *Crane Twp. ex rel. Stalter v. Secoy* (1921), 103 Ohio St. 258, 259. As the Court noted later,

> It has been the general policy, not only with government employees and appointees, but with state officers, county officers, township officers, and all other public officials, *to hold the public official accountable for the moneys that come into his hands as such official* . . .; . . . when he comes to account for the money received, it must be accounted for and paid over, unless payment by the official is prevented by an act of God or a public enemy; and burglary and larceny and the destruction by fire, or any other such reason, have not been accepted by the courts as a defense against a claim for the lost money.

Seward v. Nat'l Sur. Co. (1929), 120 Ohio St. 47, 49–50 (emphasis added) (holding that a postmaster was strictly liable for funds placed under his official control, even though the funds had been stolen and the postmaster was wholly blameless for the theft). Under this rule, the State does not need to show negligence or wrongdoing to obtain recovery; public officials are strictly liable for the public funds that they manage and control as a matter of law. See *id.* at syll. ¶ 2.

The rule is based on the significant policy concerns associated with preventing fraud against the public. "[I]t would open the door very wide for the accomplishment of the grossest frauds if public officers were permitted to present as the defense, when called upon to disburse the money according to law, that it had been purloined or destroyed by some deputy, or other subordinate" in the office. *Id.* at 50–51. Such a potential for fraud is not a relic of the past. As this Court has noted, "the need to prevent frauds against the public, to protect public funds, and

to place final responsibility for public funds on the shoulders of the officials charged with the collection and care of such funds" remains a valid concern in the present day. *State ex rel. Village of Linndale v. Masten* (1985), 18 Ohio St. 3d 228, 229. These policy concerns override any seeming harshness of the rule. See *Seward*, 120 Ohio St. at 50–52.

This Court has consistently reaffirmed this rule, see, e.g., *State v. Herbert* (1976), 49 Ohio St. 2d 88, 96–97; *Masten*, 18 Ohio St. 3d at 229, and has applied it specifically to treasurers on numerous occasions, see *State use of Wyandot County v. Harper* (1856), 6 Ohio St. 607, 610 ("By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law," he "voluntarily takes upon himself the risks incident to the office," and such an official "is, in effect, an insurance against the delinquencies of himself, and against the faults and wrongs of others in regard to the trust placed in his hands."); *Herbert*, 49 Ohio St. 2d at 97 (holding that the State Treasurer was strictly liable for investment losses on public funds by virtue of his status as a public official); *Eshelby v. Bd. of Educ.* (1902), 66 Ohio St. 71, 73 (noting, in a case involving a public school treasurer, that it is "quite clear that the liability of the treasurer is absolute"); see also *State v. Gaul* (8th Dist. 1997), 117 Ohio App. 3d 839, 851; *State ex rel. Bolsinger v. Swing* (1st Dist. 1936), 54 Ohio App. 251, 258.

The General Assembly codified the common-law rule in 1985. Under R.C. 9.39, "[a]ll public officials are liable for all public money received or collected by them or by their subordinates under color of office." The General Assembly also created several statutory exceptions for certain loss-causing events. See, e.g., R.C. 131.18 (allowing local legislative authorities to release numerous types of public officials from personal liability when public funds are lost due to "fire, robbery, burglary, flood, or inability of a bank to refund public money

lawfully in its possession belonging to such public funds," unless the official's own wrongful acts contributed to the loss), R.C. 135.39 (relieving public official liability for investment losses when the official acted properly in the investment process). Therefore, unless one of those limited statutory exceptions applies, a public official is strictly liable for all public funds under her control.

B. Community school treasurers fall within in the definition of a public official in R.C. 9.39, as they are "officers" of "political subdivisions."

Given these principles, community school treasurers are strictly liable for the funds paid to their schools if they are "public officials" under R.C. 9.39. Although the Eighth District created its own definition of the term "public official" by examining various dictionary definitions of the term, see *Cordray*, 2009-Ohio-2364, at ¶ 34, that definition should be discarded in view of the unambiguous definition of the term that appears in the Revised Code. See *State v. Lozano* (2001), 90 Ohio St. 3d 560, 562–63 (refusing to examine alternative definitions for the term "public official" in R.C. 2921.01(A) because a clear statutory definition for the term existed). Community school treasurers, who serve as officers of public entities, fit comfortably within this statutory definition and are therefore strictly liable for the funds that they control. Any other result would frustrate the purposes of R.C. 9.39.

In construing a statute, this Court must first look at the plain language of the provision and give the words used therein their usual, customary meanings. See *Medcorp, Inc. v. Ohio Dep't of Job & Family Servs.*, 121 Ohio St. 3d 622, 2009-Ohio-2058, ¶ 9. R.C. 9.38(1) specifies that the term "public official" as used in R.C. 9.39 has the same meaning as that set forth in R.C. 117.01. R.C. 117.01 in turn defines a public official as "any officer . . . of a public office," *id.* at (E), and a public office as any "political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of

government," *id.* at (D). Read together, those statutes establish that a person is a public official if she is an "officer" of a "political subdivision" or a similar entity established to accomplish a governmental function. Community school treasurers like Shabazz clearly meet these requirements.

First, Shabazz is an "officer," as treasurers are commonly considered to be "officers" within the plain meaning of that term. Treasurers of public entities have repeatedly been treated as officers subject to the common law rule of strict liability. See *Eshelby*, 66 Ohio St. 71 (school district treasurer); *Herbert*, 49 Ohio St. 2d at 88 (state treasurer); *Harper*, 6 Ohio St. 607 (county treasurer). Further, many Ohio statutes adopt this plain meaning by including treasurers in the category of "officers." See, e.g., R.C. 319.541, 505.481, 513.07, 733.23, 1701.64(A), 1702.34(A), 1711.08, 2941.47, 3517.04, 3734.025, 3939.04, 4123.02, 5311.08(A)(2). Likewise, the term "treasurer" is commonly defined as an "officer." Black's Law Dictionary defines a treasurer as "[a] corporate or governmental officer who receives, maintains custody of, invests, and disburses funds." (7 Ed. 1999) 1507. Similarly, Webster's New World College Dictionary likewise defines the term as "an officer in charge of the funds or finances, as of a government, corporation, or society." (3d Ed. 1997) 1424. Thus, because Shabazz served as the treasurer of TIPS, she is an "officer" within the meaning of R.C. 117.01(E).

Second, a community school is both a "political subdivision" and an "entity established by the laws of this state for the exercise of any function of government." R.C. 2744.01(F) provides that "'[p]olitical subdivision' includes . . . a . . . community school established under Chapter 3314 of the Revised Code," and R.C. 4117.01(B) also identifies community schools as political subdivisions. Further, this Court has treated community schools as political subdivisions for purposes of the Ohio Constitution, and other courts have considered them to be political

subdivisions for other purposes. See *Ohio Congress*, 111 Ohio St. 3d 568, 2006-Ohio-5512, at ¶ 72; *State ex rel. Rogers v. New Choices Cmty. Sch.* (2d Dist.), 2009-Ohio-4608, ¶¶ 28, 50, 51; see also *Greater Heights Acad. v. Zelman* (6th Cir. 2008), 522 F.3d 678, 680, 681.

It is similarly undisputed that Ohio established community schools to accomplish the governmental function of education. See *Ohio Congress*, 111 Ohio St. 3d 568, 2006-Ohio-5512, at ¶¶ 5, 32, 72; *Brookwood Presbyterian Church v. Ohio Dep't of Educ.* (10th Dist.), 2009-Ohio-4645, ¶ 7 (stating that "the Ohio Revised Code provides for the creation of community schools," and that "a community school is a 'public school' and is 'part of the state's program of education'") (quoting R.C. 3314.01(B)); *Doe v. Marlington Local Sch. Dist. Bd. of Educ.*, 122 Ohio St. 3d 12, 2009-Ohio-1360, ¶ 11 ("Governmental functions include '[t]he provision of a system of public education.'") (quoting R.C. 2744.01(C)(2)(c)); see also 2003 Ohio Ethics Comm. Adv. Op. No. 2003-01 (stating that community school officials are public officials under the similar definition of the term in R.C. 2921.01(A)). As such, community school treasurers are subject to the same strict liability for public funds under their control that applies to all other public officials.

Any other conclusion would not make sense. R.C. 9.39 certainly provides no basis for such a distinction: "*All* public officials are liable for *all* public money received or collected by them or by their subordinates under color of office" (emphasis added). That all-inclusive language makes no distinction based on where an official serves or for what purpose the funds are used; it does not support treating community school officials differently than officials managing other public schools' finances.

Nor does R.C. Chapter 3314, the chapter pertaining to community schools, support such a distinction. Although R.C. 3314.04 exempts community schools themselves from some

education-specific laws, it provides no exemptions for those schools' officials, and, in any event, R.C. 9.39 is not an education-specific law. Nothing else in Chapter 3314 speaks to the matter, and, considering that that chapter *does* protect community school officials from some liabilities, see R.C. 3314.071 (immunizing officials them liability on "contract[s] entered into by the governing authority or any officer or director of a community school"), that silence is deafening. Indeed, the express inclusion of this one immunization implies the exclusion of additional protections that do not appear in the statutes. See *Myers v. Toledo*, 110 Ohio St. 3d 218, 2006-Ohio-4353, ¶ 24.

The Eighth District's conclusion would have the practical effect of giving community school funds less protection than that accorded to other public funds. As this Court has long recognized, a treasurer's strict liability "is, in effect, an insurance against the delinquencies of himself, and against the faults and wrongs of others in regard to the trust placed in his hands." *Harper*, 6 Ohio St. at 610. Exempting community school treasurers from that liability removes that insurance and places those funds at greater risk, and there is no apparent reason why the public should bear that extra risk. How would it further educational innovation, the rationale for exempting community schools from some regulation? R.C. 9.39 regulates finances, not pedagogy. More importantly, what is different about the public funds entrusted to community schools? The basic state funding and grants that community schools receive come from the same coffers as the money going to other public schools and, ultimately, from the same taxpayers. See R.C. 3314.01(B), 3314.08(C), (F). There is simply no reason to place funds flowing to community schools at greater risk.

Thus, given the statutory language, the common law, and the related public policy concerns, Shabazz is responsible—based solely on her role as treasurer—for the $1,407,983 in public funds that TIPS received above and beyond the amount to which it was entitled.

C. The fact that community schools are operated by private corporations does not change the fact that they are public schools.

The above analysis is not undercut by the lower court's suggestion that Shabazz cannot be a public official because she was also a corporate official. Any assertion that community schools are simply private ventures that somehow exempt their officials from the reach of R.C. 9.39 fails on several levels.

First, as discussed above, community schools are indisputably public entities regardless of their corporate management. R.C. 3314.01(B) unambiguously states that a "community school . . . is a public school," and other statutes reflect that reality. Community school funding comes from the same State Foundation program and federal grants as traditional schools, the schools are considered to be school districts for purposes of state and federal grants, and they receive large amounts of public funding—$756,712,726.19 in the 2009 fiscal year. See R.C. 3314.08(C), (F); 2008-2009 Annual Report/Ohio Community Schools (ODE 2009), Tables 3, 4, and 5, available at http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?Page=3&TopicRelationID=662&Content=79301 (last visited Jan. 19, 2010).[1] Funds and equipment remaining when a community school closes are returned to the State for distribution to traditional school districts.

[1] The total 2009 fiscal year funding figure of $756,712,726.19 represents three different types of funding, summarized in Tables 3, 4, and 5. Table 3 reports the total amount of state funding to community schools; the combined per-school amounts in Column S equal $652,941,651.60. Table 4 reports the total amount of federal operating grants the schools received; the combined per-school amounts in Column U equal $92,525,940.79. Table 5 reports the total amount of federal start-up grants the schools received in that fiscal year; the combined per-school amounts in Column G equal $11,245,133.80.

See R.C. 3314.074(A) and (B). Community schools are subject to the same auditing requirements, public records, open meeting, and ethics laws as traditional school districts. See R.C. 3314.03(A)(8), (11)(d)–(e). They are public employers under Ohio's collective bargaining laws, their employees participate in the same public retirement systems as employees of traditional schools, and their full-time teachers must meet the same licensure requirements as teachers in traditional school districts. See R.C. 3307.01(B)(1), 3314.03(A)(10), 3314.10(A)(5)(c), 4117.01(B). They also enjoy the benefits of being a public school: They are protected by the same governmental immunity, see R.C. 2744.01(F), and have the same entitlement to self-insure under the workers' compensation laws as other public schools, see R.C. 4123.35(R)(5).

This Court reached the same conclusion—that community schools are public institutions—in *Ohio Congress*, 111 Ohio St. 3d 568, 2006-Ohio-5512. There, parties challenged the constitutionality of the community school laws by arguing that community schools could not be public entities because they are run by private corporations. After engaging in an extensive review of community schools, the Court rejected that analysis: "[C]ommunity schools belong to the state's system of common schools. By statute, they are 'part of the state's program of education.' R.C. 3314.01(B). . . . As a result, they are not private business corporations." *Id.* at ¶ 72. Thus, community school officials are not private actors, regardless of the fact that the schools associate with corporations.

Second, although R.C. 1702.55(A) provides that corporate officers are not "personally liable for any obligation of the corporation," the State is not enforcing a corporate obligation; rather, this suit arose because Shabazz controlled public funds in her role as TIPS's treasurer. Ohio law has long recognized that the primary duty of public officers is to protect and conserve

public moneys in their hands: "The safety of public funds has been the chief object of care." *Eshelby*, 66 Ohio St. at 74. Public officials' liability is based on that inherently public duty, which is grounded in solid public policy. See *Masten*, 18 Ohio St. 3d at 229; *Herbert*, 49 Ohio St. 2d at 97.

The codification of that rule in R.C. 9.39 reflects the public basis of that liability, making "public officials" liable for money received "under color of office." In other words, the liability attaches to a particular person by virtue of her individual decision to assume a position of public trust. As this Court has observed, "[b]y accepting the office, the treasurer *assumes upon himself* the duty of receiving and safely keeping the public money," and "voluntarily *takes upon himself* the risks incident to the office." *Harper,* 6 Ohio St. at 610 (emphasis added). The United States Supreme Court similarly recognized that because "every [public official] receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship[s]" that result from the strict liability that follows. *United States v. Prescott* (1845), 44 U.S. 578, 589.

Thus, although triggered by a corporation's failings, the State seeks to enforce a duty distinct from that corporation's debts and wholly outside the scope of R.C. 1702.55(A); the duty arises from both the treasurer's status as a public official and her individual decision to assume that position of public trust.

Finally, there is nothing unfair about enforcing this obligation, which has been well-established for decades. As this Court noted over 70 years ago, the decisions supporting this rule "are so uniform and so numerous that no useful purpose would be served by restating the law that has been so many times stated so clearly. It is found in the textbooks on the subject, and in the decisions from practically all the states." *Seward*, 120 Ohio St. at 50. Indeed, it has even been applied to those who acted as treasurers for other public schools. *Eshelby*, 66 Ohio St. at

73. Community school treasurers—who serve public schools—are therefore on notice of their obligation in this regard, and it is not unfair to hold them to it.

CONCLUSION

For these reasons, this Court should reverse the decision by the Eighth District Court of Appeals and affirm the summary judgment entered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellants Richard Cordray and The Ohio Department of Education was served by U.S. mail this 19th day of January, 2010, upon the following counsel:

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ORIGINAL

In the

Supreme Court of Ohio 09-1418

RICHARD CORDRAY, OHIO ATTORNEY GENERAL, et al., Plaintiff-Appellants, v. THE INTERNATIONAL PREPARATORY SCHOOL, et al., Defendant-Appellees.	:	Supreme Court Case No. _____ On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 91912

NOTICE OF APPEAL OF APPELLANTS RICHARD CORDRAY AND THE OHIO DEPARTMENT OF EDUCATION

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EXHIBIT 1

NOTICE OF APPEAL OF APPELLANTS
RICHARD CORDRAY AND THE OHIO DEPARTMENT OF EDUCATION

Appellants Richard Cordray and the Ohio Department of Education give notice of their discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Case No. 91912 on June 25, 2009 under Local Appellate Rule 22(B), upon the Eighth District's denial of reconsideration. Date-stamped copies of the Tenth District's Journal Entry and Opinion are attached to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Appellants Richard Cordray and the Ohio Department of Education has been served upon the following counsel of record by depositing it in ordinary United States mail, postage prepaid, this 6th day of August, 2009:

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JUN 25 2009

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91912

**RICHARD CORDRAY,
OHIO ATTORNEY GENERAL, ET AL.**

PLAINTIFFS-APPELLEES

VS.

**THE INTERNATIONAL
PREPARATORY SCHOOL, ET AL.**

DEFENDANTS

Appeal by:

ESTATE OF DA'UD MALIK SHABAZZ, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED IN PART; REVERSED
IN PART AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-575404

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED: May 21, 2009
JOURNALIZED: JUN 25 2009

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EXHIBIT 2

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

Defendants-appellants, Estate of Da'ud Abdul Malik Shabazz ("Da'ud") and Hasina Shabazz ("Hasina"),[1] appeal from the trial court's decision that granted plaintiffs-appellees, the Ohio Attorney General[2] ("OAG") and the Ohio Department of Education's ("ODE"), motion for summary judgment and held the defendants personally liable in the amount of $1,407,983 plus interest, for overpayments made to The International Preparatory School ("TIPS"), an Ohio non-profit corporation organized under Chapter 1702 of the Ohio Revised Code. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

The undisputed facts of this case include that TIPS was an Ohio non-profit corporation, which operated as a community school under Chapter 3314 of the Ohio Revised Code until it closed in October 2005. TIPS entered into a Community School Contract with its state-approved sponsor, Lucas County Educational Service Center ("LCESC"). The OAG petitioned the trial court for a temporary restraining order along with its verified complaint against TIPS on October 20, 2005. In the verified complaint, OAG averred that "TIPS' directors

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[1]Collectively referred to herein as "defendants."

[2]The original caption of this case was "*Marc Dann, Ohio Attorney General, et al. v. The International Preparatory School, et al.* In accordance with App.R. 29(C), the court substitutes Richard Cordray, the present Attorney General, for Marc Dann.

passed a resolution on October 17, 2005 terminating its contract with LCESC, thereby terminating its status as a community school." (Verified Complaint at ¶7.) OAG further averred that "R.C. 3314.072(C) provides that assets of a defunct and insolvent community school should be distributed pursuant to R.C. chapter 1702." Id. at ¶10.

The trial court appointed a receiver in January 2006 to oversee the closure and distribution of the assets pursuant to R.C. 3314.074 and Chapter 1702. Sometime later, the Auditor of the State of Ohio ("AOS") completed an audit of TIPS. Relevant to this appeal, the AOS audit issued a "Finding of Recovery" as follows:

"The School permanently closed and ceased its operation as a community school in October 2005. Between July 1, 2004 and October 18, 2005, the School was over funded by the Ohio Department of Education in the amount of $1,407,983, which was deposited into the School's account. The Ohio Department of Education calculated the amount overpaid for the year end[ing] June 30, 2005 was $361,446 and for the year end[ing] June 30, 2006 was $1,046,537. Since the School was not eligible for these funds, the funds were due the Ohio Department of Education and should have been returned.

"In accordance with the foregoing facts, and pursuant to Ohio Rev. Code Section 117.28, a Finding for Recovery for public funds due the State that has

not been remitted is hereby issued against The International Preparatory School, Hasina Shabazz, Treasurer and the Estate of Da'ud Abdul Malik, Chairman of the Board of Trustees, jointly and severally, and in favor of the Ohio Department of Education in the amount of $1,407.983." (R. 129, Ex. A.)

After receiving the AOS audit, the OAG requested and was granted leave to file an amended complaint, which added the Shabazzes as party defendants. The amended complaint identifies Da'ud as the chairman of the governing authority for TIPS and Hasina as the treasurer for TIPS. The OAG based its claims against the defendants upon the above-quoted finding for recovery made in the AOS audit. Neither the amended complaint nor the AOS audit make any specific allegations of any wrongdoing by either Da'ud or Hasina with regard to the over funding received by TIPS from ODE.[3] The defendants answered the amended complaint and asserted it failed to state a claim upon which relief could be granted against them individually.

Both parties moved for summary judgment. OAG moved for judgment maintaining the AOS's finding of recovery provided "prima facie evidence" pursuant to R.C. 117.36 of the validity of their claims under R.C. 117.28 against

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[3]We note the AOS audit did flag a potential abuse by these individuals with regard to lease payments made by TIPS to a corporation affiliated with the defendants, which payments over a three-year period exceeded the value of the property. However, the finding for recovery at issue did not pertain to those payments.

the defendants and TIPS. TIPS did not respond. The defendants invoked the principle that shareholders, officers, and directors of a corporation are generally not liable for the debts of the corporation and that provisions of R.C. 3314.071 precluded recovery against them individually.

OAG asserted that "defendants overstated enrollment in FY2005 and FY2006 and received funds that they were not entitled to." In response, Hasina submitted an affidavit where she averred, among other things, that "the corporate officers/school administrators managed the day-to-day operations of The International Preparatory School" and that she and Da'ud were board members. In reply to the OAG opposition, the defendants submitted an affidavit of Patricia Ali, who averred to having personal knowledge of the fact that "The International Preparatory School hired employees whose duties included the monitoring of student enrollment, and the preparation and submission of monthly attendance reports."

The trial court denied the defendants' motion for summary judgment and granted the OAG's motion for summary judgment. The defendants now appeal, assigning three errors for our review. Because all of the defendants' assignments of error essentially challenge the trial court's decision which awarded summary judgment to OAG, they will be addressed together for ease of discussion.

"I. The trial court erred as a matter of law in concluding that the factual information contained in the report of a regular audit of The International Preparatory School for the period of July 1, 2004, through October 18, 2005, issued by the auditor of the State of Ohio on or about January 30, 2007, supported the finding of personal liability against the appellants, Estate of Da'ud Abdul Malik Shabazz and Hasina Shabazz.

"II. The trial court erred as a matter of law in concluding that R.C. §1702.55 does not shield the appellants, Estate of Da'ud Abdul Malik Shabazz and Hasina Shabazz, from personal liability for funds paid to The International Preparatory School, a non-profit corporation.

"III. The trial court erred as a matter of law in concluding that R.C. §3314.071 did not shield the appellants, Estate of Da'ud Abdul Malik Shabazz and Hasina Shabazz, from personal liability for funds paid to The International Preparatory School."

No one is challenging that portion of the summary judgment order which held TIPS liable to OAG and, therefore, we do not address it herein. The sole focus in this appeal is whether the trial court properly determined by summary judgment that certain select individual officers or directors of TIPS, an Ohio non-profit organization, were personally and strictly liable for ODE's payment of a certain amount of funding to it when TIPS was "not eligible for these funds."

An appellate court reviews a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. De novo review means that this Court uses the same standard that the trial court should have used, and we examine the evidence to determine if, as a matter of law, no genuine issues exist for trial. *Brewer v. Cleveland City Schools* (1997), 122 Ohio App.3d 378, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

We afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.

Summary judgment is appropriate where it appears that: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

The burden is on the movant to show that no genuine issue of material fact exists. Id. Conclusory assertions that the nonmovant has no evidence to prove its case are insufficient; the movant must specifically point to evidence contained within the pleadings, depositions, answers to interrogatories, written

admissions, affidavits, etc., which affirmatively demonstrate that the nonmovant has no evidence to support his claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107; Civ.R. 56(C).

Action to Recover Public Money - R.C. 117.28

OAG, through its amended complaint, sought to hold the defendants personally liable pursuant to R.C. 117.28 for overpayments the ODE made to TIPS. That statute provides in relevant part:

"Where an audit report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money is due has not been collected, or that any public property has been converted or misappropriated,***.

"The auditor of the state shall notify the attorney general in writing of every audit report which sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money is due has not been collected, or that any public property has been converted or misappropriated and the date the report was filed.

"*** The attorney general or his assistant may appear in any such action on behalf of the public office and may, either or in conjunction with or independent of the officer receiving the report, prosecute an action to final determination ***."

R.C. 117.36 provides that "[a] certified copy of any portion of the report containing factual information is prima-facie evidence in determining the truth of the allegations of the petition."

"'[I]n an action to recover funds, the single and crucial inquiry is whether those who obtained such funds were legally entitled to receive them.'" *State v. Hale* (1991), 60 Ohio St.3d 62. According to the AOS audit, the subject funds were "deposited into the School's account."

As stated, the OAG averred that the AOS audit reported a finding of recovery that summarily concluded that the defendants were jointly and severally liable for TIPS receiving payments for which it was "not eligible."

R.C. 3314.071

The individual defendants maintain that the trial court erred by not applying the provisions of R.C. 3114.071, which provides:

"Any contract entered into by the governing authority or any officer or director of a community school, including the contract required by sections 3314.02 and 3314.03 of the Revised Code, is deemed to be entered into by such individuals in their official capacities as representatives of the community school. No officer, director, or member of the governing authority of a community school incurs any personal liability by virtue of entering into any contract on behalf of the school."

The trial court correctly found that this matter does not involve a breach of contract nor does it seek to hold the defendants personally liable for any contract that they entered in their official capacities as representatives of the community school. Therefore, the protections of R.C. 3314.071 do not apply to this recovery action commenced under R.C. 117.28.

Assignment of Error III lacks merit and is overruled.

Personal Liability of Corporate Officers Operating Community Schools.

The gravamen of the dispute among these parties is whether the defendants are afforded the protections of incorporating under R.C. Chapter 1702 or whether they are strictly liable as "public officials" for the payments of "public funds" to a community school.

None of the cases cited by the parties are directly on point nor could we locate any case in Ohio jurisprudence that held officers, directors, or shareholders of an Ohio non-profit corporation that operated as a community school personally liable as a matter of law pursuant to R.C. 117.28.

OAG in its brief and at oral argument advocated that the defendants be held personally and strictly liable upon the theory that they were "public officials" who received public money. OAG relies heavily on the precedent of *Seward v. Natl. Surety Co.* (1929), 120 Ohio St. 47. *Seward* held a postmaster

liable for public money stolen by a party connected with the post office management. *Seward* did not involve or address the personal liability of an officer, director, or shareholder of an Ohio corporation for the corporation's improper receipt of public funds.

Public Officials

Primarily, in maintaining that the defendants were public officials, OAG erroneously relies upon the definition of "public official" contained in R.C. 2921.01(A), which provides:

"As used in sections 2921.01 to 2921.45 of the Revised Code:

"(A) 'Public official' means any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement officers." (Emphasis added.)

The statutory definition supplied by R.C. 2921.01(A) is explicitly limited "as [the term] is used in sections 2921.01 to 2921.45," which concerns criminal offenses against justice and public administration in general. OAG brings this claim pursuant to R.C. 117.28.[4]

[4]OAG also cites to R.C. 9.39 pertaining to liability of public officials for public monies received; however, that statute does not define "public officials."

Without a statutory definition we must give the terms their ordinary meaning. See *Washington Cty. Home v. Ohio Dept. of Health*, 178 Ohio App.3d 78, 2008-Ohio-4342, at ¶36. In *Washington*, the court reasoned:

"To determine the plain meaning of 'public official,' we look to the ordinary use of that term. Blacks Law Dictionary, Sixth Edition, 1990, defines 'public official' as: 'A person who, upon being issued a commission, taking required oath, enters upon, for a fixed tenure, a position called an office where he or she exercises in his or her right some of the attributes of sovereign he or she serves for the benefit of public. The holder of a public office though not all persons in public employment are public officials, because public official's position requires the exercise of some portion of the sovereign power, whether great or small.' See *State ex rel. Sperry v. Licking Metro. Hous. Auth.* (Sept. 18, 1995), Licking App. No. 95CA52, 1995 Ohio App. LEXIS 4683. Merriam-Webster's Collegiate Dictionary, Tenth Edition, 1993, defines 'public officer' as: 'A person who has been legally elected or appointed to office and who exercises governmental functions.' See id."

There is no evidence in the record to find that the defendants were "public officials" within the ordinary meaning of that term. Therefore, the case law relied upon by the OAG, which requires public officials to be held strictly and personally liable for public monies is not dispositive here. See *Seward*, supra.

Secondly, the Ohio law governing community schools, mandated that TIPS be established as a nonprofit corporation under Chapter 1702 of the Revised Code.[5] R.C. 3314.03(A)(1). As such, the provisions of R.C. 1702.55, that its members, directors, and officers "shall not be personally liable for any obligation of the corporation," would apply.

The law does not support the OAG's argument that individuals of community schools, that are required by law to be corporate entities under R.C. chapter 1702, be deemed "public officials" who are personally and strictly liable for the corporations improper receipt of public funds.

Personal Liability of Corporate Shareholders, Officers, and Directors

The Ohio Supreme Court has held that "[t]he principle that shareholders, officers, and directors of a corporation are generally not liable for the debts of the corporation is ingrained in Ohio law." *Dombroski v. Wellpoint, Inc.*, 119 Ohio St.3d 506, 510, 2008-Ohio-4827, citing Section 3, Article XIII, Ohio Constitution; *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274 [other citation omitted]. From this rule, the Ohio Supreme Court carved an exception by creating a claim whereby the corporate veil may be

[5]There is no dispute that TIPS was organized under R.C. Chapter 1702. See Verified Amended Complaint at ¶4.

"pierced" and the individuals held personally liable. See *Belvedere*, supra, as modified by *Dombroski*, supra.[6]

The OAG's complaint incorporated the findings of the certified AOS audit report, which made generalized factual findings and a legal conclusion that the individual defendants were jointly and severally liable. In the trial court, the individual defendants made specific denials in their complaint, asserted that the complaint failed to state a claim against them, and also asserted that they could not be held personally liable without establishing a basis to pierce the corporate veil throughout the summary judgment proceedings in the court below. Therefore, this issue was not waived.[7]

Additionally, directors of a nonprofit corporation are charged with the responsibility of carrying out a public purpose. R.C. 1702.30(B) establishes the standard of care of directors in carrying out such public purposes and provides that a director shall "perform his duties as a director *** in good faith, in a

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[6]In *Dombroski*, the Ohio Supreme Court modified (by expanding) the second prong of a corporate veil piercing claim so that a plaintiff had to demonstrate that a defendant shareholder exercised control over a corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act.

[7]Case law lends support to the conclusion that the complaint must allege acts sufficient to qualify as an exception to the rule of law. See, e.g., *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, at ¶31; accord *Knotts v. McElroy*, Cuyahoga No. 82682, 2003-Ohio-5937 (upholding dismissal of plaintiff's complaint on basis of qualified immunity where plaintiff had not alleged acts against the governmental entity beyond that of mere negligence).

manner he reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances." Directors may be liable for damages resulting from their breach of these duties.

Defendants were directors of a corporation established as the governing authority of a community school. As such, they were charged by statute with overseeing the running of a public school funded with millions of dollars of public funds. If the State can prove that defendants breached their fiduciary duties as directors of the publicly funded nonprofit corporation, and that the breach resulted in over-funding by the State, then personal liability can be imposed for the results of that breach without the need to pierce the corporate veil.

The basis of the AOS's audit finding of recovery against all of the defendants was that ODE over funded TIPS amounts for which it was not eligible between July 1, 2004 and October 18, 2005, and for the year ending June 30, 2005 (as calculated by the ODE itself). The AOS audit specifically found that the amounts were "deposited into [TIPS] account." The ODE representative supplied an affidavit explaining that the over- funding calculations were derived from a failure to reconcile "error flags" concerning TIPS reported student enrollments at various times. Neither the affidavit nor the AOS audit report specifically charges either of the individual defendants with supplying the

erroneous enrollment reports, intentionally or otherwise. That is not to say that they are insulated from personal liability, where they occupied the positions of Treasurer and Chairman of the Board; only that their personal liability is not established by this record as a matter of law.

While there is a substantial amount of discussion in the audit report concerning TIPS failure to provide and maintain proper books and accounts, among other things, there is no direct factual finding that the individual defendants caused the improper payment of public money to TIPS that is the subject of this matter. At the same time, the factual findings of the audit report do create a genuine issue of material fact as to whether the individual defendants should be held personally liable for the public funds at issue.

The case law relied upon by the trial court does not persuade us to find otherwise. See *Hale,* 60 Ohio St.3d, at 62, 66; *Crane v. Secoy Twp. Trustees* (1921), 103 Ohio St. 258, 259; and *Shuster v. N. Am. Mtge. Loan Co.* (1942), 139 Ohio St. 315, 344. As set forth below, each case is factually distinguishable from this case and/or supports the conclusion that the OAG must establish some factual basis to hold the defendants personally liable for TIPS obligations.

In *Hale*, the attorney general sought recovery of money from appointed members and executive directors of the Ohio Civil Rights Commission, who had received excess compensation contrary to law. The Ohio Supreme Court in *Hale*

upheld the finding of liability against the executive director of the Ohio Civil Rights Commission, who was a public official appointed to his position. In *Hale*, the facts were that this individual "initiated the payroll information that resulted in the illegal payments to the commissioners[;]" he "exacerbated the overpayment situation" by making certain representations in a letter to the State Auditor. The court reasoned that "Brown was the commission's 'principal administrative officer' and, in that capacity, he was required to correctly report the number of hours the commissioners attended meetings. The active misrepresentations made by Brown in order to continue to pay Ellis and Lucas for days when no commission meetings were held clearly contravenes the wording of the statute." *Hale*, 60 Ohio St.3d, at 66. The court's determination of liability against Brown was additionally based on his role as a "public officer." Id. In conclusion, the *Hale* court held: "Brown, a public officer, negligently performed his duties by endorsing the overpayments made from the public treasury and assisted in violating the statute." Id.

Hale is distinguishable from the instant matter in at least two notable respects: (1) the court did not hold individuals of a non-profit corporation organized under R.C. Chapter 1702 personally liable for corporate obligations; and (2) the court's holding was against an individual that was appointed to a public office and based upon factual instances of that individual's involvement

in causing or contributing to the illegal expenditures and overpayments to the commissioners.

Likewise, the recovery of funds action at issue in *Crane* involved a finding of liability against township trustees who occupied "public office." *Crane,* 103 Ohio St. 258, 261-262 (court found that "[i]t is quite evident from the foregoing that the trustees knowingly and openly permitted and aided the township clerk in thus misappropriating public moneys of the township. That they should respond to the public for this disregard of plain public duty there can be no doubt").

Finally, *Shuster v. N. Am. Mtg. Loan Co.,* 139 Ohio St. 315, 344, involved a petition by a certificate holder against a mortgage loan company and its directors seeking an accounting of trust property placed in their hands under a reorganization plan. That case was not a recovery action like this case. Rather, the question presented in *Shuster* was: "whether or not the defendants-appellants committed a breach of trust by reinvesting the funds received from the sale of the defaulted bonds instead of immediately distributing the proceeds to the participation certificate holders" and, more narrowly stated, "[d]id the trustee breach its trust by purchasing securities with cash received from the sale of trusteed assets?" Id. at 333.

In 1942, the Ohio Supreme Court affirmed the finding of liability against the trustees in *Shuster* based upon the specific terms of the contract and reconstruction plan[8] and in part upon the principle that "'[a]ny officer *who knowingly causes* the corporation to commit a breach of trust causing loss to a trust administered by the corporation is personally liable for the loss to the beneficiaries of the trust.'" Id. at 344, quoting 3 Scott on Trusts, 1767 (emphasis added). This is similar to the exception to limited liability of corporate officers, directors, and shareholders that exists by virtue of a piercing-the-corporate-veil claim. *Dombroski*, supra.

Even in recovery actions concerning private individuals who have received public monies, it must be shown that the private individual had some involvement in procuring an illegal expenditure or actively engaged or facilitated the wrongdoing. See, e.g., *State ex rel. Smith v. Maharry* (1918), 97 Ohio St. 272,

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[8]As the Court in *Shuster* noted, "the plan and the contract [and] the order of the Court of Common Pleas of Cuyahoga County show clearly that a trust was created for the purpose of liquidation and distribution of proceeds to the holders of the certificates of participation *** The mortgage loan company was created to act in a dual capacity, i.e., owner and trustee. In its own right as a corporation, it was first to borrow funds from the Reconstruction Finance Corporation and pledge the assets which it held as trustee for the certificate holders as security for the repayment of this loan. There was, therefore, necessity for the purpose clause of the corporation in dealing with these securities for the purpose of borrowing from and repaying to Reconstruction Finance Corporation. But after the Reconstruction Finance Corporation loan was satisfied, the authority to treat these assets as the absolute property of the corporation ceased, and from that point on the mortgage loan company was to hold the assets as trustee for the certificate holders." Id. at 339-340.

277-278 (finding that anyone who wrongfully took public money or public property could be sued under [the former version of R.C. 117.28); see, also, *Mahoning Valley Sanit. Dist. v. The Gilbane Bldg. Co.* (6th Cir. 2004), 86 Fed. Appx. 856.

Based on the foregoing, we find that there remain genuine issues of material facts as to whether the individual defendants are personally liable for the obligations of TIPS to repay ODE for over funding related to the identified fiscal years.

Assignments of Error I and II are sustained to the extent that the trial court erred by granting summary judgment on the issue of personal liability because the AOS audit report did not contain specific factual allegations that either Da'ud or Hasina were responsible for TIPS receiving public funds, which it was deemed ineligible by the ODE.

Judgment affirmed as to the trial court's decision denying the individual's cross-motion for summary judgment because there is sufficient evidence in the AOS audit report to create a genuine issue of material fact as to whether the defendants can be held personally liable for the obligations of TIPS.

Judgment affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that appellants and appellees shall each pay their respective costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR

52486752

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARC DANN OHIO ATTORNEY GENERAL - ET AL.
Plaintiff

THE INTERNATIONAL PREPERATORY SCHOOL
Defendant

Case No: CV-05-575404

Judge: EILEEN T GALLAGHER

JOURNAL ENTRY

89 DIS. W/ PREJ - FINAL

PLAINTIFF(S) MARC DANN(P1) AND OHIO DEPARTMENT OF EDUCATION(P2) MOTION FOR SUMMARY JUDGMENT SCOTT M. CAMBPELL 0071056, FILED 04/21/2008, IS GRANTED. THE COURT FINDS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND DEFENDANTS ARE HEREBY FOUND TO BE PERSONALLY, JOINTLY, AND SEVERALLY LIABLE, IN ACCORDANCE WITH THE 2005 CERTIFIED STATE AUDITOR'S FINDINGS, IN THE AMOUNT OF $1,407.983.00 PLUS INTEREST AT THE RATE OF 8% FROM THE DATE OF THIS JUDGMENT.

1) PURSUANT TO R.C. SECTION 117.36, A CERTIFIED COPY OF ANY PORTION OF A REPORT CONTAINING FACTUAL INFORMATION IS PRIMA FACIE EVIDENCE IN DETERMINING THE TRUTH OF THE ALLEGATIONS. "PRIMA FACIE EVIDENCE IS THAT WHICH IS SUFFICIENT TO CARRY THE CASE TO THE TRIER OF FACT AND, IF UNREBUTTED, TO SUPPORT A CONCLUSION IN FAVOR OF THE PLAINTIFF." (SEE STATE EX REL. HOLCOMB V. WALTON, 66 OHIO APP. 3D 751, 754 (OHIO CT. APP. 1990)). DEFENDANTS HAVE FAILED TO PRESENT ANY REBUTTAL EVIDENCE TO DEFEAT THIS STANDARD AND WHAT IS STATED IN THE 2005 CERTIFIED AUDITOR'S REPORT.

2) DEFENDANTS' RELIANCE ON R.C. SECTIONS 1702.55 AND 3314.071 IS MISPLACED. IN GENERAL, DIRECTORS AND OFFICERS ARE NOT LIABLE FOR A CORPORATION'S DEBT. (SEE R.C. SECTION 1702.55). PURSUANT TO R.C. SECTION 3314.071,"NO OFFICER, [OR] DIRECTOR...OF A COMMUNITY SCHOOL INCURS ANY PERSONAL LIABILITY BY VIRTUE OF ENTERING INTO ANY CONTRACT ON BEHALF OF THE SCHOOL." (R.C. SECTION 3314.071). HOWEVER, PLAINTIFF'S CLAIMS IN THE CAPTIONED MATTER ARE BASED UPON THE PERSONAL OBLIGATIONS OF THE DEFENDANTS, NOT THE CORPORATE OBLIGATIONS, AND THEREFORE FALLS OUTSIDE OF ANY PROTECTION AFFORDED BY R.C. SECTION 1702.55. THE OHIO SUPREME COURT HAS HELD THAT INDIVIDUALS AGAINST WHOM, SUCH FINDINGS OF LIABILITY ARE MADE "ARE HELD RESPONSIBLE TO THE SAME DEGREE AS THE TRUSTEE OF A PROBATE TRUST..." (SEE STATE V. HALE (1991), 60 OHIO ST.3D 62, 66; CRANE V. SECOY TOWNSHIP TRUSTEES (1921), 103 OHIO ST. 258,259). FURTHERMORE, AN INDIVIDUAL WHO "CAUSES [A] CORPORATION TO COMMIT A BREACH OF [A PRIVATE] TRUST... IS PERSONALLY LIABLE FOR THE LOSS..." (SEE SHUSTER V. NORTH AMERICAN MORTGAGE LOAN CO. (1942), 139 OHIO ST. 315, 344). R.C. SECTION 3314.071 IS INAPPLICABLE AS WELL SINCE PLAINTIFF'S ACTIONS ARISE THROUGH A STATUTORY CLAIM (R.C. SECTION 117.36), NOT A CONTRACTUAL CLAIM.

FOR THE AFOREMENTIONED REASONS, THE COURT FINDS IN FAVOR OF THE PLAINTIFFS AND AGAINST THE DEFENDANTS IN THE AMOUNT OF $1,407.983.00, PLUS INTEREST AT THE RATE OF 8% FROM THE DATE OF THIS JUDGMENT AS STATED IN THE 2005 CERTIFIED STATE AUDITOR'S REPORT.

COURT COST ASSESSED TO THE DEFENDANT(S).

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EXHIBIT 3

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Judge Signature 07/11/2008

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R.C. 9.38 Deposit of public moneys.

As used in this section and section 9.39 of the Revised Code:

(1) "Color of office," "public office," and "public official" have the same meanings as in section 117.01 of the Revised Code.

(2) "Legislative authority" means a board of county commissioners, a board of township trustees, the legislative authority of a municipal corporation, or the board of education of a school district.

A person who is a state officer, employee, or agent shall pay to the treasurer of state all public moneys received by that person as required by rule of the treasurer of state adopted pursuant to section 113.09 of the Revised Code. A person who is a public official other than a state officer, employee, or agent shall deposit all public moneys received by that person with the treasurer of the public office or properly designated depository on the business day next following the day of receipt, if the total amount of such moneys received exceeds one thousand dollars. If the total amount of the public moneys so received does not exceed one thousand dollars, the person shall deposit the moneys on the business day next following the day of receipt, unless the public office of which that person is a public official adopts a policy permitting a different time period, not to exceed three business days next following the day of receipt, for making such deposits, and the person is able to safeguard the moneys until such time as the moneys are deposited. The policy shall include provisions and procedures to safeguard the public moneys until they are deposited. If the public office of which the person is a public official is governed by a legislative authority, only the legislative authority may adopt such a policy; in the case of a board of county commissioners, the board may adopt such a policy with respect to public offices under the board's direct supervision and the offices of the prosecuting attorney, sheriff, coroner, county engineer, county recorder, county auditor, county treasurer, or clerk of the court of common pleas. If a person who is a public official receives public moneys for a public office of which that person is not a public official, that person shall, during the first business day of the next week, pay to the proper public official of the proper public office the moneys so received during the current week.

Effective Date: 11-02-1999

EXHIBIT 4

9.39 Liability for public money received or collected - unclaimed money.

All public officials are liable for all public money received or collected by them or by their subordinates under color of office. All money received or collected by a public official under color of office and not otherwise paid out according to law shall be paid into the treasury of the public office with which he is connected to the credit of a trust fund and shall be retained there until claimed by its lawful owner. If not claimed within a period of five years, the money shall revert to the general fund of the public office.

Effective Date: 07-01-1985

EXHIBIT 5

R.C. 117.01 Auditor of state definitions.

(A) "Color of office" means actually, purportedly, or allegedly done under any law, ordinance, resolution, order, or other pretension to official right, power, or authority.

(B) "Public accountant" means any person who is authorized by Chapter 4701. of the Revised Code to use the designation of certified public accountant or who was registered prior to January 1, 1971 as a public accountant.

(C) "Public money" means any money received, collected by, or due a public official under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.

(D) "Public office" means any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.

(E) "Public official" means any officer, employee, or duly authorized representative or agent of a public office.

(F) "State agency" means every organized body, office, agency, institution, or other entity established by the laws of the state for the exercise of any function of state government.

(G) "Audit" means any of the following:

(1) Any examination, analysis, or inspection of the state's or a public office's financial statements or reports;

(2) Any examination, analysis, or inspection of records, documents, books, or any other evidence relating to either of the following:

(a) The collection, receipt, accounting, use, or expenditure of public money by a public office or by a private institution, association, board, or corporation;

(b) The determination by the auditor of state, as required by section 117.11 of the Revised Code, of whether a public office has complied with all the laws, rules, ordinances, or orders pertaining to the public office.

(3) Any other type of examination, analysis, or inspection of a public office or of a private institution, association, board, or corporation receiving public money that is conducted according to generally accepted or governmental auditing standards established by rule pursuant to section 117.19 of the Revised Code.

Effective Date: 03-12-2001

EXHIBIT 6