In the

Supreme Court of Ohio

DONNA L. LUNSFORD, *et al.*
Plaintiffs-Appellees,

v.

STERILITE OF OHIO, LLC, *et al*.
Defendants-Appellants.

Case No. 2018-1431

APPELLEES' MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE
OHIO COURT OF APPEALS, FIFTH APPELLATE JUDICIAL DISTRICT

CASE NO. 2017-CA-00232

S. DAVID WORHATCH 0031174
Law Offices of S. David Worhatch
4920 Darrow Road
Stow, Ohio 44224-1406

330-650-6000 (Akron)
330-656-2300 (Cleveland)
330-650-2390 (Facsimile)
sdworhatch@worhatchlaw.com

Counsel for Plaintiffs-Appellees

JOHN N. CHILDS 0023489
DANIEL J. RUDARY 0090482
Brennan, Manna & Diamond LLC
75 East Market Street
Akron, Ohio 44308
330-253-5060
330-253-1977 (Facsimile)
jnchilds@bmdllc.com
djrudary@bmdllc.com

Counsel for Defendant-Appellant Sterilite of Ohio, LLC

DANIEL A. RICHARDS 0059478
JOSHUA M. MIKLOWSKI 0085690
Weston Hurd LLP
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114-1862
216-687-3256
216-621-8369 (Facsimile)
drichards@westonhurd.com
jmiklowski@westonhurd.com

Counsel for Defendant-Appellant U.S. Healthworks Medical Group of Ohio, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases (cont.) **Page(s)**

Other Authorities

Plaintiffs-Appellees Donna L. Lunsford ("Lunsford"), Peter D. Griffiths ("Griffiths"), Adam Keim ("Keim"), and Laura Williamson ("Williamson") (collectively, "Plaintiffs"), through their undersigned counsel of record, hereby move pursuant to Rule 18.02(B)(4) of the Rules of Practice of this Court for **RECONSIDERATION** of the August 26, 2020, majority opinion to which four justices subscribed in reversing the judgment of a unanimous[1] panel of the Fifth Appellate Judicial District of the Ohio Court of Appeals. The grounds for this motion are that –

(1) In concluding that Plaintiffs did not object – and therefore "consented" – to submission to the "direct observation" method of collecting urine specimens to be screened for the presence or absence of drugs, this Court relied on allegations of the employer's counsel made during oral argument that are **not** rooted in the allegations included in the averments of Plaintiffs' complaint and therefore committed clear error in applying Civil Rule 12(B)(6);

(2) This Court failed to take into account the unintended consequences of handing down what amounted to a *sub silentio* wholesale rewrite of the law of "consent" in this state and the conditions under which "consent" may be deemed to have been given as a matter of law, particularly in the context of an at-will employment relationship;

(3) This Court failed to consider unintended consequences of not simultaneously announcing limitations on the application of its newly announced rule respecting Ohio law on "consent" so that conduct even more outrageous than that described in Plaintiffs' complaint will not be excused in the future, particularly when minors or transgender individuals are involved or when an employer insists on personally observing the urine specimen collection process instead of hiring professional clinical or laboratory personnel to administer that process; and

(4) This Court's decision depends on a conclusion that the record cannot yet support, *viz.*, that Plaintiffs, "beyond doubt" and as a matter of law, can prove no facts to support a claim that would satisfy even the standard articulated by the majority on August 26, 2020, by presenting evidence on remand that they in fact *did* "object" to appellants' insistence that Plaintiffs subject themselves to the "direct observation" method.

---

[1] In discussions with his clients before a decision was made to seek reconsideration, it was not lost them that of the 11 judicial officers of the State of Ohio who reviewed the record on this case at three different levels of the judiciary, *six of the 11 sided with Plaintiffs*.

Such relief is needed therefore to prevent a miscarriage of justice that otherwise would keep Plaintiffs from proceeding with presentation of their proof that they did **not** fail to object to the administration of the "direct observation" method and were threatened with immediate discharge if they did not succumb to their employer's demands.

For the reasons that follow, then, this Court should **GRANT** the motion for reconsideration and vacate its August 26, 2020, opinion and judgment in favor of a new decision that (1) properly applies the established standards for appellate review of a ruling that sustains a motion to dismiss, and/or (2) restores and applies well-established principles of "consent" in this state, and/or (3) limits this Court's holding so that unintended consequences of an even more shocking nature cannot be allowed to happen in the future, and/or (4) fashions a more appropriate remedy by remanding this matter to the trial court with instructions to conduct proceedings on the privacy-based aspects of Plaintiffs' complaint in a manner not inconsistent with the new rule of law articulated by this Court in disposition of this discretionary appeal.

RELEVANT REFERENCES TO WHAT IS … AND IS NOT … IN THE RECORD

The record before the Court upon review of the trial court's decision to dismiss Plaintiffs' complaint under Civil Rule 12(B)(6) as a matter of law consisted *only* of (1) the averments of Plaintiffs' complaint and (2) all inferences from those averments that could be reasonably drawn in Plaintiffs' favor in resisting appellants' motions to dismiss.

While the majority blithely asserts that "[o]n the face of the complaint, [Plaintiffs] consented, without objection, to the collection of their urine samples under the direct-observation method,"[2] the averments of Plaintiffs' complaint say **nothing** about Plaintiffs' alleged failure to

[2] **Opinion**, August 26, 2020 ("**Opinion**"), ¶ 43.

"object" to appellants' sudden use of the "direct observation" method of urine specimen collection by Plaintiffs' employer for the first time in October 2016 after years of using less intrusive means of collecting samples. The majority reasons, curiously, that Plaintiffs "consented by their action"[3] in submitting to the "direct observation" method when confronted with two choices … proceed or be fired.[4] But the record is **devoid** of any allegations in Plaintiffs' complaint that would pass muster under the standards applicable to motions made under Civil Rule 12(B)(6) whereby a court can dismiss a civil action only where such allegations, *on their face*, establish "beyond doubt" that the plaintiff can prove no set of facts upon which relief can be granted on his or her claim, even after all reasonable inferences from his or her allegations are construed in the non-moving party's favor. The same is true, of course, for the prospects of Plaintiffs' proofs that would establish that they in fact *did* "object" to the deployment of the "direct observation" method or at least submitted to it without waiving or relinquishing any rights to challenge their employer's actions at a later date so as to avoid a defense that they somehow "consented" and therefore cannot make a tort claim for injuries proximately caused by appellants' conduct in administering the employer's substance abuse screening program.

The *only* allegations of any "facts" appearing *anywhere* in the record of the proceedings in this case about Plaintiffs' so-called failure to "object" come in the form of statements

---

[3] *Id.*, ¶ 40.

[4] *See id.*, ¶ 25, *quoting Lake Land Emp. Group of Akron, L.L.C. v. Columber*, 101 Ohio St.3d 242, 247, 804 N.E.2d 27, 32, 2004-Ohio-786, ¶ 18 ("the employee's remedy, if dissatisfied, is to quit"). For reasons detailed later in this memorandum, forcing an at-will employee to choose between his or her dignity and a paycheck in order to avoid subjecting himself or herself to the humiliation of bearing his or her genitalia to a perfect stranger to remain employed stretches the concept of "consent" in ways clearly not considered by the majority in articulating its holding in this discretionary appeal.

made during oral argument by the employer's counsel at the **2:15, 2:24, 2:31, and 7:05 marks**[5] of the video record of the oral argument conducted by this Court on January 28, 2020, when such counsel at the **2:15 mark** claimed – *falsely* – that "[a]ccording to the complaint," Plaintiffs lodged no "objection" to deployment of the "direct observation" method and then doubled down on his misrepresentation of the record to this Court by claiming at the **2:24 mark** that "[n]one of the appellees are alleged to have made any contemporaneous objections [to the "direct observation" method] as they were selected for the test or as they furnished a urine sample."

There are no allegations in Plaintiffs' complaint to support either statement! Instead, the complaint is **silent** on the issue of whether Plaintiffs objected,[6] but given the balance of the express allegations of the complaint and the nature of the claims asserted in the first five counts of that complaint, the only reasonable inference that could be drawn from the express allegations is that Plaintiffs either objected or succumbed to the "direct observation" method only after being threatened with the loss of their jobs if they refused. Either such inference is a far cry from contending, as learned counsel opposite did at oral argument, that Plaintiffs' "alleged" that they had lodged no objections to the "direct observation" method! Counsel for Plaintiffs' employer should have known better than to mislead this Court in that fashion.

---

[5] Such video record is accessible online at *https://ohiochannel.org/video/supreme-court-of-ohio-case-no-2018-1431-lunsford-v-sterilite-of-ohio-llc*.

[6] With the help of a word-searching tool in his Word 2016 processing program, Plaintiffs' undersigned counsel scoured his clients' complaint for the appearance of the words "objection" or "object," in any form, and found only two such instances, one each in Paragraphs 12 and 13 of the complaint. Each dealt with the "object" of the employer's drug screening program and did not in any sense make any reference to whether or not Plaintiffs voiced "objections" or in any other way "objected" to the "direct observation" method being deployed for the first time in the employer's history. Thus, there are *no allegations* in the complaint on which the employer's counsel could make the misleading statements he made to this Court during oral argument.

At the **2:31 mark** of the video record of the oral argument, the employer's counsel made the baseless assertion that Plaintiffs "made no complaint about [the procedure] or refused to take the test." *Again, no such allegation appears in Plaintiffs' complaint!* There is **nothing** in the record as yet, one way or the other, on this question, but the mere absence of an affirmative averment that an objection was made does **not** mean that no objection was lodged any more that it means that the "direct observation" method was deployed over Plaintiffs' "objections" or after such "objections" were expressly reserved. There simply is **nothing** in the record at this point on which this Court or the employer's counsel could rely in drawing any such conclusion or inference *against* Plaintiffs in this regard at this early stage of the pleading process.

Lastly, at the **7:05 mark** of the video record of the oral argument, the employer's counsel *alleged* that "[n]one of [the Plaintiffs] objected to [the procedure]." As highlighted already, there is absolutely **nothing** in the record to support the notion that any allegation of Plaintiffs' complaint or any reasonable inference to be drawn from that allegation would support the very issue this Court ultimately regarded as dispositive in this case, namely, that no cause of action for invasion of privacy can lie where an at-will employee "consents, *without objection*, to the collection of his or her urine sample under the direct-observation method."[7]

This is a case in which the trial court justified dismissal of five counts of Plaintiffs' complaint where each of those counts hinged on the availability of an action for invasion of privacy or public policy and it was determined that no such claim was available to Plaintiffs as a matter of law. Hence, what this Court had before it was the question of whether each of those five counts should be tossed out or instead this case should have been remanded to the trial court for further

[7] **Opinion**, ¶ 1 (emphasis supplied).

proceedings not inconsistent with the new rule of law announced on August 26, 2020, in contravention of well-established principles on what constitutes "consent" to an act in this state.

SUMMARY OF THE ELEMENTS OF THIS COURT'S DECISION UNDER SCRUTINY

This Court's decision must be reconsidered in the context of the specific counts[8] of Plaintiffs' complaint that the trial court dismissed. After all, when confronted with appellants' motions to dismiss under Civil Rule 12(B)(6), the trial court was duty-bound to accept all of the allegations of the first five counts of that complaint as true and to draw only such reasonable inferences as may favor the targets of the motion to dismiss.[9] While the United States Supreme Court has expressed the test for the sufficiency of a complaint in civil actions brought in federal courts in more refined terms in recent years,[10] this Court still adheres to the principle that no motion to dismiss can be granted under Civil Rule 12(B)(6) absent a demonstration from the four corners

---

[8] **Count One** states a common law claim for invasion of privacy. **Count Two** alleges wrongful termination of two of the Plaintiffs in violation of public policy protecting at-will employees against discharge when the employer did not make provisions for alternative collection methods in the event the "direct observation" method interfered with or inhibited such employees in their efforts to produce a "valid urine specimen" within the time allotted by the employer and then summarily terminating such employees upon deeming that they had "refuse[d]" to submit to the drug screening procedure" and wrongfully discharging those employees in violation of public policy prohibiting unreasonable intrusion on their seclusion. **Count Three** seeks declaratory relief banning the employer's unfettered, indiscriminate, and arbitrary deployment of the "direct observation" method in all cases. **Count Four** seeks injunctive relief to prevent the employer from deploying the "direct observation" method except in very limited circumstances. **Count Five** seeks to prosecute the claims for declaratory and injunctive relief as a class action on behalf of all similarly-situated employees of the employer.

[9] *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756 (1988); *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584, 589 (1991).

[10] In federal courts, the "no set of facts" standard has been superseded by the following more refined test: "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 561-63, 127 S.Ct. 1955, 1968, 167 L.Ed.2d 929 (2007).

of the non-moving party's pleading *itself* that it is "*beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[11] In this discretionary appeal addressing the propriety of the trial court's decision to dismiss Plaintiffs' complaint as a matter of law, this Court was duty-bound to adhere to foregoing standards of review. Thus, before drawing the conclusion that Plaintiffs, *as a matter of law*, can be deemed to have "consented" to the "direct observation" method of urine specimen collection because of their alleged failure to "object" to that method, there *must* be some allegation in the pleadings that would allow this Court to conclude, again*, as a matter of law*, that "Appellees … proceeded with the drug test under the direct-observation method *without objection*" [12] such that Plaintiffs' failure to allege expressly in their complaint under this state's "notice pleading" rules that they specifically "objected" to their employer's use of the "direct observation" method would be fatal to their privacy-based claims.

There are <u>no allegations</u> in Plaintiffs' complaint bearing on the questions of "consent" or whether Plaintiffs "objected" to "direct observation." Hence, it was clear error for the majority to conclude, as it did, that Plaintiffs "proceeded with "the drug test … without objection" and that – for the first time in the State of Ohio and *as a matter of law* – the mere lack of any "objection" can support a finding that the party who failed to object thereby "consented" to the conduct claimed to be actionable as a tort.

In other words, this Court has now announced that a failure to object to another's erstwhile offensive or hurtful or actionable conduct means that the victim has "consented" to the

---

[11] *O'Brien v. University Community Tenants Union*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753, 754-55 (1975) (syllabus) (emphasis supplied).

[12] **Opinion**, ¶ 10 (emphasis supplied).

tortfeasor's conduct and thereby virtually *licensed* the other person to commit a tort … *that is a first in Ohio*.

STANDARDS OF REVIEW

This Court invokes reconsideration procedures to correct decision that are deemed, upon reflection, to have been made in error.[13] This Court's Rules of Practice do not set forth the standards for reviewing a motion for reconsideration. However, it is possible to borrow from case law under Appellate Rule 26(A)(1) to frame Plaintiffs' burden in seeking reconsideration. Under such cases, the burden is defined as demonstrating *either* that this Court committed an obvious error in its decision *or* that this Court did not consider an issue of consequence or did not fully consider such an issue when it should have been considered.[14] As the Seventh Appellate Judicial District recently observed in *Siltstone Resources, LLC v. State of Ohio Public Works Commission*, 2020-Ohio-729, 2020 WL 995552, ¶ 2 (7th App.Jud. Dist., Feb. 26, 2020):

> … The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not at all or was not fully considered by us when it should have been. [Citation omitted.] An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th [App.Jud.] Dist.1996). Rather, [an application for reconsideration]

---

[13] *See, e.g., State ex rel. Mirlisena v. Hamilton County Board of Elections*, 67 Ohio St.3d 597, 622 N.E.2d 329 (1993) (reasoning contained in a previous dissenting opinion adopted by a majority of this court pursuant to a motion for reconsideration); *State ex rel. Eaton Corporation v. Lancaster*, 44 Ohio St.3d 106, 541 N.E.2d 64 (views contained in a previous concurring opinion adopted by a majority of this court pursuant to a motion for "rehearing"); *State ex rel. Huebner v. West Jefferson Village Council*, 75 Ohio St.3d 381, 661 N.E.2d 339 (1995) (original decision vacated in favor of reasoning of the dissenting opinion upon change in stance of one justice in the 4-to-3 majority in the original decision) (Lunsford's undersigned counsel serving as counsel for the relator in moving for reconsideration).

[14] *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278, 282 (1981).

> provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law. [Citation omitted.]

LAW AND ARGUMENT

Relief on Plaintiffs' motion for reconsideration is needed to prevent *both* (1) a miscarriage of justice through this Court's failure to adhere to the proper standard for review that applies to motions to dismiss under Civil Rule 12(B)(6) *and* (2) unintended consequences not considered by this Court in handing down what amounted to a *sub silentio* wholesale rewrite of the law of "consent" in this state and how "consent" can be deemed to have been given as a matter of law, particularly in the context of the at-will employment relationship and irrespective of the lack of any allegations in the pleadings or evidence otherwise properly appearing in the record on the question as framed in this Court's majority decision.

I. RECONSIDERATION WILL ALLOW THIS COURT TO CORRECT A CLEAR ERROR BY FOCUSING ON THE ACTUAL RECORD INSTEAD OF THE MISLEADING RENDITION OF IT THAT THE EMPLOYER'S COUNSEL SHARED WITH MEMBERS OF THIS COURT DURING ORAL ARGUMENT.

In preparation for drafting this motion, Plaintiffs' undersigned counsel watched and listened to every minute and second of the video record of the January 28, 2020, oral argument in this matter. Plaintiffs' counsel did **not** even remotely acknowledge or agree or stipulate or concur in respect to any notion that his clients failed to "object" to deployment of the "direct observation" method.

Not once.

The same holds true for each of the briefs filed on behalf of Plaintiffs in opposing appellants' motions to dismiss in the trial court … and filed as appellants in support of Plaintiffs'

assignments of error in the Fifth Appellate Judicial District … and filed as appellees in this Court in urging affirmance of the appellate court's unanimous decision.

The misleading comments of the employer's counsel led the justices of this Court to believe the record somehow supports a contention that Plaintiffs failed to object when it plainly does not. There are **no allegations** in Plaintiffs' complaint to support such a conclusion and no reasonable inference can be drawn in favor of Plaintiffs, as the targets of appellants' motions to dismiss, or even *against* them, that would have saddled them with a conclusion that their alleged failure to "object" would be fatal to any of their five privacy-based claims.

This Court's introduction of its holding in the first paragraph of its August 26, 2020, decision *and* its articulation of the specific holding at the end of that opinion[15] clearly depend on the majority's finding that the record somehow supports a conclusion that plaintiffs "consented" to the "direct observation" method by submitting to the same "without objection."

How did the employer's counsel know Plaintiffs did not "object"? For that matter, *how did the four justices in the majority know?* The question of whether or not Plaintiffs "objected" is **not** to be found anywhere among Plaintiffs' allegations of fact in their complaint, or from any reasonable inferences from such allegations that could be drawn in favor of *Plaintiffs*, or from any statements made or positions advocated on Plaintiffs' behalf by their counsel, or through any comments made by Plaintiffs' counsel during oral argument on January 28, 2020. Hence, the employer's counsel engaged in *pure unsupportable speculation* when he claimed at the 2:15, 2:24, 2:31, and 7:05 marks of the video record of the oral argument that the allegations of the complaint somehow establish that Plaintiffs "consented" because they supposedly have acknowledged they

[15] **Opinion**, ¶ 44.

did not "object" to the "direct observation" method, thereby supposedly establishing "beyond doubt" that Plaintiffs never could prove otherwise.

The conclusion shared by employer's counsel and the four justices in the majority simply does **not** follow logically from the predicate. Just because the complaint is *silent* on whether Plaintiffs in fact "objected" does **not** mean, as a matter of law, that Plaintiffs ultimately will not be able to show that they did "object" or are estopped to claim they "objected."

Until this Court announced its 4-to-3 decision on August 26, 2020, the question of whether or not Plaintiffs "objected" to the "direct observation" method was **irrelevant**. After all, the sole allegation directed at this issue among the allegations of Plaintiffs' complaint is that the "Consent and Release" form[16] that the employer's agent presented to Plaintiffs *before* letting them know[17] that the "direct observation" method would be used instead of the customary method[18] used in administering prior drug screening procedures did **not** "specify that the Plaintiffs knowingly, voluntarily, and willingly consented to the use of the 'direct observation' technique when other less intrusive methods for collecting urine specimens were available to the Employer and its agent."[19] For reasons detailed in the next section of this memorandum, the law in Ohio was that "consent" had to be established by evidence that the "consenting" party *knowingly* and *voluntarily* gave his or her consent and **not** by the notion that such party's failure to "object" to being subjected to tortious behavior amounted to his or her "consent" to be victimized.

---

[16] **Complaint**, ¶ 15.

[17] *Id.*, ¶¶ 14-15 (the form was presented as the employer's agent commenced the process).

[18] *Id.*, ¶ 11.

[19] *Id.*, ¶ 15.

Indeed, the "Consent and Release" form itself said **nothing** about deployment of the "direct observation" method[20] or Plaintiffs' "consent" to the use of that technique. Instead, the form merely (1) authorized the employer's agent to collect a urine specimen (without disclosing that "direct observation would be used for the first time in the employer's history), (2) acknowledged that the urine specimen was being collected for the purpose of subjecting it to urinalysis for the possible presence of illegal drugs, and (3) consented to the agent's reporting the results of the screening to the employer.

Nowhere was the "consent" of the employee solicited for the specific method to be used on collecting the sample. Thus, allegations of the failure to "object" were **not** germane to the statement of Plaintiffs' privacy-based claims, as the issue of whether or not Plaintiffs' "objected" was **not** important since the "Consent and Release" form did **not** solicit "consent" to the "method," just the collection of a sample, the processing of it, and the reporting of the results to the employer … that is, the question of any form of "objection" never became germane until the majority made it so in its August 26, 2020, opinion.

All of the majority's emphasis on Plaintiffs' alleged failure to "object" is now important only because of the holding of this Court in this case. After all, the majority expressly declared that this case was resolved *exclusively* on the strength of the *second* proposition of law advanced by the agent for collection of Plaintiffs' urine specimens, *to-wit*:

> Ohio law does not recognize a cause of action for invasion of privacy against independent third-party laboratories or their trained staff who are hired to collect and test urine samples as part of a drug testing policy between an employer and employee by the direct observation method of

---

[20] **Opinion**, ¶ 4 ("The [substance-abuse policy] … provides that urinalysis will be used to test for an employees' illegal use of drugs or improper use of prescription or over-the-counter drugs, but is silent on how the urine sample will be collected.").

> collection when the employee signs a consent authorizing any testing necessary to determine the presence or level of drugs.

Opinion, ¶¶ 16-17. Nowhere in that proposition is there any contention that "consent" can be *inferred* from the failure to "object" to the method used to collect urine specimens even where the "Consent and Release" form that Plaintiffs were required to sign made no mention of that method. And it is clear that the majority did **not** rely on that "Consent and Release" form in reversing the court below.[21] Thus, the holding announced by the majority on August 26, 2020, hinges on the conclusion that the allegations of Plaintiffs' complaint themselves somehow demonstrated "beyond doubt" that no set of facts could be proved to escape the conclusion that by merely submitting to their employer's urine specimen collection process, *ipso facto* "appellees consented, *without objection*" to the use of that method.[22]

Again, the majority's conclusion does **not** follow from the predicate. Plaintiffs were **not** required at the motion-to-dismiss stage of the pleadings to *prove* their case to avoid dismissal. All they had to establish is that they stated a claim on which relief can be granted under long-held principles stemming from this Court's articulation of the tort of invasion of privacy in *Housh v. Pesh*, 165 Ohio St. 35, 133 N.E.2d 340 (1956). Proof of that claim would come at a later day.

In essence, however, and in spite of the fact that Ohio is a "notice pleading" state, the majority's decision evidently sets up a prerequisite to pleading an invasion-of-privacy claim at least in the context of administering a substance abuse screening program in an at-will employment

---

[21] *Id.*, ¶ 39 (omission of a specific disclosure in the consent form used in this case that the direct-observation method would be deployed, according to the majority, "does not change the outcome here").

[22] *Id.*, ¶ 43 (emphasis supplied).

setting, *viz.*, that the employee must be careful to allege that he or she "objected" to the method used by the employer in gathering the specimen and/or that the manner in which the individual went about collecting the specimen was "highly objectionable." Otherwise, the rule laid out by the majority does **not** follow from the predicate.

A complaint cannot fail to state a claim upon which relief can be granted unless the averments of that complaint, *in toto*, demonstrate on their "face" and "beyond doubt" that the plaintiff **never** could prove any set of facts to negate the inference of the majority's new rule that a mere failure to "object" could support the defense of "consent" needed to avoid liability. Whether or not Plaintiffs could meet that burden in this case is unknowable at this juncture, as all this Court has before it now are the pleadings. Not one averment of Plaintiffs' complaint or any reasonable inference to be derived from Plaintiffs' allegations can support appellants' contention that it is "beyond doubt" that Plaintiffs could never prove they "objected" to their employer's use of the new "direct observation" method.

Plaintiffs must be allowed their chance to develop the record by introducing evidence of the extent to which they in fact "objected."[23] Only in that fashion would any court be able to determine, as a matter of law, whether such evidence was sufficient to stave off a defense to their five privacy-based claims rooted in this Court's new standard that "an at-will employee has no cause of action for common-law invasion of privacy" when he or she "consents, without objection, to the collection of the employee's urine sample under the direct-observation method."[24]

---

[23] At a minimum, reconsideration should be granted to modify this Court's mandate by ordering remand of this matter to the trial court for further proceedings not inconsistent with the majority's newly announced rule for the reasons detailed in the fourth part of the "Law and Argument" section of this memorandum.

[24] **Opinion**, ¶ 44.

Since this Court was bound by the same standards of review as the trial court when considering appellants' motions to dismiss under Civil Rule 12(B)(6), it could **not** rely on the misrepresentations of the employer's counsel respecting what Plaintiffs' complaint says or does not say about whether they proceeded to submit to the "direct observation" method "without objection." Nor could this Court draw conclusions or inferences that Plaintiffs failed to "object" merely from allegations of their conduct in submitting to the "direct observation" method after being threatened with the loss of their jobs if they persisted in objecting or outright refused to comply. This Court's decision of August 26, 2020, articulates the principle that an invasion of privacy victim's failure to "object" to allegedly tortious conduct amounts to "consent" to be subjected to the ill effects of such conduct. While that rule has ramifications for Ohioans far beyond the at-will employment setting, it remains that if this Court is going to adopt that standard, Plaintiffs in this case have the right to try to meet that standard. They cannot be disadvantaged by the unfortunate happenstance of being the first alleged victims of a drug screening program that allegedly was administered in such a way as to expose their employer and the specimen-collecting agent to a claim for invasion of privacy, only to be denied because their counsel did not know until August 26, 2020, that his clients' complaint in this "notice pleading" state had to aver specifically that Plaintiffs lodged "objections" to the "direct observation" method or took some cognizable steps to proceed with the specimen collection process without prejudice to such "objections."

The opinions or mere allegations of fact or suppositions advanced by the employer's counsel about what the evidence ultimately might show on this issue were **not** proper grounds for sustaining a motion to dismiss. All that mattered is what Plaintiffs' complaint alleges … and *not one word* is alleged about failing to "object" to the "direct observation" method.

Thus, the majority clearly committed error by relying on such opinions, allegations, or suppositions in articulating a new rule insulating at-will employers from invasion-of-privacy lawsuits as a matter of law even when management threatens to terminate an employee summarily unless he or she allows his or her privacy to be invaded by allowing a same-sex stranger to gawk at his or her genitalia as he or she struggles to produce a specimen under such conditions or be deemed to have refused if unable to do so under such conditions. The majority's opinion hinges on whether or not "consent" was given by Plaintiffs by not "objecting" to being forced to submit to the "direct observation" method. However, the book is **not** closed on whether it Plaintiffs could ever prove that they "objected" or proceeded only upon preserving their objections and "cooperating" without prejudice to the full effect of such "objections" at a later date, *e.g.*, at a trial on the merits of their invasion-of-privacy claims. After all, the majority's decision did **not** close the book on any such invasion-of-privacy claims against an at-will employer. All that are foreclosed as a matter of law are those claims where the "employee consents, without objection" to the collection of urine specimens under the "direct observation" method. Nowhere in this Court's majority opinion are privacy-based claims foreclosed where the employee can demonstrate, as Plaintiffs are confident they would in this case, that he or she in fact "objected" or suffered indignities or physical or emotional harm as a proximate result of how the specimen collector comported himself or herself while the employee's genitalia were exposed.

For these reasons, then, the Court should **GRANT** this motion for reconsideration and correct the clear error by reinstating the Fifth Appellate Judicial District's decision and allowing Plaintiffs to proceed with prosecuting their claims under whatever new standard this Court should articulate through the reconsideration process. While a majority of this Court's justices has the authority to articulate a rule of law that equates a failure to "object" to an expression of

"consent" to submit to a "direct observation" urine specimen collection process by which a judgment for damages might be pursued for an actionable "intrusion on seclusion" common law privacy claim, it **cannot** rule in Plaintiffs' case – and on the record *actually* built to date – that the allegations of Plaintiffs' complaint reveal "beyond doubt" that Plaintiffs can prove no facts to establish that they did in fact "object" in such a fashion as to avoid a "consent" defense of the sort embraced by the majority in adopting its new rule. If such a conclusion is to be reached upon reconsideration *as a matter of law*, it must be rooted in faithful adherence to the proposition that each and every one of the allegations of Plaintiffs' complaint is true, that every reasonable inference that may be drawn from such allegations is in Plaintiffs' favor, and that no part of this Court's decision can be based on mere self-serving opinions, allegations, and suppositions introduced by counsel for either of the appellants during oral argument.

II. RECONSIDERATION SHOULD BE GRANTED TO ADDRESS UNINTENDED CONSEQUENCES OF THE MAJORITY'S WHOLESALE REWRITE OF THE LAW OF "CONSENT" IN THIS STATE AND THE CONDITIONS UNDER WHICH "CONSENT," AS A MATTER OF LAW, MAY BE DEEMED TO HAVE BEEN GIVEN, PARTICULARLY IN THE CONTEXT OF AN AT-WILL EMPLOYMENT RELATIONSHIP.

As detailed above, when it comes to the question of "consent" in the present posture of this case, what matters, *before* all of the evidence is in and can be evaluated, is what is found within the four corners of Plaintiffs' complaint. Sheer speculation by appellants' counsel or a majority of the members of this Court that Plaintiffs "did not object" – and therefore "consented" – to their deployment of the "direct observation" method have no place and were inappropriate in the context of appellants' Civil Rule 12(B)(6) motions and reconsideration therefore should be granted for the reasons already outlined in the first section of this "Law and Argument" section of Plaintiffs' memorandum. Plaintiffs' complaint says **nothing** about "consenting" (or failing to

"object") to the "direct observation" method. In the end, it was improper for this Court to indulge appellants' fanciful claims that by failing to allege in the complaint that Plaintiffs "objected" once they discovered that appellants would follow the "direct observation" protocols ordered by the employer, it can be *inferred* that no such objections ever were lodged in any form at any time.

This part of the argument in support of reconsideration, however, focuses on the majority's failure to consider the unintended consequences of laying down a general rule that the defense of "consent" to a tortious act can be established merely by showing that the victim of the tort did not "object" to the allegedly tortious behavior. As this Court's decision has ramifications that transcend the at-will employment context of this case, Plaintiffs urge this court to **GRANT** reconsideration to reshape the rule it has now articulated and, in doing so, recognize that its rule also is unworkable in Plaintiffs' circumstances.

Plaintiffs' submission to their employer's drug screening protocols was anything but "voluntary." They did so only under threat of immediate dismissal if they balked.

While is it true that an at-will employment relationship grants both employer and employee a great deal of latitude when it comes to terminating their relationship, this Court recognizes that there are limits, rooted in public policy, that frame the extent to which an employer can exercise its privilege of ending the relationship, whether expressly or constructively. One of those limitations is that hiring someone in an at-will employment capacity does **not** confer on the employer a virtual license to commit intentional torts that harm the employee. On August 26, 2020, a majority of this Court traipsed farther down the path toward allowing employers to exercise unfettered discretion in the at-will work setting than ever before. It should take the opportunity presented by Plaintiffs' motion, then, to consider the unintended consequences of its decision on

the rights and expectations of the all-too-forgotten other party to the at-will employment relationship … the at-will employee.

Even though members of this Court and the appellants' counsel acknowledged during oral argument that an at-will employer cannot expect to avoid liability for invasion of privacy if the "direct observation" was **not** limited to same-sex observation[25] or the owner of the company himself or herself wanted to do the observing personally instead of hiring a clinical or laboratory technician to collect the specimens in this fashion,[26] the majority's opinion lays down **no limits** in blithely holding that an at-will employee has no recourse when he or she "consents, without objection" to such offensive behavior by not walking off the job or simply succumbing to the pressure placed on the employee by management's threat to terminate the employee if he or she does not give in to the intrusion on his or her most private of affairs.

There are other unintended consequences to this Court's new rule that an at-will employee's failure to "object" to the "direct observation" method amounts to a "consent" to baring one's genitalia in order to keep his or her job. For example, would this Court disallow civil actions against employers who might try to condition continued employment in an at-will setting on expressly or implicitly "consenting" to an intentional assault by not "objecting"? Or "consenting" to an act of sexual imposition by not "objecting"? Or "consent[ing], without objection," to assist his or her employer in perpetrating a fraud on a customer? Or "consent[ing], without objection," to acts that would assist a company's owner in falsely reporting materials testing results or fraudulently certifying a component's compliance with industry or regulatory standards for

---

[25] **Video Record of Oral Argument**, January 28, 2020, at the 9:10, 12:19, and 12:56 marks.

[26] *Id.* at the 9:46, 10:16, and 13:04 marks.

manufacturing or performance? Or "consent[ing], without objection," to look the other way as Medicare fraud is committed? Or "consent[ing], without objection," to condoning, tolerating, excusing, or engaging in acts of defamation?

The majority's wholesale rewrite of Ohio law of "consent" – and particularly how the mere failure to "object" can, in all instances, prove *implied* "consent"[27] – spawns a wide variety of such unintended consequences that were not considered in this Court's majority opinion, but should have been. Indeed, lost in the shuffle of the majority's reasoning is the distinction between "consenting" to giving urine specimens for substance abuse screening purposes and "consenting" to allowing a complete stranger to focus on one's genitalia as the specimen is harvested. It is as if the majority are satisfied that at-will employees in the work setting should be able to rely on the good faith of their employers to sort it all out. While expecting people to act in the interests of

---

[27] The majority really stretched to find some authority in America for this proposition. It settled upon an unreported 1996 decision of an intermediate appellate court of the State of Tennessee in *Stein v. Davidson Hotel Co.*, Case No. 01-A-01-9509-CV-00407, 1996 WL 230196 (Tenn.App., May 8, 1996). The facts in *Stein*, however, are plainly distinguishable from Plaintiffs' case. In *Stein*, the court specifically found that the employee had "waived" her right to claim damages for an invasion of privacy supposedly committed in the course of having to submit to an employer-ordered drug screening procedure because she was working for the employer when the drug screening policy went into effect and had continued to do so for two years without quitting or challenging the policy in court " even though she knew the nature of the test and that [her employer] could choose her for a test at any time." *Id.* at *9. By contrast, Plaintiffs had been subjected to drug screenings that **never** included "direct observation," but when Plaintiffs were subjected to the "direct observation" method the *first time*, they banded together to sue appellants. Plaintiffs did not "waive" anything. They did not wait two years before suing. They did not sit on their rights. The immediately sought redress for the invasion of their privacy. So, whether this Court treats this as a "consent" case or a "waiver" case, the outcome in Plaintiffs' circumstances should be the same … Plaintiffs never "consented" to the "direct observation" method or "waived" their privacy claims by waiting too long to assert them. Unlike the plaintiff in *Stein*, Plaintiffs asserted their causes of action *immediately* upon being subjected to "direct observation" the first time the employer ordered that method of urine specimen harvesting.

their employees as well as themselves is well and good, as far as it goes, the law is supposed to be available to individuals when the better instincts of human beings falter.

The new rule laid out by the majority in this case offers no answers – or limits – and therefore at-will employees all across Ohio face predictable consequences from the majority's failure to consider all of the ramifications of holding that "consent" to an intrusion on one's right to seclusion can be "implied" merely from a failure to "object" when an at-will employer's unilateral decision to insist on some objectionable, questionable, immoral, or borderline or outright unlawful conduct as a condition to keeping one's job. *Today*, that condition is to require all of its employees to bare themselves from the waist down in front of a perfect stranger as they void into cup. *Tomorrow*, the condition exacted by another at-will employer may be far worse and even more outrageous.

What are the limits of this Court's 4-to-3 decision? Where will it end now that the nose of the camel has been allowed to poke into the individual tents of employees of an at-will employer in Massillon, Ohio? If "consent" can be implied in this case from Plaintiffs' submitting to the "direct observation" method "without objection" while under the threat of immediate discharge for refusing, it is not hard to imagine what else an at-will employer could conscript its employees to do for the sake of not losing their jobs.

The point of this case is – and remains – that the law in this state cannot be that an at-will employee must check his or her dignity at the door when reporting for duty each day.

The law does accord at-will employers in the private sector a great deal of latitude when it comes to maintaining and safe and productive work environment. However, management can go too far. How far is too far in terms of intruding on the at-will employee's most private of affairs? Only the trier of *fact* can make that decision based on the evidence. *Housh* says as much

and thankfully this Court did not overrule *Housh* in deciding this case. Thus, since *Housh* remains good law, the question of how far is too far in the context of invasion-of-privacy cases is one for the trier of *fact*. It is a decision most assuredly that a court cannot make *as a matter of law* absent some extraordinary circumstances where the plaintiff in this "notice pleading" state alleges facts that clearly preclude recovery.

In this case, the majority drew the conclusion that Plaintiffs impliedly "consented" when they did not walk off the job or refuse to submit to their employer's "direct observation" method. In Ohio, "consent" and "waiver" are tantamount to the same thing.[28] If one "consents" to an act that otherwise would serve as the basis for an actionable tort, he or she effectively "waives" the opportunity to sue for damages caused by tortious conduct. In Ohio, then, "consent" or "waiver" can be shown only upon "a voluntary relinquishment of a known right or such conduct as warrants an inference of relinquishment of such right" under circumstances where the relinquishment of the right does not itself violate public policy.[29] One of the essential elements of a "waiver" under Ohio law is a *knowing* intention to relinquish a right.[30] In this case, the "right" was to be free from intrusion into one's most private affairs.

---

[28] Lest there be any doubt about this, Plaintiffs note that this Court relied on "waiver" principles articulated in the unreported Tennessee Court of Appeals case of *Stein v. Davidson Hotel Co.*, *supra*, as authority for the proposition that Plaintiffs "consented, without objection" to the "direct observation" urine specimen collection method at issue in this case. Thus, a majority of this court equates principles of defining when a "waiver" takes place with those defining when "consent" takes place.

[29] *See generally* 42 O.JUR.3D *Estoppel and* Waiver § 93 (collecting cases).

[30] *Id.*, § 94 (collecting cases). "A person cannot be bound by a waiver of his rights … unless such waiver is distinctly made." *Id.*, *citing Karly Kiefer Machine Company v. Henry Hiemes, Inc.*, 82 Ohio App. 310, 80 N.E.2d 183 (1948).

On reconsideration, this Court should square the new rule on *implying* "consent" to defeat an invasion-of-privacy claim in the at-will reemployment context with the fundamental principle that "consent" or "waiver" can operate as such a bar *only* if the "consent" or "waiver" represent a *knowing* intent to relinquish the right to remain free from any number of outrageous acts by an at-will employer. Where an at-will employer asks one of its employees to cooperate in perpetrating a crime or a fraud, would the employee have any recourse for the loss of income and suffering the employer would cause if employee is fired for refusing? This Court's decision in this case seems to suggest that such an employee would **not** have such a claim and that his or her only recourse would be to walk out the door or be prepared to be fired for being insubordinate. And since insubordination is one of the grounds for disqualifying a displaced worker from receiving unemployment benefits, this Court's new rule will force at-will employees to choose between allowing their employers to expect cooperation in a wide variety of unsavory acts and landing on the unemployment line.

The most that can be said for appellants is that upon *conscripting* Plaintiffs to submit to drug screenings under the threat of immediate discharge if they refused, Plaintiffs dutifully honored their employer's instructions. However, since the "consent" form did **not** expressly reflect any sort of "intention to relinquish" any right to challenge the *manner* in which the employer would conduct its drug screenings by means of deployment of the "direct observation" technique, Plaintiffs' acts in signing such form and going through with the urine specimen collection process, as outrageous and offensive as it was so they would not wind up on the unemployment line, should **not** be regarded under our state's law as a knowing "waiver" of any claim(s) seeking redress from appellants for having compelled Plaintiffs to do so … and therefore should **not** be regarded, *as a matter of law*, as some form of implied "consent" to allow appellants to intrude upon their privacy.

The majority's failure to consider all of these additional consequences and ramifications of the expedient result fashioned in this case should be corrected upon reconsideration.

In the last analysis, this Court – for the first time in Ohio jurisprudence – has sanctioned the notion that an at-will employer, by virtue of that relationship, has a virtual license to commit a tortious act and expect its employee to go along with it or quit. There is **no authority** for such a proposition. This is because the at-will employment relationship is, at its base, a contract and (1) the object of every contract in this state must be legal in that the act or forbearance to be accomplished must not nullify another principle of law and (2) Ohio courts will not enforce a contract with an illegal purpose, as such a contract is void and no rights can arise from such a contract.[31] Thus, an at-will employer **cannot** be allowed to assume that an implied term of every at-will employment contract is that the employee is forced to comply with *any* instruction to commit *any* form of unlawful or fraudulent act and silently endure *any* form of indignity or embarrassment because the employee's only recourse is to surrender his or her job and join the ranks of the unemployed.

Is *that* the kind of state a majority of the justices of this Court want to leave as a legacy for their children and grandchildren?

Ohioans deserve better than the result announced in this case. They need protection against employers who ask too much of them just because management knows its employees' only recourse is to quit if they refuse to give in.

---

[31] *See, e.g., Minister Farmers Cooperative Exchange Company, Inc. v. Meyer*, 117 Ohio St.3d 459, 464, 884 N.E.2d 1056, 1061, 2008-Ohio-1259, ¶ 28; *Cumpston v. Lambert*, 18 Ohio 81, 87, 1849 WL 86 (1849); *Jackson v. Bryant*, 33 Ohio App. 468, 472, 169 N.E. 825, 826 (1929); *Snyder v. Snyder*, 170 Ohio App.3d 26, 33, 865 N.E.2d 944, 949, 2007-Ohio-122, ¶ 32.

The act of submitting to the "direct observation" method of collecting urine specimens under threat of termination for refusing to comply, does **not** remotely suggest that Plaintiffs either authorized appellants to invade their privacy, or to gather their urine specimens by the "direct observation" method, or to release appellants from any claims for invading Plaintiffs' privacy. However, the very *worst* that can be said for Plaintiffs' submission to the specimen harvesting process is that it would be up to a jury to decide whether the steps appellants' required Plaintiffs to endure were sufficiently unreasonable and outrageous as to cause Plaintiffs, as persons "of ordinary sensibilities," to suffer outrage, mental distress, embarrassment, and/or humiliation.

That is the legacy the members of this Court should leave for their children and grandchildren … and, indeed, for *all* of the people living and working in the State of Ohio.

For all of the foregoing reasons, this Court should **GRANT** this motion for reconsideration and refine its ruling of August 26, 2020, to address the issues that it should have considered in respect of all of the ramifications, implications, and consequences of the way it found that Plaintiffs' "consented" by merely going through with the objectionable behavior management had ordered under the threat of sudden loss of income if they refused. After all, this Court's decision will reach far beyond the scope of the at-will employment relationship and will allow tortfeasors and their insurers to claim "consent" in circumstances heretofore hardly imaginable. However, at least in the context of at-will employment relationships, this Court should vacate the August 26, 2020, decision in favor of applying standards more in line with the principles developed since 1956 through *Housh* and its progeny.

III. RECONSIDERATION WILL ALLOW THE ENTIRE COURT TO ADDRESS THE UNINTENDED CONSEQUENCES OF THE MAJORITY'S FAILURE TO ANNOUNCE PRACTICAL LIMITATIONS ON ITS NEWLY ANNOUNCED RULE SO THAT CONDUCT EVEN MORE OUTRAGEOUS THAN THAT DESCRIBED IN PLAINTIFFS' COMPLAINT WILL NOT BE EXCUSED IN THE FUTURE, AN ISSUE THIS COURT SHOULD HAVE CONSIDERED, BUT DID NOT.

This Court's August 26, 2020, decision sets no practical limits on its ruling. It is as if the majority ignored the very issues that various justices discussed with appellants' counsel during oral argument in acknowledging that it would be unwise to adopt a hard-and-fast rule banning invasion-of-privacy cases irrespective of how outlandish the at-will employer's behavior. Examples of outlandish behavior believed by members of this Court to "cross the line" included allowing "direct observation" without requiring a same-sex monitor, requiring employees to void in front of their peers on the plant floor, and using anyone other than a trained clinical or laboratory technician to collect urine specimens by the "direct observation" method.

Regrettably, **no limitations** were incorporated into the majority's opinion to curb even the sorts of abuses that certain justices of this Court and appellants' counsel acknowledged during oral argument as conduct that should expose an at-will employer to a claim for invasion of privacy. Thus, by failing to announce any such limitations, this Court has left the doors wide open for at-will employers to try to get away with a wide variety of questionable conduct in their dealings with their employees, bounded only by the limits of their imaginations and the creativity of their lawyers in leveraging this Court's decision in *Lunsford* as justification for their defense tactics.

For example, by operation of Chapter 4109 of the Ohio Revised Code, the minimum age that a resident of Ohio must attain to be employed outside of one's immediate family's

business[32] is 14 years of age. Suppose an Ohioan's 14-year-old daughter wants to work a part-time job at a fast food restaurant and the franchisee insists that the "direct observation" method be deployed to make sure that teenager is not "gaming" the system so as to compromise the integrity of the substance abuse testing program. Since *Lunsford* imposes no limit on the availability of the option of ordering the "direct observation" method in the discretion of the franchisee, that 14-year-old girl would have no recourse and no cause of action for invasion of privacy since the majority's decision in this case has no guardrails.

What if the owner of the company or a senior management team member himself or herself wanted to be present to witness the urine specimen collection process by "direct observation"? Even though members of this Court agreed with appellants' counsel during oral argument that such conduct by the company owner or senior manager would "cross the line," the majority's opinion crafted no limits to make sure that sort of thing will not happen.

What about a clinical or laboratory technician who is a pedophile or homosexual? The majority's opinion establishes no guidelines to make sure the underage employee will not be subjected to the leering focus of someone with an obsession where minors are concerned. Nor does that opinion require monitoring of the monitors themselves so that the assignment of a same-sex technician to perform "direct observation" urine specimen collection services will not be someone having a prurient interest in seeing naked bodies of individuals of the same sex or anxious to find any excuse to touch any part of the employee's exposed skin below the waist.

Some employees have problems with their bladders and incontinence affecting their bowels. Is the majority's decision immutable so that an employee having such problems and

---

[32] O.R.C. § 4109.06(A)(5).

embarrassed about revealing the same to a perfect stranger would have no recourse for the mental anguish and emotional distress caused by having to undress and reveal his or her condition … particularly if such embarrassment makes it impossible to produce a specimen and the employer elects to fire the employee upon deeming him or her to have "refused" to cooperate by operation of a substance abuse testing policy of the sort at issue in the case now before this Court?

What about a transgender employee? The majority's opinion does nothing to address the question of whether a male or female clinical or laboratory technician should be deployed to collect the sample by "direct observation."

Female employees randomly selected for an unannounced screening may be menstruating. It is likely that such employees may be mortified by having to allow a perfect stranger watch as they work around or remove feminine hygiene products to facilitate the production of a urine specimen. Does the majority mean that such women would have no recourse for the embarrassment or humiliation they would suffer by having to attend to such tasks in front of a stranger?

Why would any employer be prohibited by the majority's opinion from stopping at requiring employees to disrobe from the waist down? If management is concerned enough that men or women are carrying in substances that can be used to compromise the specimen-gathering process or taint harvested samples, would the employer be allowed to order employees to disrobe entirely in front of a total stranger (even to the point of allowing the stranger to conduct a body cavity search) without risking any recourse by the employee apart from his or her decision to quit? The majority's opinion does not offer any guidance along these lines.

Even outside of the context of a drug screening program, what about an employer who wants to make sure his or her accounting or purchasing staff members are not in dire financial straits and therefore might be inclined to try to steal from the company? The majority's opinion

does not indicate whether such a staff member would have any recourse against his or her employer for being fired for refusing to comply with a demand to allow management to inspect three years' worth of tax returns to make sure the employee is not a tax cheat.

There are **no practical limits** incorporated into the majority's August 26, 2020, opinion. Without such limits, conduct even more outrageous than the "direct observation" steps at issue in this case could be ordered by at-will employers and any resulting invasion of privacy would be *excused* because a broad application of the "consent" principles newly announced in this case could be creatively used to bar any claim for damages proximately caused by the employer's intrusion into the seclusion of each of the hypothetical employees referenced above. Without guardrails, employers' counsel statewide soon will have a "field day" conjuring ways to leverage the majority's opinion to explain away or avoid the risk of exposure for more and more outrageous behavior in the employment setting.

The principles articulated by this Court in announcing its rule that an at-will employee's failure to "object" to the particular method selected for harvesting urine specimens will bar a subsequent claim for invasion of privacy must be tested against every reasonable conceivable creative way an at-will employer might divine under the banner of having to assure the integrity of the urine specimen collection process. This Court should use the reconsideration process of Rule 18.02 to revisit the specific holding of the majority opinion and either (1) declare it to have been improvidently handed down and restore the availability of the *Housh* doctrine to serve as a needed check on outrageous employer conduct or (2) announce suitable limits so crafty defense counsel do not start lining up defenses to claims all across Ohio to defeat challenges to their clients' discretion in ordering their employees to do just about anything those employers might want them to do before at least one of those cases makes its way to this Court to define the limits of the

doctrine announced on August 26, 2020, in *Lunsford*. For this additional reason, this Court should **GRANT** the motion for reconsideration and fix the problems sure to come in the absence any sort of guardrails in the final judgment of this Court in this case.

IV. AT A MINIMUM, THIS COURT SHOULD WORK SUBSTANTIAL JUSTICE BY REMANDING THIS MATTER TO THE TRIAL COURT TO CONDUCT FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE NEW RULE OF LAW ON "CONSENT" AND THE CONDITIONS UNDER WHICH "CONSENT" MAY BE DEEMED TO HAVE BEEN GIVEN.

This Court's decision of August 26, 2020, tossed out five counts of Plaintiffs' complaint without anything in the record to support a conclusion that there are no facts that Plaintiffs could prove to avoid the defense that they "consented" to "direct observation" by not "objecting." Instead, four justices of this Court have concluded that merely by going forward and submitting themselves to the "direct observation" method "without objection," Plaintiffs are barred from asserting an invasion-of-privacy action because such conduct amounted to a "consent" to pulling their clothing up or down while someone watched them urinate.

Not one justice of this Court knows any more than appellants' counsel whether Plaintiffs in fact "objected" to "direct observation" in some fashion before finally succumbing to the threat of termination if they persisted with their "objections" or did anything else to proceed without prejudice to bringing claims for damages and injunctive and declaratory relief to stop the practice.

The discovery process would allow Plaintiffs and defendants to explore the factual underpinnings of the "consent" question in the context of whether Plaintiffs proceeded "without objection." The pleading process would allow Plaintiffs, if necessary, to articulate by amendment such facts as may be necessary to avoid summary disposition of their claims in light of the new rule on "consent" articulated by a majority of this Court. Indeed, in the end, inasmuch as the

majority has framed the "consent" question in the context of whether Plaintiffs in fact "objected" to the "direct observation" method, this Court's August 26, 2020, rule reserves this as an issue for the trier of *fact*. Therefore, it would be premature for this Court in this discretionary appeal to decide the "consent" defense as a matter of law any more than it would be appropriate for the trial court immediately on remand to draw such a conclusion without first allowing discovery and then motion practice that would join that issue in determination of whether a jury should be given the chance to weigh in.

Moreover, it seems the justices in the majority have forgotten that there are three counts in Plaintiffs' complaint that do **not** seek redress for past employer conduct, but rather seek declaratory and injunctive relief to prevent *future* employer conduct. In those cases, there is no question of "consent," as the employees have yet to do anything that could be deemed to constitute "consent." Instead, Plaintiffs seek for themselves and as representatives of a class of employees subject to the employer's substance abuse screening policy such declaratory and injunctive relief as may be warranted in determining whether such policy is unenforceable under Ohio law or is so vague or ambiguous in some respects as to require suspension of the policy until changes are made to cause it to fall in line with public policy designed to safeguard against unreasonable intrusions into the private affairs of its employees and to address the sorts of scenarios outlined in the third section of the "Law and Argument" section of this memorandum.

For this reason, then, this Court, at a minimum, should **GRANT** reconsideration to reframe the remedy upon disposition of this discretionary appeal to restore to Plaintiffs that which the Fifth Appellate Judicial District restored to them … the opportunity to gather and present evidence in support of their claims, only this time in a manner not inconsistent with this Court's newly articulated rule respecting the "consent" defense and how an at-will employer could sustain its

burden of proving that affirmative defense in the context of whether or not Plaintiffs failed to "object" to "direct observation."

CONCLUSION AND RELIEF REQUESTED

It will come as no surprise to the members of this Court that Plaintiffs believe the dissenting opinion in this case offers the more reasonable approach to the disposition of this case in the context of a Civil Rule 12(B)(6) motion designed exclusively to test the sufficiency of the complaint in stating a claim upon which relief can be granted. To say, "beyond doubt," that Plaintiffs, *as a matter of law*, can prove no set of facts that would entitle them to relief is, as the dissent correctly concludes, "to subvert Civ.R. 12(B)(6)," as "whether [Plaintiffs'] alleged implied consent to … the direct-observation method was the product of their legitimate fear that they would be terminated is a question of fact outside the scope of a … motion to dismiss"[33] and "the at-will-employment doctrine does not supersede an employee's right to obtain redress for the violation of his or her privacy rights."[34] To this end, Plaintiffs urge at least one member of the majority to reconsider his or her position on the merits of this case and adopt the dissent's well-reasoned exposition respecting the posture of this case at the earliest stage of the pleading process. Plaintiffs' undersigned counsel only wishes he had been as persuasive in the merit brief he filed in this case on behalf of his clients as Justice Stewart was in capturing the essence of this case, as exemplified in the following excerpts of her dissenting opinion:

> Whether [Plaintiffs] have an invasion-of-privacy cause of action against appellants has nothing to do with their status as at-will employees. *An at-will-employment relationship does not allow an employer to commit intentional torts against its employees.* And [Plaintiffs'] complaint stated

---

[33] **Opinion**, ¶ 68 (Stewart, J., dissenting).

[34] *Id.*, ¶ 62.

sufficient facts to show that [their employer] coerced [them] to submit to the humiliation of having their genitalia directly observed as each of them produced or attempted to produce a urine sample….

* * *

To be clear, this case is not about an employer's right to discharge an at-will employee. Nor is this case about an employer's right to require drug testing as a condition of employment—appellees do not dispute that [their employer] could require them to submit to drug testing. Rather, this case is about *how* [the employer] conducted its workplace drug-testing program and whether its use of the direct-observation method of urine collection constituted an invasion of [Plaintiffs'] right to privacy [emphasis in original]. *Whether an employee has been hired on an at-will basis has no effect on the employee's claim that the employer violated his or her right to privacy.*

[Plaintiffs] understood that as at-will employees they could be terminated at any time and for any reason. *But they could have had no understanding that their status as at-will employees would require them to provide a urine sample while a stranger directly observed their genitalia*. And [the] complaint makes it clear that Keim and Williamson were not terminated based on their status as at-will employees or the at-will-employment doctrine. [ ] Lunsford and Griffiths each produced a urine sample and were not terminated. Keim and Williamson alleged that they had tried to provide a urine sample but were unable to do so, and they were terminated under [their employer's] substance-abuse policy that considered an employee's failure to provide a urine sample within a specified period of time a "refusal to undergo a drug test."

* * *

… As a broad principle regarding whether a person consented to an act or acted under duress, we have explained that the "real and ultimate fact to be determined in every case is whether the party affected really had a choice; whether he had his freedom of exercising his will." [Citation omitted.] … *Consent is generally an absolute defense* to an intentional tort [citation omitted] *and like most defenses, its merit depends on the facts alleged*. *For this reason, the defense of consent is usually not amenable to resolution by a Civ.R. 12(B)(6) motion to dismiss.*

* * *

With no direct consent by [Plaintiffs], the question is whether [Plaintiffs] impliedly consented to the use of the direct-observation method by their actions; that is, whether their actions of submitting or attempting to submit their urine samples while being directly observed constituted consent.

> [Plaintiffs] had no time to make considered decisions on whether to submit to drug testing under the direct-observation method. [The employer's] substance-abuse policy stated that "[a]ny employee who refuses to undergo a drug/alcohol test will be subject to immediate termination." At the time [Plaintiffs] were required to provide their urine samples, they were presented with two choices: either provide a urine sample under the direct-observation method or be terminated. *It would strain the meaning of the word "consent" to suggest that [Plaintiffs] consented under the circumstances in this case*.
>
> * * *
>
> Under the facts alleged by [Plaintiffs] in their complaint, what happened to them was not much different from being an unwilling participant in a shotgun wedding. [Plaintiffs] alleged that they were "forced" to expose their genitals to third-party observers. Taking this allegation as true for the purposes of a Civ.R. 12(B)(6) motion to dismiss, … *whether [Plaintiffs'] alleged implied consent to testing under the direct-observation method was the product of their legitimate fear that they would be terminated is a question of fact outside the scope of a Civ.R. 12(B)(6) motion to dismiss*. For the majority to hold as *a matter of law* that [Plaintiffs] consented to having their genitalia observed while they gave, or attempted to give, a urine specimen is to subvert Civ.R.12(B)(6) [emphasis in original].
>
> * * *
>
> [T]he employees here are not challenging the drug-testing policy itself—they are challenging the highly-offensive manner in which it took place without prior warning that the direct-observation would be used. This distinction is important when the scope of an employee's consent has been distorted, as the majority has done here, to encompass implied consent without the employee's having a reasonable choice or there being limitations on the testing procedure. At what point would the majority hold that an employer has exceeded the scope of an employee's implied consent in the context of an employee's providing a urine sample? What indignities must an at-will employee suffer to avoid losing his or her income and benefits before the employee has a cause of action for invasion of privacy? *Make no mistake, the majority's decision today will disproportionately affect workers who have no meaningful choice and no recourse for their employers' intentional torts*.

Opinion, ¶¶ 47, 58-59, 63, 65-66, 68, and 70 (Stewart, J., dissenting) (emphasis supplied except as otherwise indicated). There will be plenty of opportunity for all parties in this civil action to gather and present their evidence on the questions of fact and mixed questions of law and fact that

abound. This Court should have confined itself to the allegations of Plaintiffs' complaint and all reasonable inferences that might be drawn from those allegations in favor of Plaintiffs in concluding that the trial court could not have determined, as a matter of law, that Plaintiffs "beyond doubt" could prove no set of facts supporting their claims for invasion of privacy, wrongful termination in violation of this state's policy in protection of privacy rights, and the privacy-based claims for individual and class declaratory and injunctive relief.

Granting appellant's motion under Civil Rule 12(B)(6) was decidedly **not** appropriate given the averments of Plaintiffs' complaint, the standards for reviewing such a motion, and the plainly fact-specific nature of the claims and defenses available in respect of each of the five counts of the complaint that the trial court tossed out and the Fifth Appellate Judicial District reinstated. Upon reconsideration, one or more members signing on to the majority opinion will have an opportunity to correct that clear error.

If this Court is to announce a new rule on how "consent" can be implied merely from an at-will employee's compliance with a management directive, "without objection" and under direct threat of immediate termination for insubordination if he or she refuses, Ohioans are entitled to know if there are any limits to this new rule … or whether it extends beyond the context of an at-will employment relationship … or whether application of the specific holding in *Lunsford* is meant to cover any number of other employment situations where management may extract an at-will employee's "cooperation" by ordering that the employee engage or not engage in certain conduct, no matter how offensive or unreasonable or unlawful, as a condition to keeping his or her job with full knowledge that the employee's only recourse would be to quit and join the ranks of

the unemployed with no "safety net" in the form of unemployment compensation to bridge the gap in the employee's career.[35]

In the last analysis, this motion is made to encourage at least one justice in the majority to reconsider (1) whether the allegations of Plaintiffs' complaint – and *only* that complaint – show "beyond doubt" that Plaintiffs can prove no set of facts to support any of the five counts that the trial court dismissed and/or (2) whether Plaintiffs' status as at-will employees diminished their expectations of privacy each time they walked into their employer's plant to do their jobs because Ohio law extends a virtual license to at-will employers to commit or attempt to commit intentional torts against their employees because the recourse of such employees is limited to terminating their at-will relationship to join the ranks of the unemployed. Granting reconsideration will allow this Court *both* to correct the clear error made in applying Civil Rule 12(B)(6) standards to the record of this case *and* to consider the unintended consequences of its holding.

/s/ S. David Worhatch
S. DAVID WORHATCH 0031174
Law Offices of S. David Worhatch
4920 Darrow Road
Stow, Ohio 44224-1406
330-650-6000 (Akron/Kent)
330-656-2300 (Cleveland)
330-650-2390 (Facsimile)
sdworhatch@worhatchlaw.com

Counsel for Plaintiffs-Appellees

[35] An employee's act of insubordination disqualifies him or her from eligibility for unemployment compensation benefits just as his or her voluntary decision to quit would support disqualification. O.R.C. § 4141.29(D)(2)(a); *see also, e.g., Guy v. City of Steubenville*, 147 Ohio App.3d 142, 149-50, 768 N.E.2d 1243, 1249-50, 2002-Ohio-849, ¶¶ 34-36 (police officer ineligible for unemployment compensation due to his insubordination in refusing to consent to the release of information from a mandatory counseling session as ordered by a consent decree); *Isenberg v. Artcraft Memorials, Inc.*, 2012-Ohio-2584, 2012 WL 2088123, ¶ 17 (11th App.Jud.Dist., June 11, 2012) (employee's "insubordination and disregard for authority" were sufficient to establish just cause to make claimant ineligible for unemployment compensation benefits).

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, a copy of the foregoing was served on counsel for defendants in accordance with S.Ct.Prac.R. 3.11(C)(1) [*method(s) of service checked*] □ by ordinary U. S. Mail, first-class postage prepaid, addressed to Daniel A. Richards, Esq., and Joshua M. Miklowski, Esq., counsel for Defendant-Appellant U.S. Healthworks Medical Group of Ohio, Inc., Weston Hurd LLP, The Tower at Erieview, 1301 East Ninth Street, Suite 1900, Cleveland, Ohio 44114-1862 (**Facsimile Telephone No. 216-621-8369**), and John N. Childs, Esq., and Daniel J. Rudary, Esq., counsel for all other defendants-appellants, Brennan, Manna & Diamond, LLC, 75 East Market Street, Akron, Ohio 44308 (**Facsimile Telephone No. 330-253-1977**), □ by facsimile transmission to the facsimile telephone number of counsel referenced above, □ by delivery in hand to the offices of counsel at the addresses referenced above, ■ by electronic transmission via one of more *e*-mail messages addressed to defendants' counsel at *drichards@westonhurd.com*, *jmiklowski@westonhurd.com, jnchilds@hmdllc.com,* and *djrudary@bmdllc.com*.

/s/ S. David Worhatch

S. DAVID WORHATCH 0031174
Law Offices of S. David Worhatch
4920 Darrow Road
Stow, Ohio 44224-1406

330-650-6000 (Akron/Kent)
330-656-2300 (Cleveland)
330-650-2390 (Facsimile)
sdworhatch@worhatchlaw.com

Counsel for Plaintiffs-Appellees