

IN THE SUPREME COURT OF OHIO

David Ayers,

Appellant,

v.

City of Cleveland, et al.,

Appellees.

Case No. 2018-0852

On Discretionary Appeal from the
Cuyahoga County Court of Appeals, Eighth
Appellate Dist., Case No. CA 16 105074

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STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (“OPAA”) is a private non-profit membership organization that was founded in 1937 for the benefit of the 88 elected county prosecutors. Its mission is to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that effect the office of the Prosecuting Attorney; and to aid in the furtherance of justice.

OPAA members routinely defend employees pursuant to the provisions of Chapter 2744 and therefore have a strong interest in issues relating to that Chapter, including employee rights of indemnification. Accordingly, in the interest of aiding this Court’s review of the indemnification issue, specifically whether the provisions of Chapter 2744 permit a judgment creditor of an employee to proceed directly against a public employer, the OPAA offers the following amicus brief in support of the interests of all political subdivisions in the State of Ohio.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the Statements of Facts from the brief of Defendants-Appellees.

ARGUMENT

PROPOSITION OF LAW: The right of a public employee to seek indemnification from a public employer does not extend to a third party under any circumstances. Rather, the right of indemnification is limited to the public employee.

Chapter 2744 does not authorize a judgment creditor to proceed directly against a political subdivision to recover any judgment entered against a public employee. The instant case involves a simple and direct question of law - whether a judgment creditor of a public employee may have that employee’s right of indemnification assigned to it and subsequently seek

indemnification from the political subdivision employer. The answer to this question implicates the financial well-being of every political subdivision in the State of Ohio.

Chapter 2744 is the statutory plan that provides for the immunity from tort liability of political subdivisions in the state. This Court has long recognized that the provisions of Chapter 2744 are designed to protect the fiscal integrity of the political subdivisions affected by this legislative blueprint. The General Assembly carefully defined the rights of both political subdivisions and the employees of those political subdivisions. Because the General Assembly enacted this comprehensive statutory plan, both political subdivisions and their employees are governed by its express provisions. As set forth below, Chapter 2744 limits the right of indemnification to an employee and does not allow for any other party to step into the shoes of that employee. This Court should reject the arguments of Plaintiff-Appellant and affirm the judgment of the Eighth District Court of Appeals.

I. Chapter 2744 of the Ohio Revised Code Creates a Comprehensive Legislative Plan that Limits Tort Liability of Political Subdivisions and Their Employees. (Responsive to Appellant's Arguments I - A, B, and C.)

Chapter 2744 of the Ohio Revised Code sets forth a comprehensive plan enacted by the General Assembly that permits individuals, under strict guidelines and circumstances, to seek redress for injuries received as a result of the negligence of a political subdivision or its employees. This Court has consistently held that the statute serves the purpose of conserving the fiscal resources of political subdivisions by limiting their tort liability. *Menefee v. Queen City Metro*, 49 Ohio St.3d 27, 29, 550 N.E.2d 181, 182 (1990). In that decision, this Court stressed that the state has a valid interest in preserving the financial soundness of its political subdivisions, citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). *Menefee* at 29, 550 N.E.2d

at 183. This holding has consistently been affirmed. *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 669-70, 653 N.E.2d 1186, 1188 (1995). In *Fahnbulleh*, this Court noted that the General Assembly could have made a determination to limit recovery in certain circumstances in order to advance a legitimate state interest. *Id.*, citing *Menefee*, 49 Ohio St.3d at 29, 550 N.E.2d at 183, and *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 353, 639 N.E.2d 31, 38 (1994).

In the context of the monetary caps on damages placed in Chapter 2744, this Court has held that a limit on damages for which a political subdivision may be liable is rationally related to the purpose of preserving the financial integrity of political subdivisions. *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205, at ¶ 10. The Court also noted, “we have already held that the General Assembly could have prohibited *all* tort actions against political subdivisions.... Therefore we cannot say that it is arbitrary or unreasonable for the General Assembly to allow *some* recovery in tort actions.” *Id.* at ¶ 15, other citations omitted (emphasis original).

The General Assembly enacted Chapter 2744 as a response to the judicial abrogation of common-law sovereign immunity. *State of Graves v. City of Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, 922 N.E.2d 2001, at ¶ 12. Accordingly, the express terms of Chapter 2744 control the circumstances and the nature of any recovery against a political subdivision and its employees. As set forth below, the decisions of this Court make clear that the right to bring a civil tort claim against a political subdivision or its employees is governed solely and expressly by the language of the statute enacted by General Assembly.

A critical piece of the statutory blueprint both protects a political subdivision from financial difficulties and also limits the potential exposure of public employees. Chapter 2744 is

replete with references to the negligence of a political subdivision and to the negligent actions of its employees. Thus, employees are protected from liability for any negligent actions that are within the scope of their employment. See, generally, R.C. 2744.02(B).

However, political subdivisions are also protected by Chapter 2744 from liability in a number of circumstances. For example, R.C. 2744.03 expressly provides that an employee may not act outside the scope of the employee's employment or defined official responsibilities. R.C. 2744.03(A)(6)(a). Additionally, an employee cannot act with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 2744.03(A)(6)(b). These protections serve important functions.

First, the limitations protect the public from an employee who fails to act within the confines of an assigned duty or responsibility. An employee acting outside the scope of his or her employment, or in a wanton, willful, or malicious manner, is on clear notice that such behavior will not be protected by the immunity provided for in the statute. Further, any *liability* as the result of such behavior is the responsibility of the employee rather than the public employer.

Second, such provisions clearly protect the financial integrity of a political subdivision. There may be times when a political subdivision would want to deny representation to, as well as indemnification of, an employee who acts outside the scope of employment, or with willful, wanton, or malicious purpose. It would make little sense to enact a comprehensive blueprint to protect the fiscal integrity of political subdivisions and provide protection to their employees if an employee acting in bad faith or with malicious purpose could render the employer liable for his or her actions.

The General Assembly may impose these limitations on recovery and any others that it so chooses. This must be true, because the General Assembly could abolish tort immunity

altogether if it chose to do so. *Menefee*, 49 Ohio St. 3d at 29, 550 N.E.2d at 182-83. Likewise, the General Assembly could also place limitations on the recovery by any party. *Oliver*, 123 Ohio St. 278, 2009-Ohio-5030, at ¶ 13, citing, *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420. It therefore follows that the General Assembly may limit the circumstances under which an individual may recover against a political subdivision *or* an employee of a political subdivision. This conclusion must follow because what the General Assembly may abolish or modify according to its legislative wisdom, it may also limit in a manner that accomplishes its specific statutory purposes.

Here, the General Assembly created a statutory blueprint that permits a claimant to seek recovery for damages caused by the negligence of a political subdivision or its employees. That blueprint is narrowly defined and carefully limited with the express purpose of maintaining the fiscal integrity of the political subdivision. That blueprint also affords protection to the employees of a subdivision when the appropriate legislative guidelines are met. Accordingly, Chapter 2744 excludes a recovery by the Appellant in this case.

II. The Express Provisions of Revised Code Chapter 2744 Do Not Permit a Judgment Creditor to Seek Recovery Against a Political Subdivision in Place of the Public Employee. (Responsive to Appellant's Arguments I - C, D, E, and F, II – A, B, C, and D.)

As noted above, Chapter 2744 is a comprehensive statutory scheme created by the General Assembly. Accordingly, its terms and applications are controlled by the express language of the appropriate statutory provisions. Appellant attempts through a variety of interpretations and obfuscations to create a statutory ambiguity in the terms of the statute to argue that Appellant may proceed to recovery in place of the public employee. However, after applying the statutory plan to the instant case it is clear that there is no ambiguity in the meaning

of the terms used by the statute. Therefore, a third party creditor of an employee is not entitled to indemnification through the public employee.

The Court of Appeals opinion in the instant case determined the city did not indemnify the detectives involved in the underlying action. *Ayers v. City of Cleveland*, 8th Dist. No. 105074, 2017-Ohio-8571 at ¶ 13. The Court also noted that neither of the detectives originally sought to enforce their right to indemnification under the statute. This is a significant finding, since the public employees did not seek a determination of their rights under the provisions of Chapter 2744.

Moreover, the appeals decision correctly held that the purpose of Chapter 2744 was to “...shield the employee from financial ruin resulting from an act committed in good faith and within the scope of employment.” *Id.* at ¶ 31. The Eighth District decision also correctly held that the protections created in statutory immunity for political subdivision employees did not provide an avenue for creditors to collect a monetary judgment from the political subdivision. *Id.* This conclusion is in accord with the determination of the Tenth District Court of Appeals over 27 years earlier. “Further, R.C. 2744.07(A)(2) creates a statutory obligation to indemnify rather than a means to enforce a judgment.” (This section was subsequently renumbered in an amendment to the Chapter.) *Stengel v. Columbus*, 74 Ohio App. 3d 608, 612, 600 N.E.2d 248, 251 (1991).

R.C. 2744.07(A)(1) provides that a political subdivision will provide for the defense of an employee in state or federal court and in any civil action proceeding alleging general tort claims. Under the Definition Section of Chapter 2744 “employee” is defined to mean: an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer’s, agent’s, employee’s, or servant’s

employment for a political subdivision. R.C. 2744.01(B). Accordingly, in creating this comprehensive statutory scheme, the General Assembly assigned a very specific statutory definition to the term “employee.”

As noted in the Revised Code, words and phrases that have acquired particular meaning by legislative definition shall be construed accordingly. R.C. 1.42. The goal of statutory interpretation is to determine the intent of the General Assembly, as evidenced in the statutory language adopted. “The polestar of statutory interpretation is legislative intent, which a court best gleans from the words General Assembly used in the purpose it sought to accomplish. Where the wording of a statute is clear and unambiguous this court’s only task is to give effect to the words used.” *State v. Elum*, 68 Ohio St.3d 585, 587, 629 N.E.2d 442, 444 (1994). When a statute is unambiguous, a court must apply it as written. *State ex rel. Cincinnati Enquirer v. Pike Cty. Gen. Health Dist.*, ___ Ohio St.3d ___, 2018-Ohio-3721, ___ N.E.3d ___, at ¶ 20, citing *State ex rel. Ohio Presbyterian Retirement Servs., Inc. v. Indus. Comm.*, 151 Ohio St.3d 92, 2017-Ohio-7577, 86 N.E.3d 294, at ¶ 19.

When the words of a statute are unambiguous, a court has no cause to apply any rules of statutory construction. *Cincinnati Enquirer*, at ¶ 22, citing *State ex rel. Clay, v. Cuyahoga Cty. Med. Examiner’s Office*, 152 Ohio St.3d 163, 217-Ohio-8714, 94 N.E.3d 498, at ¶¶ 16-17. In fact, this Court has expressly declared that “[i]f we were to brazenly ignore the unambiguous language of a statute, or if we found a statute to be ambiguous only after delving deeply into the history and background of the law’s enactment, we would invade the role of the legislature: to write laws.” *Jacobson v. Kaforey*, 149 Ohio St. 3d 398, 2016-Ohio-8434, 75 N.E.2d 203, at ¶ 8 (emphasis original).

Further, the Appellant is clearly mistaken and misstates the definition created by the General Assembly when he concludes that the phrase “an officer, agent, employee, or servant ...” may be interpreted to mean a judgment creditor as an “agent”. Contrary to the Appellant’s assertion, there is no ambiguity in the definition of “employee” as set forth by the General Assembly. Because it is clear that the statutory definition of employee is concise and narrow, no further review of legislative history or potential, surmised intentions of the General Assembly is necessary. The statutory definition does not provide for any other addition, such as a judgment creditor, to step into the statutory rights of the employee. If the General Assembly had intended that a third-party could exercise such rights it would have more broadly defined the term “employee” than it did in Chapter 2744.

Instead, the definition of “employee” is in fact limited. R.C. 2744.01(B) defines the term “employee” as meaning, “... an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer’s, agent’s, employee’s, or servant’s employment for a political subdivision.” Appellant suggests that the reading of this definition should mean that “agent” is modified by employee, and that a third party creditor is covered by the express language of the statute. However, that reading is only reached by a convoluted construction that the English language prohibits.

A review of the entire phrase produces its intended meaning. The first phrase, “officer, agent, employee, or servant” must be read in conjunction with the second part of the same sentence: “who is authorized to act and *is acting within the scope of the officer’s, agent’s, employee’s or servant’s employment for a political subdivision.*” (Emphasis added.) The General Assembly clearly decided to limit indemnification rights to employees of a political subdivision. This language reinforces the clear intention of the General Assembly that the

immunity provided to a public employee of a political subdivision only extended to negligent acts undertaken within the scope of that employee's duties and responsibilities.

Under no circumstances could any third party judgment creditor be considered an agent acting within the scope of the detectives' employment. If the General Assembly had intended such a result, it would require another sentence, modifying its own limitations. By way of example, the General Assembly could have stated that "employee means an officer, agent, employee or servant...who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision, or a third party who is assigned such rights by the employee." Clearly, the General Assembly chose to write the statute differently. It chose to write the statute in a way that limits a potential recovery only to an employee of a political subdivision. It is undeniable that the General Assembly possesses the authority to so limit the statute.

Appellant's selective parsing of the statutory definition of employee amounts to an exercise of engaging in statutory interpretation to create, and then resolve, an ambiguity where no ambiguity exists. The next phrase, "whether or not compensated or full-time or part-time, who is authorized to act in is acting within the scope of ..." clearly evidences the intention of the General Assembly that these terms are meant to be all encompassing and *limited* to individuals working directly for the political subdivision. A judgment creditor cannot work directly for a political subdivision, and therefore could never be considered to be an employee. That reality excludes a judgment creditor.

If Appellant's interpretation of "employee" is correct, then the preceding section, R.C. 2744.07(A), would have to be read to include a judgment creditor. According to Appellant's theory, then, a political subdivision would be required to provide a defense for an employee *or* a

judgment creditor of the employee. This absurd result must follow from Appellant's proposed definition of "employee" within the statute, because the definition provided by the General Assembly must be read consistently through the entire statutory blueprint of political subdivision immunity. Such an absurd result could not be the result intended by the General Assembly.

Appellant's reliance of comments by any member of the General Assembly on the intent of a statute is misplaced. First, the General Assembly in Ohio speaks through its legislative enactments. A single legislator does not speak for the entire Ohio General Assembly. *State v. Toney*, 81 Ohio St. 130, 140, 90 N.E. 142, 144 (1909). Consequently, legislative intent is determined from the expression of the legislative body as a whole rather the opinion of any single member of the General Assembly. *Nichols v. Villareal*, 113 Ohio App. 3d 343, 349, 680 N.E.2d 1259, 1264 (1996), cited with approval in *State, ex rel. Willke v. Taft*, 107 Ohio St. 3d 1, 2005-Ohio-5303, 836 N.E.2d 536, at ¶ 41.

Second, it is also clear that the expression of any single legislator could mean that public employees were insulated from liability for negligent acts rather than Appellant's assumption that it meant *all* liability. In any event, such a broad meaning ascribed by Appellant is clearly at odds with the specific language selected by the General Assembly.

There is no ambiguity in the term "employee". Therefore, Appellant's arguments regarding other meanings, and the rights of indemnification in general, are irrelevant. Such references and information are unnecessary because the statutory plan enacted by the General Assembly is clear and concise.

Furthermore, it is clear that this narrow definition of employee fulfills the purposes of Chapter 2744. The primary purpose of Chapter 2744 is to protect the fiscal integrity of political subdivisions. It also serves the purpose of protecting an employee who acted in good faith and

whose actions were not manifestly outside the scope of the employee's employment or official responsibilities. *Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585, at ¶ 11. In *Lambert*, the opinion noted that an analysis of an injury claim is comprised of reviewing the actions of both the political subdivision *and* the employee(s) involved. Additionally, the political subdivision would have a further duty to indemnify and hold harmless said employee if a judgment was obtained against the employee for acts or omissions in connection with a governmental or proprietary function, *provided* that the *employee* acted within good faith and within the scope of his or her employment or official responsibilities. *Id.*, citing *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 576, 752 N.E.2d 267, 272 (2001).

It is understandable that Appellant seeks to create ambiguity where none exists inasmuch as part of Appellant's argument relies on the concept of fundamental fairness. It may well be that a deserving party goes uncompensated for an injury in this case. However, no plaintiff is ever guaranteed recovering a judgment despite winning that judgment. There are many instances where a defendant may be judgment-proof. In other instances, it is possible that a plaintiff will recover only a partial judgment. Indeed, as noted above, this Court has upheld the statutory cap on damages as an integral part of the General Assembly's plan in Chapter 2744 to protect the fiscal integrity of political subdivisions. *Oliver*, 123 Ohio St.3d 278, 2009-Ohio-5030, at ¶ 10. Any perceived unfairness expressed by Appellant here is not a sound reason to overturn a comprehensive statutory system.

The provisions of Chapter 2744 are clear and precise. Despite the arguments set forth by Appellant, there is no ambiguity in the language selected by the General Assembly in creating this statutory scheme to protect the fiscal integrity of political subdivisions and, in appropriate cases, the employees of political subdivisions. The term "employee" is clearly limited as set forth

in Chapter 2744. That definition does not allow for any other party, regardless of its connection to, affiliation with, or claim against, an employee to step into the shoes of that employee of the political subdivision. To hold otherwise would enlarge the statutory definition of “employee” created by the General Assembly and would supersede the general design it set forth in Chapter 2744. Accordingly, it is clear that a third party judgment creditor is not entitled to exercise the rights of employee indemnification. Indemnification is exclusively the right of a public employee covered by Chapter 2744. Such a right cannot be assigned to any other person or entity.

CONCLUSION

Chapter 2744 of the Revised Code clearly and unambiguously defines the rights and protections of political subdivisions and their public employees. This statutory blueprint limits the protections granted to political subdivisions and individuals who satisfy the statutory definition of employee. Third party judgment creditors are excluded from the narrow and precise definition of employee. Accordingly, this Court should reject Appellant’s arguments and affirm the judgment of the Eighth District Court of Appeals in favor of Appellees.

Respectfully submitted,

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