ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NOS. 2013-0493/2013-0291

ANITA HAUSER
Plaintiff-Appellee,

vs.

CITY OF DAYTON POLICE DEPT., et al.
Defendant-Appellant.

ON APPEAL FROM SECOND DISTRICT COURT OF APPEALS
CASE NO. CA 24965

BRIEF OFAMICUS CURIAE, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLEE, ANITA HAUSER

Alphonse A. Gerhardstein (0032053)
Gerhardstein & Branch Co. LPA
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202
Tel (513) 621-9100
Fax (513) 345-5543
agerhardstein@gbfirm.com
Attorney for Amicus Curiae,
Ohio Association for Justice

John J. Scaccia, Esq. (0046860)
Scaccia & Associates, LLC
1814 East Third Street
Dayton, Ohio 45403
Tel (937) 258-0410
Fax (937) 258-0416
Attorney for Appellee,
Anita Hauser

Thomas M. Green, Esq. (0016361)
Green & Green, Lawyers
800 Performance Place
109 North Main Street
Dayton, Ohio 45402-1290
Tel (937) 224-3333
Fax (937) 224-4311
tmgreen@green-law.com
Attorney for Appellant,
E. Mitchell Davis

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

The Amicus Curiae now appearing before this Court is the Ohio Association for Justice (OAJ). The OAJ is comprised of over a thousand attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and the promotion of public confidence in the legal system.

As was tacitly acknowledged when this Court accepted jurisdiction over this appeal, this action involves an issue of substantial public import. The time has come for this Court to eliminate the confusion caused by the Eighth District's outlying opinion in *Campolieti v. City of Cleveland* and confirm that R.C. § 4112.02(A) expressly imposes liability on a political subdivision's managers and supervisors just as it expressly imposes liability on private employers' managers and supervisors. In accordance with the majority of Ohio Appellate Courts, the Second District's decision below on this question strikes an appropriate balance between the need to hold government entities responsible for discriminatory hiring practices and the public's interest in maintaining suitable limits upon municipal liability. The OAJ therefore urges this Court to affirm the Second District and continue to hold political subdivisions to the same standard as private employers.

II. STATEMENT OF FACTS

Amicus curiae OAJ adopts the Statement of Facts and the Case presented by the Appellee.

III. ARGUMENT

PROPOSITION OF LAW: Revised Code Chapter 4112 expressly imposes liability on political subdivision management employees so as to lift Revised Code § 2744.03(A)(6)(c) immunity.

A. The Plain Language of R.C. Chapter 4112 Expressly Imposes Liability on Political Subdivision Management Employees

The Defendant-Appellant's proposition of law—that "[l]iability is not expressly imposed on political subdivision employees under R.C. § 4112.01(A)(2) so as to lift R.C. § 2744.03(A)(6)(c) immunity"—is incorrect. While it is true that the Political Subdivision Tort Liability Act "generally provides that political subdivisions and their employees are immune from liability," *Schoenfield v. Navarre*, 164 Ohio App. 3d 571, 2005-Ohio-6407, ¶14 (6th Dist.), the Act is clear that there are exceptions to this general rule. For the present purposes, the relevant exception is found in R.C. § 2744.03(A)(6)(c): "an employee of a political subdivision . . . is immune from liability unless . . . [c]ivil liability is expressly imposed upon the employee by a section of the Revised Code."

Indeed, the plain language of R.C. § 4112.02(A) imposes liability on "*any* employer." (emphasis added). The statutory definition of "'employer' *includes the state, any political subdivision of the state* . . . and *any person* acting directly or indirectly in the interest of an employer." R.C. § 4112.01(A)(2) (emphasis added). The statutory definition of "'person' includes *one or more individuals* . . . and *the state and all political subdivisions*." R.C. § 4112.01(A)(1) (emphasis added). Read in concert with these definitions, the plain language of R.C. § 4112.02(A) expressly imposes liability on "any one or more individuals acting directly or indirectly in the interest of any political subdivision of the state." Defendant-Appellant argues that "at first blush, R.C. § 4112.02(A) only imposes liability on employers," but as shown above, the definitions of "employer" and "person" in R.C. §4112.01(A)(1-2) clearly impose liability on

a broader group than just those "who control[]and direct[] a worker under a . . . contract of hire and who pay[] the worker's salary or wages." BLACK'S LAW DICTIONARY (9th ed. 2009).

B. The Holding of *Genaro v. Central Transport, Inc.* Is Directly Applicable to the Case *Sub Judice* and Should Control the Outcome

The Supreme Court agreed in *Genaro v. Central Transport, Inc.* when it held that "individual supervisors and managers are accountable for their own discriminatory conduct occurring in the workplace environment" and that "a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112." 84 Ohio St. 3d 293, 300 (1999). Principles of stare decisis, "the bedrock of the American judicial system," dictate that this decision should be followed because this Court "should depart from precedent" only "with the assurance that the newly chosen course for the law is a significant improvement over the current course." *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2002-Ohio-0932, ¶1.

Defendant-Appellant carefully crafts his discussion of *Genaro* to make it seem as if the Court was liberally construing the statute to accomplish a desired result. However, the Court was merely following the plain language of the statute which itself mandates that Chapter 4112 "shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply." R.C. § 4112.08.

Defendant-Appellant also notes *Genaro*'s conclusion that R.C. 4112's definition of "employer" is "much broader in scope" than the definition in Title VII, despite this Court's previous finding that "federal case law interpreting and applying Title VII is generally applicable to cases involving R.C. Chapter 4112." *Genaro*, 84 Ohio St. 3d at 297. Defendant-Appellant says

this as if the *Genaro* Court improperly extended the R.C. § 4112 definition of employer,[1] but fails to mention that the *Genaro* Court only came to this conclusion after carefully comparing the text of the two analogous passages. This comparison clearly shows that the *Genaro* Court's conclusion was correct:

> R.C. 4112.01(A)(2) defines "employer" as "any person employing four or more persons within the state . . . and *any person acting directly or indirectly in the interest of an employer*." In contrast, under Title VII, "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and *any agent of such a person*." The differing numerosity requirements and uses of agency terminology indicate that Title VII's definition of "employer" is far less reaching than the encompassing language of R.C. 4112.01(A)(2). Without doubt, the language employed by the General Assembly with regard to R.C. 4112.01(A)(2) is much broader in scope than that employed by the analogous Title VII provision.

Genaro, 84 Ohio St. at 298-99 (emphasis in original, internal citations omitted).

The two definitions are not "sufficiently similar to warrant the conclusion that both were meant only to impose vicarious liability on employers for the acts of their employees." Def. Merits Brief at 9 (citing *Genaro*, 84 Ohio St. 3d at 302 (Moyer, C.J., dissenting)). The Title VII term "agent"—"[o]ne who is authorized to act for or in place of another," BLACK'S LAW DICTIONARY (9th ed. 2009)—has a much narrower meaning than the phrase from Chapter 4112, "any person acting directly or indirectly in the interest of an employer." *See also* RESTATEMENT (THIRD) OF AGENCY § 1.01 and cmts. (2006) ("Not all relationships in which one person provides services to another satisfy the definition of agency."). On its face, the Chapter 4112 definition includes more persons than just "agents." This is more than just a "fine distinction." Def. Merits Brief at 9.

[1] "It took a divided *Genaro* Court to extend liability under Chapter 4112 to include private sector managers and supervisors." Def. Merits Brief at 9.

Defendant-Appellant extensively cites to the two *Genaro* dissents[2] in an effort to undermine the majority's analysis of these definitions. For example, he states that former Chief Justice Moyer's dissent "rightly reasoned" that if "the General Assembly wished to extend individual liability to managers and supervisors it could have easily included the word 'employee' in R.C. § 4112.02(A)." *Genaro*, 84 Ohio St. 3d at 301 (Moyer, C.J., dissenting). But Chief Justice Moyer made no mention of the fact that the statutory definition of "employer"—which includes "*any person* acting directly or indirectly in the interest of an employer"—is broad enough to include "employees" in addition to persons who are not "employees."

Defendant-Appellant also quotes from Chief Justice Moyer's dissent for the proposition that "the phrase 'any person acting directly or indirectly in the interest of an employer' was included in the definition of 'employer' to 'impose vicarious liability on employers for discriminatory acts of their employees, not to add the employees to the list of persons liable." Def. Merits Brief at 6 (quoting *Genaro*, 84 Ohio St. 3d at 301 (Moyer, C.J., dissenting)). Defendant-Appellant treats this statement as if it is conclusive of the General Assembly's intent, but he omits a key word from the Chief Justice's quote. It actually reads: "this phrase was . . . *likely* included in R.C. 4112.01 in order to impose vicarious liability on employers for discriminatory acts of their employees." *Genaro*, 84 Ohio St. 3d at 301 (Moyer, C.J., dissenting) (emphasis added). Chief Justice Moyer was speculating on the legislative intent, not stating a fact. The *actual* legislative intent was not identified or discussed in the *Genaro* decision because such a discussion was not necessary; the language of the statute was already clear and unambiguous. Chief Justice Moyer drew this hypothesis from federal cases interpreting Title VII,

[2] Defendant-Appellant twice notes that *Genaro* was 4-3 decision, but the mere fact that the Court arrived at a split decision does not make its decision any less valid. It is axiomatic that split decisions carry the same legal authority as unanimous decisions, provided a simple majority of the justices arrived at the same conclusion.

but as explained above, the definition of "employer" in R.C. § 4112.01(A)(2) is textually distinct from that in Title VII and requires a different interpretation.

But even if the two definitions were identical, *Genaro* was correctly decided because the plain language of Title VII appears to create individual liability. The federal courts interpreting Title VII have applied canons of construction to sidestep this language and find that it only imposes respondeat superior liability. *See Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997) ("We concede that 'a narrow, literal reading of the agent clause in § 2000e(b) does imply that an employer's agent is a statutory employer for purposes of liability.' However, it is well-settled that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" (citations omitted)). This Court, however, has "stated on numerous occasions that if the meaning of a statute is clear on its face, then it must be applied as it is written." *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Ass'n*, 69 Ohio St. 3d 521, 524 (1994). "To construe or interpret what is already plain is not interpretation but legislation, which is not the function of courts." *Thompson Elec., Inc. v. Bank One, Akron, N.A.*, 37 Ohio St. 3d 259, 264 (1988). This Court should therefore not defer to the federal courts when interpreting Ohio's laws, especially when doing so would be against the General Assembly's intent and the plain, unambiguous meaning of the statute.

C. The Defendant-Appellant's Proposition of Law Relies on *Campolieti v. Cleveland* Which Should Not be Followed by This Court

Defendant-Appellant relies on the Eighth District's decision in *Campolieti v. Cleveland*, 184 Ohio App. 3d 419, 2009-Ohio-5224 (8th Dist.), as support for his proposition that Chapter 4112 imposes liability only on employers, but this reliance is misplaced. Despite being decided ten years after *Genaro*, *Campolieti* makes no mention whatsoever of *Genaro*. *Campolieti* states that "[f]ederal case law interpreting Title VII . . . is generally applicable to cases involving

alleged violations of R.C. Chapter 4112," yet completely ignores *Genaro*'s controlling precedent that the two laws are textually distinct and require different interpretations. Furthermore, *Campolieti* found that an individual was immune from suit under R.C. § 4112.14 because that section "speaks in terms of employers." But the decision does not, even once, mention the statutory definition of "employer" as found in § 4112.01(A)(2), nor does it discuss how the term is broadly defined in that statute. Instead the "court seemed to merely use the everyday definition of employer." *Hauser v. Dayton Police Dept.*, 2d Dist. No. 249651 2013-Ohio-11, ¶20. *Campolieti* also fails to discuss the directive of R.C. § 4112.08 that Chapter 4112 should be construed liberally.

Because of these shortcomings, *Campolieti* is correctly considered an outlier in Chapter 4112 jurisprudence. *See Hauser v. Dayton Police Dept.*, 2d Dist. No. 249651 2013-Ohio-11; *Satterfield v. Karnes*, 736 F. Supp. 2d 1138, 1154-55 (S.D. Ohio 2010) ("Although it is conceivable that the Ohio Supreme Court *could* hold that *Genaro*-based liability in § 4112 is not what the Ohio legislature had in mind when it required that liability be 'expressly imposed upon the employee by a section of the Revised Code' in order for immunity to be withdrawn, there does not appear to be any clear 'data' to make this Court believe that the Ohio Supreme Court *would* so hold.") (emphasis added).

All other Ohio Appellate courts which have considered the question have reached the opposite conclusion from *Campolieti*. *See Albert v. Trumbull Cnty. Board*, 11th Dist. No. 98-T-0095, 1999 WL 957066 ("a political subdivision and its employees may be liable for discriminatory practices pursuant to . . . Chapter 4112."); *State ex rel. Conroy v. Williams*, 185 Ohio App. 3d 69 2009-Ohio-6040, ¶30 (7th Dist.) (supervisor at a political subdivision was not immune from liability in a discrimination action); *Hall v. Memorial Hosp. of Union Cnty.*, No.

14–06–03, 2006-Ohio-4552, 2006 WL 2535761, ¶ 15 (3d Dist.) (three defendants who occupied managerial or supervisory positions in a hospital, which was a political subdivision, were not entitled to statutory immunity as liability was expressly imposed for disability discrimination under Chapter 4112). Had the Eighth District properly considered the *Genaro* decision and the Chapter 4112 definition of employer in *Campolieti*, it is likely that the conflict among the Appellate Districts currently before this Court would not even exist.

To further support his proposition, Defendant-Appellant cites to several examples of cases which found that a statute did not expressly impose liability on an employee to defeat § 2744.03(A)(6)(c) immunity, yet all are distinguishable. For example, he cites to *Cramer v. Auglaize Acres*, 113 Ohio St. 3d 266, 2007-Ohio-1946 (2007), which held that that the term "person" in R.C. § 3721.13 was too general to expressly impose liability on the county employees so as to lift immunity. However, the Court only found as such because the statute in question did not define "person." *Id.* at ¶32. Chapter 4112, on the other hand, *does* define "person," and it does so broadly enough to expressly encompass employees of political subdivisions, as explained above.

Defendant-Appellant also cites to *Marshall v. Montgomery Cnty. Children Serv. Bd.*, 92 Ohio St. 3d 348, 352 (2001), which held that R.C. § 2151.421(A)(1)(a) does not expressly impose liability on persons for failure to investigate reports of child abuse. However, the *Marshall* Court did not take issue with whether the statute expressly imposed liability, but rather with *what the statute expressly imposed liability for*. The Court recognized that the statute did not expressly impose liability for a failure to *investigate* child abuse, but that it *did* expressly impose liability for a failure to *report* child abuse. *Id.* Also, like the statute currently *sub judice*, the statute at issue in *Marshall* provides a definition of "person." R.C. § 2151.421(A)(1)(b).

Defendant-Appellant also cites to *O'Toole v. Denihan*, 118 Ohio St. 3d 374, 385 (2008), for the same proposition as *Marshall*, but *O'Toole* is also distinguishable because, like in *Cramer*, the statute at issue in *O'Toole*, R.C. § 2919.22(A), "uses the word 'person' without any reference to political subdivisions or their employees."[3] *Id.* In contrast, Chapter 4112 explicitly defines "person" to include "one or more individuals . . . and the state and all political subdivisions."

In short, Defendant-Appellant can point to no case law, other than *Campolieti*, which either directly or indirectly supports his proposition of law. And as explained above, *Campolieti* is highly problematic because of its failure to acknowledge *Genaro* and its failure to use the correct definition of "employer." His proposition is without support in Ohio jurisprudence, is entirely without legal merit, and should therefore be rejected.

D. Immunity for Political Subdivision Management Employees Is Lifted by Other Statutes in Addition to R.C. § 4112.02(A)

Two alternative grounds also support an affirmance in this case. First, Defendant-Appellant's actions fit within the language of R.C. § 4112.02(J), which declares that "[i]t shall be an unlawful discriminatory practice . . . [f]or any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice." By its plain language, this provision—which has no analog in Title VII—covers virtually any circumstance in which a person aids in the commission of workplace

[3]The relevant portion of R.C. §2919.22(A) reads, "No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."

discrimination. Thus, even if individuals are not included in the R.C. 4112 definition of "employer," § 4112.02(J) encompasses individual liability.

Second, R.C. § 2744.03(A)(6)(b) contains another relevant exception to municipal employee immunity: "the employee is immune from liability unless . . . [t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." The acts alleged in this case involve intentional discriminatory conduct, and such intentional conduct inherently meets the standard for wanton and reckless conduct. *See Anderson v. Massillon*, 134 Ohio St. 3d 380, 2012-Ohio-5711, ¶¶33-35 (defining "wanton misconduct" and "reckless conduct," and citing authority for the fact that "intentional conduct would suffice to prove recklessness"). Though this issue was not discussed below, it is appropriate for this Court to consider issues not raised on appeal in "the interests of justice." *See, e.g., Matthews v. Matthews*, 5 Ohio App. 3d 140, 146 (10th Dist. 1981). This Court may therefore find it more appropriate to conclude that intentional discrimination claims under Chapter 4112 inherently satisfy the exception found in Section 2744.03(A)(6)(b).

E. Individual Liability for Political Subdivision Management Employees Is Necessary to Protect Employees.

Defendant-Appellant correctly notes that "the primary statutory purpose of R.C. Chapter 2744 is the preservation of the financial stability of political subdivisions" and that "[Ohio] has a long-standing policy that political subdivision employees are immune from suit except under a few specific circumstances." Def. Merits Brief at 10 (citations omitted). But he is wrong to assert that this Court's affirmation of the decision below would harm either of these long-established principles. Deciding as such provides only one "specific circumstance" under which municipal employees would be liable: namely, invidious discrimination in hiring practices. There is no need to "safeguard[] the ability of political subdivision employees to perform their official duties

without fear of possible liability" in this respect, because no legitimate state interest is served by such invidious discrimination. Def. Merits Brief at 10. Contrary to Defendant-Appellant's assertion, there is no "justifiable reason" to treat political subdivision employees differently from their private-sector counterparts in this regard. *Id.*

R.C. 4112's imposition of individual liability for managers and supervisors is needed to properly deter discriminatory behavior and hold accountable those who perpetrate it. Opponents of individual liability typically argue that employees aggrieved by invidious and intentional discrimination should file other claims available against the individual perpetrators such as assault, battery, intentional infliction of emotional distress, invasion of privacy, and defamation. But it is obvious that none of these causes of action would provide a remedy in tort to a plaintiff such as Anita Hauser. Ms. Hauser was not threatened with violence or physically assaulted. The conduct alleged against her would likely not be found to meet the high bar of "outrage" required for intentional infliction of emotional distress. Further, no facts about her private life were publicly disclosed and no false statements about her were made or published. Yet Ms. Hauser was still legally wronged, and this wrong entitles her to a legal remedy: the remedy that the Ohio Legislature has already created for her.

R.C. 4112 fulfills a need in Ohio law, and political subdivision employees should be held to the same standards as all other Ohio employers when it comes to being accountable for employment discrimination. Holding them to such standards will not open the floodgates to frivolous litigation. Indeed, in the fourteen years since *Genaro*, there has been no "flood." Had such a "flood" occurred, surely the General Assembly would have acted to "stem the tide," but

they have not.[4] Instead, the threat of the imposition of joint liability on political subdivision employees encourages those employees to *not* engage in discriminatory practices, and thus *reduces* the number of lawsuits. If potential employment discrimination defendants want to escape Defendant-Appellant's predicted parade of horribles, the solution is simple: do not utilize discriminatory hiring practices.

IV. CONCLUSION

Contrary to Defendant-Appellant's assertions, the Second District's decision in *Hauser* correctly applied the plain meaning of the statutes in determining that political subdivision managers or supervisors are subject to liability under R.C. § 4112.02(A). Accordingly, this Court should answer the certified question in the affirmative, and the decision below should be affirmed. Doing so will ensure statewide consistency for employment discrimination plaintiffs.

Respectfully submitted,

Alphonse Gerhardstein (Jonathan Stoudt 0083839 / w authority)

Alphonse A. Gerhardstein (0032053)
Attorney for *Amicus Curiae,*
Ohio Association for Justice
Gerhardstein & Branch Co. LPA
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202
Tel (513) 621-9100
Fax (513) 345-5543
agerhardstein@gbfirm.com

[4] No legislative effort to overturn *Genaro* has been successful. For example, both House Bill 300 (125th General Assembly) and Senate Bill 383 (129th General Assembly) only received sponsor hearings and did not make it out of committee.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been sent by regular U.S. Mail, on this 20TH day of August, 2013 to:

John J. Scaccia, Esq. (0046860)
Scaccia & Associates, LLC
1814 East Third Street
Dayton, Ohio 45403
Attorney for Appellee,
Anita Hauser

Thomas M. Green, Esq. (0016361)
Green & Green, Lawyers
800 Performance Place
109 North Main Street
Dayton, Ohio 45402-1290
Attorney for Appellant,
E. Mitchell Davis

Alphonse Gerhardstein (JONATHAN STOUT 0083837 W/ AUTHORITY)
Alphonse A. Gerhardstein (0032053)