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IN THE SUPREME COURT OF OHIO  
CASE NO.: 2018-0852

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Appeal from the Court of Appeals  
Eighth Appellate District  
Cuyahoga County, Ohio  
Case No. CA 16 105074

DAVID AYERS

Appellant

v.

CITY OF CLEVELAND, et al.,

Appellees

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**BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS  
IN SUPPORT OF APPELLEES**

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## **I. STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION**

The Ohio Association of Civil Trial Attorneys (“OACTA”) is comprised of attorneys, corporate executives, and claims professionals dedicated to the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. For more than 50 years, OACTA’s mission has been to provide a forum where dedicated professionals can work together to promote and improve the administration of justice in Ohio. OACTA supports laws and policies that promote predictability, stability, and consistency in Ohio’s civil justice system.

The focus of OACTA is on the legal issue that this Court accepted for review: Whether "Subsection 2744.07(A)(2) reflects the Legislature's intent to permit a judgment creditor to proceed directly against an indemnitor."<sup>1</sup> The issue from OACTA's perspective is whether the Legislature in passing the Tort Liability Act intended to protect plaintiffs/judgment creditors or create an exception to political subdivision immunity that is not expressly in the Act itself? The Act's text, structure, and underlying policy – as well as the prevailing case law interpreting the Act – all dictate that the answer must be, no.

OACTA's members have a pointed interest in ensuring the Political Subdivision Tort Liability Act is properly interpreted. Here, in accord with the Legislature's express language and intent, the Eighth District properly limited indemnification rights to employees and refused to implicitly create an exception to a political subdivision's immunity. This Court should affirm.

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<sup>1</sup> On Appeal, Plaintiff extensively alleges unsubstantiated claims merely to arouse suspicion and inflame passions that are irrelevant to the legal issue before the Court. As the Eighth District Court of Appeals observed, Plaintiff's claims in this regard have "yet to be resolved by a trier of fact" and "conclusory statements concerning the interaction between the City and the officers between the civil judgment and the bankruptcy proceedings are premature at this time." *Ayers v. Cleveland*, 8<sup>th</sup> Dist. No. CA 16-105074, at ¶47. Further, "To the extent a third-party creditor believes the political subdivision's conduct was inappropriate, it may pursue legal action against the political subdivision on other grounds, as Ayers has in this case [i.e., separate claims against the City for tortious interference, breach of contract, aiding and abetting, abuse of process, unjust enrichment, etc.]"

## II. STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts contained in the City of Cleveland's merits brief. On August 29, 2018, this Court accepted the following proposition of law.

## III. LAW AND ANALYSIS

**PROPOSITION OF LAW I: WHETHER "SUBSECTION 2744.07(A)(2) REFLECTS THE LEGISLATURE'S INTENT TO PERMIT A JUDGMENT CREDITOR TO PROCEED DIRECTLY AGAINST AN INDEMNITOR."**

**A. Under R.C. 2744.07(A)(2), the Legislature unequivocally limited standing to assert a claim for indemnification to "employees" of political subdivisions.**

The Eighth District majority properly refused to judicially create a cause of action for a judgment creditor to directly enforce a *political subdivision employee's* right to indemnification or circumvent a political subdivision's immunity. The Legislature did not authorize a judgment creditor to directly sue or recover tort damages from a political subdivision. The language of the Act unequivocally provides an indemnity right only to an "employee" of a political subdivision, not a judgment creditor trying to avoid that subdivision's immunity to recover or enforce a judgment for tort damages.

R.C. 2744.07(A)(2) provides:

Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless **an employee** in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities. [Emphasis added.]

The City's obligations under R.C. 2744.07(A)(2) are owed only to the individuals who are employees of a political subdivision. The term "employee" is unambiguously defined: "'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 ..." R.C. 2744.01(B).

To interpret a statute, this Court must first look at its language to determine legislative intent. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). When a statute's meaning is clear and unambiguous, courts apply the statute as written. *Id.* at 105–106, 304 N.E.2d 378. Courts must give effect to the words used, refraining from inserting or deleting words. *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 53–54, 524 N.E.2d 441 (1988). The plain language of the Act does not provide a direct cause of action or standing to a third-party judgment creditor. The text is unambiguous. The definition of "employee" does not include a third-party judgment creditor.

The Plaintiff's position does not give effect to the words the Legislature used in the Act. To the contrary, Plaintiff urges this Court to add language to the Act that not surprisingly serves the purpose of giving him a direct means of recovery against the City. Plaintiff wants to read into the Act a new right that not only an "employee" but a "third-party judgment creditor" may assert a direct claim against a political subdivision. If the Legislature intended for a judgment creditor to take the place of an employee of a political subdivision, there can be no serious doubt that the Legislature would have expressly done so. *State ex rel. Cassels v. Dayton City School District Board of Education*, 69 Ohio St. 3d 217, 220, 631 N.E.2d 150, 1994-Ohio-92 ("in construing a statute, it is the duty of the court to give effect to the words used and not to insert words not used."); see *O'Toole v. Denihan*, 2008-Ohio-2574, ¶ 57, 118 Ohio St. 3d 374, 383–84, 889 N.E.2d 505, 514 (The canon *expressio unius est exclusio alterius* tells us that the express inclusion of one thing implies the exclusion of the other.). Plaintiff demands direct payment of a judgment by the City, notwithstanding the City was dismissed, with prejudice. There is no basis for the City to pay the

judgment entered against its employees, except on an improper respondeat superior theory. But, “A political subdivision may not be held liable under a theory of respondeat superior unless one of the exceptions to the sovereign immunity listed in R.C. 2744.02(B) applies.” *Reno v. Centerville*, 2d Dist. Montgomery No. 20078, 2004-Ohio-781, 2004 WL 316512, ¶ 53, citing *Lee v. Cleveland*, 151 Ohio App.3d 581, 2003-Ohio-742, 784 N.E.2d 1218 (8th Dist.). The Act only authorizes public employees, not judgment creditors, to obtain indemnification.

The express language of R.C. 2744.07 shows that the Legislature limited the indemnification right to the "employee" and not any other party. Indeed, the Act is concerned with protecting employees and political subdivisions, not third-party judgment creditors. If the Legislature wanted to protect third-party tort creditors, it could have explicitly so stated in this Act or another provision of the Revised Code that expressly would impose liability for tort damages on a political subdivision. The Legislature did not.

**B. The Legislature did not intend to benefit third-party judgment creditors or create a common-law exception to political subdivision immunity for their benefit.**

Review of the Act as a whole, its stated legislative purpose, and case law interpreting the Act establish that R.C. 2744.07's explicit purpose is to protect municipal "employees" by giving them a right to indemnification, not to provide an avenue for creditors to collect a monetary judgment from a political subdivision or avoid a political subdivision's immunity.

**1. The fundamental structure of the Act demonstrates that R.C. 2744.07 does not create an exception to a political subdivision's immunity for a third-party creditor seeking tort damages.**

The analytical structure, or three-tiered analysis, of the Act is well understood in Ohio. In sum, a political subdivision is presumptively immune under the first tier. A political subdivision may lose its immunity under R.C. § 2744.02(A) only if one of the R.C. § 2744.02(B)(1-5) exceptions apply under the second tier of analysis. See e.g., *Hortman v. Miamisburg*, 110 Ohio



St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, ¶ 9. Even then, a political subdivision can regain immunity under the third-tier of statutory analysis. *Id.*; see R.C. § 2744.03.

There is no dispute that the City is a political subdivision, which satisfied the first tier, and is presumptively immune. And, there is no dispute that no exception applies under R.C. § 2744.02(B)(1-5).<sup>2</sup> These are not points of contention among the parties. Nevertheless, Plaintiff seeks to effectively create a common-law exception to political subdivision immunity for claims by third-party tort creditors, a class that the Legislature did not intend to protect.

This Court has expressly held that R.C. 2744.02 begins with an express general denial of liability as to a political subdivision, "**limited only by the exceptions provided in division (B) of the statute.**" *Rankin v. Cuyahoga Cty. Dep't of Children & Family Servs.*, 2008-Ohio-2567, ¶ 30, 118 Ohio St. 3d 392, 397, 889 N.E.2d 521, 525, emphasis added. This is in perfect accord with the Legislature's text that provides: "**Except as provided in division (B) of this section**, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property ... ." (Emphasis added.) R.C. 2744.02(A).

Plaintiff as a third party creditor wants to use R.C. 2744.07 to impose liability for damages on a political subdivision. The Legislature has rejected this. R.C. 2744.02(A)(limiting the exceptions to those narrowly stated in R.C. 2744.02(B)(1-5). This Court has repeatedly rejected efforts to create exceptions outside of R.C. 2744.02(B)(1-5). See e.g., *Rankin v. Cuyahoga Cty. Dep't of Children & Family Servs.*, 2008-Ohio-2567, 118 Ohio St. 3d 392, 889 N.E.2d 521 (rejecting creation of an exception beyond R.C. 2744.02(B)(1-5)); see further e.g., *Cater v.*

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<sup>2</sup> Indeed, none of the exceptions applies to these facts. The injuries in this case did not involve the operation of a motor vehicle (R.C. 2744.02(B)(1)), a proprietary function (R.C. 2744.02(B)(2)), public roads (R.C. 2744.02(B)(3)), physical defects of a building (R.C. 2744.02(B)(4)), or a duty expressly imposed on a political subdivision by statute (R.C. 2744.02(B)(5)).

*Cleveland*, 83 Ohio St.3d 24, 32, 697 N.E.2d 610 (1998)(rejecting that other provisions of Chapter 2744 beyond R.C. 2744.02(B)(1-5) can impose liability on a political subdivision, “R.C. § 2744.03(A)(5) is a defense to liability; it cannot be used to establish liability.”); *Fabrey v. McDonald Vill. Police Dep’t*, 1994-Ohio-368, 70 Ohio St. 3d 351, 356, 639 N.E.2d 31, 35 (the exception to individual immunity under R.C. 2744.03(A)(6)(b) has no effect on an exception to immunity for a political subdivision).

Plaintiff’s interpretation defies the fundamental structure of the Act. The Act by its express terms rejects that the City can be held liable in this case. Again, neither the parties nor the lower courts dispute that the City is immune from liability without exception under R.C. 2744.02(B)(1-5). The Plaintiff naturally seeks the "deepest pocket" to recover and wants by nature of his tort judgment to seek recovery directly against the City – a result that cannot (and has judicially been determined cannot) occur. A judgment creditor is not an employee of the political subdivision. And the Legislature did not carve out an exception for a judgment creditor’s claims under R.C. 2744.02(B)(1-5), or otherwise enact a provision of the Ohio Revised Code that would expressly impose civil liability for damages on a political subdivision under R.C. 2744.02(B)(5).

If the Legislature wanted to define an employee as a judgment creditor under R.C. 2744.01, or offer an exception to immunity under 2744.02(B), or include a novel feature to indemnity rights under R.C. 2744.07, or provide a benefit to a judgment creditor under any of the provisions of the Revised Code to expressly impose civil liability on a political subdivision, there is no doubt it could have and certainly would have done so. But, the Legislature’s silence is devastating to Plaintiff’s position that it intended to give judgment creditors the ability to circumvent the immunities it expressly provided to political subdivisions. This is especially so in light of the general legislative policy underlying the Act to benefit political subdivisions and employees of

political subdivisions. Other than argument, nothing suggests the Legislature sought to benefit third-party creditors by enacting Chapter 2744 of the Ohio Revised Code.

Only an employee of a political subdivision can bring a direct action for indemnification.

**2. The explicit purpose of the Act is to protect political subdivisions from tort damages, not to give judgment creditors a direct route to recover against a political subdivision.**

Ohio's Political Subdivision Tort Liability Act is designed to limit liability, not expand the liabilities and the duties of political subdivisions. Ohio's Political Subdivision Tort Liability Act provides broad immunity to political subdivisions like the City. The Legislature enacted that Act because "the protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services for their residents." *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522 at ¶ 38, citing Am.Sub.H.B. No. 176, Section 8, 141 Ohio Laws, Part I, 1733. The " 'manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.' " *Id.*, citing *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 453, 639 N.E.2d 105 (1994).

The Legislature's overarching intent of the Political Subdivision Tort Liability Act is to protect political subdivisions. The Legislature had no intent to protect judgment creditors by way of the Tort Liability Act. Interpreted in the way that Plaintiff wants would be directly contrary to the Legislature's intent by directly holding a political subdivision liable for tort damages when there was no exception to immunity under R.C. 2744.02(B)(1-5).

Understandably, Plaintiff wants to recover from the City because he believes it is preferable to his cause. But a litigant's or even " 'Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.' "

” *Rankin v. Cuyahoga Cty. Dep’t of Children & Family Servs.*, 2008-Ohio-2567, ¶ 34, 118 Ohio St. 3d 392, 397, 889 N.E.2d 521, 526, quoting *State v. Smorgala*, 50 Ohio St.3d 222, 223, 553 N.E.2d 672 (1990). It is a court’s duty to apply the statute as the General Assembly has drafted it and not to rewrite it. See, e.g., *Bd. of Edn. of Pike-Delta-York Local School Dist. v. Fulton Cty. Budget Comm.*, 41 Ohio St.2d 147, 156, 324 N.E.2d 566 (1975)(“Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute. ... The remedy desired by appellants from this court must be obtained from ... the General Assembly”). This Court has further held that a “statutory policy” may not be implemented by the Ohio courts in a private civil action absent a clear implication that such a remedy was intended by the Ohio Legislature. *Fawcett v. G. C. Murphy & Co.*, 46 Ohio St.2d 245, 249, 348 N.E.2d 144 (1976).

Ultimately, Plaintiff wants to judicially amend R.C. 2744.07 or R.C. 2744.02(B) to allow him as a judgment creditor to directly recover against a political subdivision or to create a common-law exception to a political subdivision's immunity for judgment creditors. Plaintiff's disagreement with Chapter 2744 is for the General Assembly, not for the courts.

### **3. The Eighth District's opinion is in accord with prevailing case law.**

In accord with the Act and the underlying policy behind the Act, Ohio courts analyzing R.C. 2744.07(A)(2) have overwhelmingly held that the statute does not create a private cause of action for judgment creditors or circumvent a political subdivision's immunity. This Court should affirm the appellate court's decision.

Ohio's intermediate appellate districts have found that the Act provides indemnification to employees of political subdivisions and not direct payment by the public employer of a judgment creditor. See e.g.s *Piro v. Franklin Twp.*, 102 Ohio App.3d 130, 65 N.E.2d 1035 (9th Dist. 1995); *Campbell v. Burton*, 2<sup>nd</sup> Dist. No. 99CA12, 1999 WL 940418 \*9, rev and remanded on other

grounds, 92 Ohio St.3d 336 (2001)("clearly" R.C. 2744.07 does not expressly impose liability on a political subdivision); *Anderson v. City of Massillon*, 5th Dist. Stark No. 2013CA00144, 2014-Ohio-2516, ¶ 74-75; *Stengel v. Columbus*, 74 Ohio App.3d 608, 612, 600 N.E.2d 248 (10th Dist. 1991); *Buckeye Union Ins. Co. v. Arlington Board of Education*, 93 Ohio App.3d 285, 288, 638 N.E.2d 170 (3d Dist. 1994).

Federal courts have reached similar conclusions. In an analogous case involving an indemnification cause of action brought against the City of Cleveland by wrongfully imprisoned plaintiffs, the United States District Court for the Northern District of Ohio held that "the right of indemnification [under R.C. 2744.07(A)(2)] is the right of the employee; it does not create a cause of action or any enforceable right against the city in favor of a plaintiff who sues a municipal employee." *Ajamu v. Cleveland*, N.D. Ohio No. 1:12CV1320, 2016 WL 4013596, at \*2 (July 27, 2016), citing *Maruschak v. Cleveland*, N.D. Ohio No. 1:09 CV 1680, 2010 WL 2232669, at \*6, fn. 8 (May 28, 2010). See also *Shoup v. Doyle*, 974 F.Supp.2d 1058 (S.D. Ohio 2013) ("R.C. 2744.07(A)(2) does not provide Shoup with a cause of action against the City or anyone; it imposes a duty on the City to defend its employees from her claims.").

These decisions provide a stark contrast to the Plaintiff's position, which conflicts with the plain language of the Act and the Legislature's purpose and intent.

#### **IV. CONCLUSION**

This Court should affirm the Eighth District Court of Appeals judgment in favor of the Defendant/Appellee City of Cleveland.

Respectfully submitted,

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A copy of the foregoing Amicus Brief of OACTA has been electronically filed and served by regular U.S. mail, postage prepaid, on January 8, 2018 to the following:

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