ORIGINAL

IN THE SUPREME COURT OF OHIO

BARBARA ZUMWALDE,	:	**Case No. 2010-0218**
Plaintiff, Appellee,	:	
vs.	:	**On Appeal from the Hamilton County Court of Appeals, First Appellate District**
MADEIRA AND INDIAN HILL JOINT FIRE DISTRICT,	:	
Defendant,	:	**Court of Appeals Case No. C0900015**
and	:	
STEPHEN ASHBROCK,	:	
Defendant/Appellant.	:	

MERIT BRIEF OF APPELLEE BARBARA ZUMWALDE

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INTRODUCTION

R.C. § 2744.09(B) states that "this chapter does not apply to, and should not be construed to apply to...civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision." (emphasis added). Pursuant to the plain language of this statute, most Ohio appellate courts have found that a political subdivision employee may not avail himself of the immunities afforded by Chapter 2744 where he is named as a defendant in a case in which the plaintiff's claim arises out of her employment with a political subdivision.[1]

Despite the unambiguous language of the statute and its relatively consistent application by Ohio's judiciary, Chief Ashbrock contends that individual employees should not be stripped of immunity simply because they are named alongside a political subdivision in a civil action stemming from an employment related dispute. This interpretation of the statutory language must be rejected, however, as it is nothing more than a self-serving request for this Court to ignore the unequivocal intent of the General Assembly and rewrite the statute in a manner so as to afford individual employees protections and immunities not contemplated by the legislature. Moreover, policy considerations weigh in favor of excluding both political subdivisions and their employees from the purview of Chapter 2744 in civil actions arising out of the employment disputes.

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[1] The issue of whether R.C. 2744.09(B) operates to remove the protections afforded by Chapter 2744 from individual employees named as Defendants in cases arising out of the employment relationship has been addressed by the First, Fourth, Eighth, and Eleventh appellate districts.

Accordingly, Plaintiff-Appellant Barbara Zumwalde respectfully requests that Chief Ashbrock's proposition of law be denied and that this Court remand this case back to the trial court for further disposition on the merits.

STATEMENT OF THE CASE AND FACTS

On December 19, 2006, Barbara Zumwalde, a full-time firefighter employed by the Madeira & Indian Hill Joint Fire District ("JFD"), filed a lawsuit against the JFD and its Fire Chief, Stephen Ashbrock. One of Ms. Zumwalde's claims alleged that Defendants violated the Ohio Civil Rights Act by purposefully and maliciously retaliating against her in response to her having engaged in activity protected by the laws of this state. Specifically, Ms. Zumwalde contends that Chief Ashbrock's decision to place her on an unpaid suspension was the direct and proximate result of her having named both him and the JFD as Defendants in an earlier employment discrimination lawsuit.

Following discovery on these issues, Defendants filed a Motion for Summary Judgment contending that Chief Ashbrock was immune from liability pursuant to R.C. Chapter 2744. The trial court denied that motion, finding that because genuine issues of fact existed with regard to whether Chief Ashbrock had purposefully retaliated against Ms. Zumwalde, issues of fact necessarily existed with regard to whether his conduct was malicious, reckless, wanton, or in bad faith. (Appx. at 12). Chief Ashbrock timely appealed the trial court's decision. (Appx. at 1-2).

In the First District Court of Appeals, Ms. Zumwalde argued that Chief Ashbrock should be denied immunity from liability at the summary judgment stage because: (1) the Ohio Political Subdivision Tort Liability Act does not apply to actions arising out of the employment relationship; and (2) even if the Act does apply, genuine issues of fact

exist with regard to whether Chief Ashbrock's suspension of Ms. Zumwalde was motivated by a malicious, retaliatory animus. Finding in favor of Ms. Zumwalde, the appellate court determined that under the exception set forth in R.C. § 2744.09(B), both the JFD and Chief Ashbrock were foreclosed from asserting immunity under Chapter 2744.

Chief Ashbrock now requests that this Court reverse the Court of Appeals' decision and remand the case back to the First District for a determination regarding whether he is entitled to individual immunity pursuant to R.C. § 2744.03(A)(6). Ms. Zumwalde urges this Court to affirm the First District's decision and remand the case back to the trial court for further adjudication on the merits.

ARGUMENT IN OPPOSITION

Proposition of Law: R.C. § 2744.09(B) applies only to claims by an employee against a "public subdivision" for "claims arising out of the employment relationship."

A. The plain language of R.C. § 2744.09(B) precludes both political subdivisions and their employees from asserting immunity in cases arising out of the employment relationship.

Chief Ashbrock contends that "the plain language of R.C. § 2744.09(B) limits its application to claims against the political subdivision if the claim 'arises out of the employment relationship between the employee and the political subdivision.'" (Appellant's Br. at 6) (emphasis added). Based on this assessment of the statute, he concludes that employee-supervisors named as individual defendants in civil actions arising out of an employment dispute between an employee and a political subdivision are entitled to assert immunity normally afforded individuals under Chapter 2744. (Id.).

While this analysis might hold water if the statute actually stated that the exception set forth in R.C. 2744.09(B) was limited to claims by an employee against a

political subdivision, Chief Ashbrock's interpretation must be rejected because the word claim does not appear anywhere in the statutory provision. Rather, R.C. § 2744.09(B) provides that "[t]his chapter, does not apply to, and shall not be construed to apply to...civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision." (emphasis added).

Black's Law Dictionary defines the term "action" as "a civil or criminal judicial proceeding" and further notes that "the terms 'action' and 'suit' are nearly if not quite synonymous." (Garner, ed. 7th ed., West 1999, citing Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3 (2d ed. 1899). Applying the ordinary meaning of the term "civil action" to R.C. 2744.09(B), it is clear that the General Assembly intended to remove the entire "suit" or "proceeding" from the purview of the Political Subdivision Tort Liability Act—not merely those claims alleged against a political subdivision. See *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 336-237, 78 N.E.2d 370 (the legislature is presumed to know the meaning of words and to have used words of statute advisedly and to have expressed legislative intent by use of words found in the statute).

Moreover, analysis of R.C. § 2744.09 as a whole further illustrates that the General Assembly purposefully chose to remove entire "civil actions" arising out of the employment relationship from the ambit of Chapter 2744. Specifically, comparison of R.C. § 2744.09(B) with R.C. § 2744.09(E) forecloses the possibility that the legislature intended, as Appellant suggests, to limit the operation of R.C. § 2744.09(B) to claims against a political subdivision:

> This chapter does not apply to, and shall not be construed to apply to, the following:
>
> (B) Civil actions by an employee, or the collective bargaining unit of an employee, against his political subdivision relative to any matter arising out of the employment relationship between the employee and the political subdivision;
>
> (E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

If the legislature had intended R.C. § 2744.09(B) to apply only to claims raised by an employee against her political subdivision, the legislature could have made its intention clear by using the word "claims" as it did in R.C. § 2744.09(E). However, the General Assembly's deliberate choice in drafting R.C. § 2744.09(B) was to exclude entire "civil actions" arising out of the employment relationship between a political subdivision and an employee—including claims raised in the same action against individual defendants.

Under these circumstances, adoption of the Chief Ashbrock's interpretation of the statutory provision would require this Court to substitute the word "claim" for the word "civil action" in R.C. § 2744.09(B). Because such an act would considerably overstep the judiciary's duty to apply the law as enacted by the legislature, Chief Ashbrock's proposition of law must be squarely rejected. See *Funk v. Rent-All Mart, Inc.* (2001), 91 Ohio St.3d 78, 80, 742 N.E. 2d 127 (Supreme Court of Ohio's duty is to give effect to the words used in a statute, not to delete words used or insert words not used); see also *Bd. Of Edn. v. Fulton Cty. Budget Comm.* (1975), 41 Ohio St.2d 147, 156, 324 N.E.2d 566 (Supreme Court of Ohio does not sit as a superlegislature to amend Acts of the General Assembly).

B. The majority of Ohio appellate courts to directly address the issue have determined that R.C. § 2744.09(B) removes immunity from both political subdivisions and their employees in cases arising out of the employment relationship.

In his brief, Chief Asbhrock attempts to bolster his proposition of law by arguing that the Eighth District Court of Appeals has twice held that § R.C. 2744.09(B) does not apply to an employee's claim against another employee even if that claim arises out of the employment relationship. (Appellant's Br. at 7-8). However, Chief Ashbrock fails to mention that every other court that has considered the issue has construed R.C. 2744.09(B) to remove such civil actions from the purview of Chapter 2744 entirely, including any claims alleged against individual employees.

Indeed, in addition to the First District in this case, both the Fourth and Eleventh Districts have concluded that an employee may not assert immunity if he is named as a defendant in a civil action arising out of the employment relationship between the plaintiff and a political subdivision. See *Nagel v. Horner*, 162 Ohio App.3d 221 at ¶1; 2005-Ohio-3574, 833 N.E.2d 300 (police chief foreclosed from asserting immunity defense pursuant to R.C. 2744.09(B)); *Ross v. Trumbull Cty. Child Support Enforcement Agency*, 11 Dist. No. 2000-T-0025, 2001 WL 114971 at *8 (county official foreclosed from asserting immunity defense pursuant to R.C. 2744.09). Plaintiff-Appellee urges this Court to adopt the conclusion arrived at by the majority of the appellate panels who have addressed the issue and find that Chief Ashbrock is not entitled to individual immunity from Ms. Zumwalde's retaliation claim.

C. Defendant-Appellant's claim that application of R.C. § 2744.09(B) to claims against employees renders R.C. § 2744.03(A) meaningless is wholly unfounded.

In a final attempt to justify his proposition of law, Chief Ashbrock brazenly asserts that "application of R.C. 2744.09(B) to claims against employees of political subdivisions will render R.C. 2744.03(A)(6) meaningless." (Appellant's Br. at 8). Specifically, Chief Ashbrock contends that courts should always apply the two tiered analysis set forth in R.C. 2744.03(A)(6) because that provision "does not limit immunity by the types of claims asserted against an employee of a political subdivision." (Appellant's Br. at 9). This argument must be rejected for several reasons.

First, R.C. 2744.09(B) represents a narrow exception to the Political Subdivision Tort Liability Act which only applies to claims against individual employees who are named alongside political subdivisions in civil actions arising out of the employment relationship. Occasional application of such a pointed provision hardly renders the usual two-tiered individual immunity analysis meaningless and/or obsolete as that analysis still remains in effect with regard to a panoply of actionable claims which may be alleged against a political subdivision or its employees.

The absurdity of this assertion is further evidenced by the fact that Defendant-Appellant concedes earlier in his brief that R.C. 2744.09 "abrogates an employee's entitlement to immunity for other types of claims." (Appellant's Br. at 6). Thus, while Appellant contends that R.C. 2744.09(B) renders R.C. 2744.03(A)(6) meaningless because the latter provision does not "limit immunity by types of claims," he inexplicably does not seem to consider that R.C. 2744.09(A) and (E), both of which limit an individual employee's right to assert immunity by "types of claims," have the same adverse effect on the statute's ordinary operation. (Appellant's Br. at 6 (R.C. 2744.09(A) and (E) establish that employees of a political subdivision may not assert immunity from liability for claims arising out of contracts or alleged violations of federal law)).

Because Defendant-Appellant's argument is wholly unfounded from both a legal and practical standpoint, this Court should disregard it entirely.

D. Policy considerations weigh in favor of denying immunity to political subdivision employees named as defendants in civil actions arising out of the employment relationship.

Practical policy considerations also support the First, Fourth, and Eleventh District's determination that the plain language of R.C. 2744.09(B) denies immunity to both political subdivisions and their employees in cases arising out of employment disputes. Indeed, not only do the usual reasons for providing governmental immunity not apply in cases arising out of the employment relationship, the "manifest statutory purpose" of R.C. 2744—preservation of the fiscal integrity of political subdivisions—is not well served by providing immunity to individual employees while denying it to political subdivisions named as defendants in the same civil action. See *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 81, 873 N.E.2d 878, 2007-Ohio-4839 (explaining purpose of Chapter 2744).

A review of the Political Subdivision Tort Liability Act makes clear that the statutory scheme is designed to afford local government entities and their employees protection from lawsuits arising from acts and omissions committed in the process of providing government services to the general public in accordance with the laws of the municipality, State of Ohio, and/or the United States. Thus, a political subdivision cannot generally be held liable for its police officer's negligent operation of a motor vehicle while responding to an emergency call, *Lewis v. Bland* (1991), 75 Ohio App.3d 453, 599 N.E.2d 814, its water department's negligent repair of underground equipment and utility lines, *FirstEnergy Corp. v. Cleveland*, 179 Ohio App.3d 280, 901 N.E.2d 822, or other such acts and omissions associated with governmental and/or proprietary

functions. Similarly, individual employees are not accountable in damages for negligent acts and/or discretionary decisions associated with carrying out their assigned tasks. See, e.g., *Blankenship v. Enright* (1990), 67 Ohio App.3d 303, 586 N.E.2d 1176 (clerk of common pleas court immune from suit arising from negligent failure to enter judgment).

While clear justification exists for affording political subdivisions and their employees protection for the aforementioned functions associated with their duties to the general public, the same justification does not exist for providing those entities with immunity from liability arising out of their relationship with employees. Indeed, although political subdivisions are often called upon to carry out a unique role in society with unusual duties and responsibilities designed to ensure the proper functioning of local governments, one area where they are not distinctive is the employment arena. Political subdivisions and their supervisory employees have the same rights and responsibilities as private employers to abide by Ohio's employment practices laws; fair and equal administration of those laws is no more difficult or less necessary for a government employer than a private corporation. Thus, while Chief Ashbrock should properly be afforded immunity for discretionary decisions such as how best to manage a large urban fire, he should not be shielded from his decision to discriminate against one of his employees simply by virtue of the fact that he is a government employee. For these reasons, the General Assembly purposefully chose to except civil actions arising out of the employment relationship from the ambit of Chapter 2744's immunity provisions.

Moreover, providing immunity to individual employees while denying it to political subdivisions named in the same lawsuit will do nothing to further Chapter 2744's goal of preserving the fiscal integrity of political subdivisions. See *Menefee v.*

Queen City Metro (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181 (purpose of Chapter 2744 is to conserve fiscal resources of political subdivision). Indeed, in light of this Court's recent decision in *Hubbell* permitting interlocutory appeals of immunity denials, such a policy would require a municipality to not only expend funds defending against the original action with regard to the political subdivision but would also require that it fund one or more appeals available only to the individual employee defendant. *Hubbell*, 115 Ohio St.3d 77. This would not be a wise or judicious use of public resources. On the other hand, adhering to the plain text of R.C. 2744.09(B) and denying immunity to individual employees would ensure a consolidated, expedient civil action.

CONCLUSION

Because the First District heeded the express intent of the General Assembly by determining that this entire "civil action" is exempt from the purview of Chapter 2744, Plaintiff-Appellee Barbara Zumwalde respectfully requests that this Court reject Defendant-Appellant Stephen Ashbrock's proposition of law and remand this case back to the trial court for further adjudication on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via regular U.S. mail to Wilson E. Weisenfelder, Jr. and Laura I. Hillerich, RENDIGS, FRY, KIELY & DENNIS LLP, One West Fourth Street, Suite 900, Cincinnati, OH 45202 on this 6th day of August, 2010.

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