IN THE SUPREME COURT OF OHIO

ALLISON HARRIS,	:	Supreme Court Case No. 2022-0784
Plaintiff/Appellant,	:	On Appeal from the Jefferson County Court of Appeals, Seventh Appellate District
vs.	:	
		Court of Appeals Case No. 21 JE 0013
DUSTIN HILDERBRAND,	:	
Defendant/Appellee.	:	

BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS URGING AFFIRMANCE IN SUPPORT OF DEFENDANT-APPELLEE DUSTIN HILDERBRAND

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization of attorneys, corporate executives, and insurance professionals and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. For over half a decade, OACTA has made concerted efforts to ensure and promote the consistent and appropriate application of Ohio's laws, statutes, and ordinances and, as part of that effort, OACTA frequently submits amicus briefs in both federal and state court on matters of significant importance to its diverse membership. Such matters include, as is at issue in this case, the interpretation and application of Ohio's statutory immunity scheme for political subdivisions and their employees; R.C. 2744 et seq.

There are two important concepts at issue in the current case before the Court, both of which will have broad and far reaching implications regarding the application of R.C. 2744. The first issue is the scope of the **exception** to immunity for actions **manifestly** outside the scope of an employee's employment or official responsibilities. In this case, both Appellant and opposing Amicus supporting Appellant seek to turn the immunity scheme set forth by the General Assembly on its head, arguing that Appellee must establish that his allegedly negligent actions in keeping, harboring, and caring for a police dog were not within the scope of his employment. In doing so, Appellant and opposing Amicus seek to impose the burden on Appellee to prove that his actions were within the scope of employment, but that is not how Ohio's immunity scheme works. Once Appellee submitted evidence that keeping, harboring, and caring for the police dog was part of his official job duties as a police officer, he established a right to statutory immunity from Appellant's civil claims **as a matter of law** and it then became incumbent on Appellant to submit evidence demonstrating that the allegedly negligent actions were **manifestly** outside the scope of Appellee's

employment. Appellant failed to submit **any** such evidence and, therefore, the Seventh District was correct in finding that Appellee is entitled to summary judgment on the basis of immunity.

Appellee is indisputably a Belmont County Deputy Sheriff who was required to keep, harbor, and care for his police dog within his home **as part of his official duties**. In fact, Appellee was compensated for such work through a stipend in addition to his regular pay. Appellant and opposing Amicus argue that despite such evidence, summary judgment was not appropriate because it should be for a jury to decide whether the allegedly negligent act (having the dog perform demonstrations over an hour before the bite occurred) was within the scope of Appellee's duties. But again, that approach is directly contrary to the Ohio statutory immunity scheme within R.C. 2744, providing that **the default position in Ohio is that employees are entitled to immunity subject *only* to *limited* exceptions.** Thus, once an employee of a political subdivision has submitted evidence showing that the immunity statute is generally applicable, it becomes **the plaintiff's burden to submit evidence overcoming that immunity**. There does not appear to have been a dispute below regarding whether the statutory immunity for employees in R.C. 2744.03(A)(6) is generally applicable in this case, and Appellant certainly did not include any such questions or issues within her propositions of law, so that issue is not before the Court. Rather, the first issue to be addressed by the Court based upon the accepted propositions of law is whether Appellant submitted sufficient evidence to establish a question of fact as to whether Appellee acted **manifestly** outside the scope of his employment. Because Appellant did not submit any such evidence, the Seventh District's holding that the exception to immunity in R.C. 2744.03(A)(6)(a) is inapplicable should be affirmed.

Other Amicus briefs filed in support of Appellee demonstrate why the application of this rule of law is important to a determination of liability for police officers charged with the additional

duties of keeping, harboring, and caring for a police dog. In addition to these apt and persuasive arguments, OACTA is also concerned about the potential effects a broad reading of this exception to immunity may have in not only these specific circumstances, but also for the liability of political subdivisions and their employees throughout the State.

There are hundreds, if not thousands, of entities that qualify as political subdivisions throughout Ohio, and multitudes of employees working for those entities. If the exception to immunity in R.C. 2744.03(A)(6)(a) is read as Appellant and opposing Amicus propose, the question of liability will shift to a determination of whether defendants can prove that their actions were within the scope employment rather than, as the General Assembly intended, whether plaintiffs can present evidence that the employee's actions were **manifestly** outside the scope of employment. The difference is subtle but important, placing the burden of proof to overcome immunity on the plaintiff, in this case the Appellant, and requiring a showing not just that the actions were not within the scope of employment, but that they were **manifestly** outside of the scope of employment. Accepting the arguments of Appellant and opposing Amicus would result in a drastic multiplication of the exposure to liability for employees of political subdivisions, which is directly contrary the clear intention of the statute as recognized by this and other courts, the plain language of the statute, and the rules of statutory interpretation.

It should be noted that Appellant's arguments regarding the fact that Appellee potentially has insurance coverage available for the claims against him is wholly irrelevant to a determination of the issue of statutory immunity. Indeed, the majority, if not all, of Ohio's political subdivisions carry some sort of insurance for tort claims, and if the presence of an insurance policy to satisfy a potential tort claim somehow invalidated the application of R.C. 2744 et seq., then the entire statutory immunity scheme would be practically eviscerated and political subdivisions and their

employees would be discouraged from obtaining insurance, thus resulting in the risk of even greater financial losses to the public. Additionally, the provisions within R.C. 2744 provide for and contemplate the provision and application of insurance by various parties, including the political subdivisions, their employees, and third parties. As articulately set forth within Appellee's Merit Brief, there is no law, reasoning, statute, or precedent that would support Appellant's attempt to argue that a coverage decision made by a private insurance company is in any manner relevant to the application of the exceptions to immunity in R.C. 2744.03(A)(6).

The second issue to be determined in this case is whether R.C. 955.28(B) **expressly** imposes liability on employees of political subdivisions. As they did in ignoring the word **manifestly** when discussing the application of R.C. 2744.03(A)(6)(a), both Appellant and opposing Amicus ignore the word **expressly** when considering the application of the exception to immunity in R.C. 2744.03(A)(6)(c). Both parties also completely ignore the additional qualifying language within that statute, whereby the General Assembly made clear that an exception to immunity does not arise simply because a statute generally imposes liability for allegedly tortious conduct: "Civil liability **shall not be construed to exist** under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term 'shall' in a provision pertaining to an employee." R.C. 2744.03(A)(6)(c) (emphasis added).

In making her argument on this point, Appellant relies solely on the one-off decision in *Hicks v. Allen*, 11th Dist. Ashtabula No. 2005-A-0002, 2007-Ohio-693, which, as the Seventh District noted in its decision in this case, is in direct contrast to the subsequent and more recent decisions issued by the Fifth, Seventh, and Ninth District Courts of Appeals, as well as an earlier

decision from the Eleventh District. *Harris v. Hilderbrand*, 7th Dist. Jefferson No. 21 JE 0013, 2022-Ohio-1555, ¶ 47. Moreover, Appellant's argument that the General Assembly has impliedly acknowledged the application of the holding in *Hicks* is undercut by the more recent and more numerous decisions holding that R.C. 955.28(B) **does not expressly impose** liability on political subdivisions or their employees for purposes of R.C. 2744. If anything, the fact that the General Assembly has repeatedly amended both statutes, as noted in Appellant's Merit Brief, subsequent to these more recent and numerous decisions and has not put anything in either statute contrary to those decisions in order to provide that R.C. 955.28(B) expressly imposes liability under R.C. 2744, actually supports the conclusion that the General Assembly is in agreement with the current majority interpretation of the statute as adopted by the Seventh District below. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶ 22-26 (superseded by statute on other grounds as stated in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, ¶ 16).

Opposing Amicus goes even further than Appellant, arguing that dicta found in the plurality decision in *Hauser v. Dayton Police Dept.*, 140 Ohio St.3d 268, 2014-Ohio-3636 somehow supports the conclusion that R.C. 955.28(B) **expressly** imposes liability on employees of political subdivisions even though there is no such language, express or otherwise, within R.C. 955.28(B). Because the decision in *Hauser* is a plurality opinion it is of questionable viability in general. *Westerville City Schools Bd. of Education v. Franklin Cnty. Bd. of Revision*, 154 Ohio St.3d 308, 2018-Ohio-3855, ¶ 15 (citing *Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 633 (1994)). Furthermore, the decision did not in any manner address the application of R.C. 955.28(B) and was by its own express admonition "limited to the provisions dealing with 'employer' discrimination, R.C. 4112.01(A)(2) and 4112.02(A)." *Hauser* at ¶ 16. Accordingly, *Hauser* is not

only of questionable viability overall, but it is by its own terms limited in application and scope, and the dicta relied upon by opposing Amicus is distinguishable from and inapplicable to this case.

Indeed, taking the arguments of Appellant and opposing Amicus to their logical conclusion, any statute that imposes civil liability on any class of individuals would be found to **expressly impose** liability on employees of political subdivisions and therefore invoke the exception to immunity in R.C. 2744.03(A)(6)(c). Such an interpretation is untenable and directly contrary to the explicit, unambiguous language within R.C. 2744.03(A)(6)(c) and would result in the imposition of liability on employees of political subdivisions for any and all statutorily defined torts, taking the decision of when to **expressly** impose such liability out of the hands of the General Assembly and placing it in the hands of judges who find such liability impliedly imposed by statutes of general liability.

STATEMENT OF THE CASE AND FACTS

Amicus adopts the Statement of the Case and Facts as set forth in Appellee's Merit Brief.

LAW AND ARGUMENT

I. Exceptions to Immunity Should be Narrowly Interpreted

R.C. 2744 establishes that political subdivisions and their employees are immune from civil liability by default, with such immunity being lifted only through the application of specifically enumerated exceptions. The purpose and effect of this immunity has been summarized as follows:

> The General Assembly's enactment of R.C. 2744.02(A)(1) reflects a policy choice on the part of the state of Ohio to extend to its political subdivisions the full benefits of sovereign immunity from tort claims. Likewise, the exceptions to immunity in R.C. 2744.02(B) and the exceptions and defenses in R.C. 2744.03 reflect policy choices on the state's part to submit itself to judicial relief on tort claims only with respect to the particular circumstances identified therein. Because those exceptions and defenses are in derogation of a general grant of immunity, they must be

> construed narrowly if the balances which have been struck by the state's policy choices are to be maintained.

Doe v. Dayton City School Dist. Bd. of Edn., 137 Ohio App.3d 166, 169 (2nd Dist. 1999); see also, *Schlegel v. Summit Cnty.*, 9th Dist. Summit No. 29804, 2021-Ohio-3451, ¶ 22 ("Because a 'sewer system' pertains to an exception to the general grant of immunity, the phrase should be construed more narrowly than broadly.") appeal not allowed, 165 Ohio St.3d 1523, 2022-Ohio-258; *Dearth v. City of Columbus*, 10th Dist. Franklin No. 17AP-346, 2019-Ohio-556, ¶ 32; *Guenther v. Springfield Twp. Trustees*, 2nd Dist. Clark No. 2010-CA-114, 2012-Ohio-203, ¶ 14; *Maruschak v. City of Cleveland*, N.D.Ohio No. 1:09 CV 1680, 2010 WL 2232669, *6 ("Exceptions to immunity must be construed narrowly to effectuate the purpose of the immunity statute.") (citing *Hallett v. Stow Bd. Of Edn.*, 89 Ohio App.3d 309, 312–313 (9th Dist. 1993)); *Doe v. Jackson Local School Dist.*, 5th Dist. Stark No. 2006CA00212, 2007-Ohio-3258, ¶ 17. As Ohio Courts of Appeals have recognized, if the exceptions to immunity are "invoked too liberally, the balance of competing interests reflected in the structure of R.C. Chapter 2744 is undermined." *Bucey v. Carlisle*, 1st Dist. Hamilton No. C-090252, 2010-Ohio-2262, ¶ 17; see also, *Student Doe v. Adkins*, 4th Dist. Lawrence No. 20CA08, 2021-Ohio-3389, ¶ 31 (citing *Fried v. Friends of Breakthrough Schools*, 8th Dist. Cuyahoga No. 108766, 2020-Ohio-4215, ¶ 35 (quoting *Bucey* at ¶ 17).)

While the foregoing cases were discussing immunity for political subdivisions in R.C. 2744.02(B)(2), the same logic is applicable to the related immunity for employees of political subdivisions in R.C. 2744.03(A)(6). *Pope v. Trotwood Madison City School Dist. Bd. of Educ.*, 2nd Dist. Montgomery No. 20072, 2004-Ohio-1314, ¶ 13 ("R.C. 2744.03(A)(6) provides immunity for an employee in his personal capacity except in certain narrow circumstances."); *Johnson v. City of Wickliffe*, 11th Dist. Lake No. 2003-L-159, 2005-Ohio-1687, ¶ 14. Such cases are likewise in keeping with earlier decisions from this Court regarding the application of

exceptions to immunity. *Wall v. Cincinnati*, 150 Ohio St. 411, 416 (1948); *Wooster v. Arbenz*, 116 Ohio St. 281 (1927), paragraph three of the syllabus (finding that exceptions to political subdivision immunity "are in derogation of the common law and must therefore be strictly construed").

The arguments of Appellant and opposing Amicus completely ignore the underlying purpose of Ohio's statutory immunity scheme and, rather than narrowly interpreting the exceptions to that immunity, improperly seek to broaden and expand those exceptions beyond even the most liberal bounds. Such an attempt to circumvent the statutory immunity scheme should be rejected and the Seventh District's decision granting immunity to Appellee should be affirmed.

II. Appellant and Opposing Amicus Violate Basic Tenet's of Statutory Interpretation by Ignoring "Manifestly" within R.C. 2744.03(A)(6)(a) and "Expressly" within R.C. 2744.03(A)(6)(c)

"A basic rule of statutory construction requires that words in statutes should not be construed to be redundant, nor should any words be ignored. Statutory language must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 26 (internal citations and quotes omitted). Furthermore, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 578–79, 2001-Ohio-1287 (citing R.C. 1.42).

As part of their ongoing effort to have this Court broadly interpret the applicable exceptions to immunity, Appellants and opposing Amicus violate these tenets of law by ignoring the use of the modifying words manifestly and expressly within R.C. 2744.03(A)(6)(a) and (c) respectively. Within the context of R.C. 2744 and the question of scope of employment, this Court has recognized that the term "manifestly" means "plainly, obviously." *Whaley*, 92 Ohio St.3d at 578. Moreover, in *Whaley* this Court found that the term "not manifestly outside the scope of employment" was broader than the term "within the scope of employment," which logically means that the negative of the first phrase "manifestly outside the scope of employment" is narrower than the phrase "within the scope of employment." *Id.* at 578-79. Thus, this Court has already considered and rejected arguments similar to those raised herein by Appellants and opposing Amicus, seeking to ignore the use of the phrase manifestly when referring to and modifying scope of employment under R.C. 2744. *Id.*

III. Argument of Amicus Contrary to Appellant's First Proposition of Law

In his first proposition of law, Appellant argues that the exception to immunity for actions **manifestly** outside the scope of employment is applicable because Appellee was off duty and hosting a party at his personal residence at the time the police dog under Appellee's supervision and care bit Appellant. Such an argument, however, seeks to broadly, rather than narrowly, interpret the exception to immunity in R.C. 2744.03(A)(6)(a) and ignores the modifying word manifestly, as well as the undisputed evidence in the record showing that the keeping, harboring, and care of the dog at his house was part of Appellee's job duties and that he was in fact paid separately for such work in addition to this regular salary. Appellant (as well as opposing Amicus) argue that there it is an issue of fact as to whether Appellee was within the course of employment, but neither presents any argument that there is evidence to show that Appellee was acting

manifestly (i.e. plainly and obviously) outside the scope of his employment, as is necessary to overcome immunity and establish this exception.

Furthermore, "[i]n the context of immunity, '[a]n employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment.'" *Mayer v. Bodnar*, 5th Dist. Delaware No. 22 CAE 05 0041, 2022-Ohio-4705, ¶ 58 (quoting *Curry v. Blanchester*, 12th Dist. Clinton No. CA2009-08-010, 2010-Ohio-3368, ¶ 30). Rather, "[t]he act must be so divergent that it severs the employer-employee relationship." *Powlette v. Carlson*, 2nd Dist. Montgomery No. 29437, 2022-Ohio-3257, ¶ 33. "It is only where the acts of state employees are motivated by actual malice or other [situations] giving rise to punitive damages that their conduct may be outside the scope of their state employment." *Mayer* at ¶ 58. "One acts with a malicious purpose if one willfully and intentionally acts with a purpose to cause harm." *Powlette* at ¶ 33.

As articulated by Appellee, there is no evidence in the record, nor even any argument by Appellant or opposing Amicus, that Appellee had either a malicious purpose or intent to harm Appellant. Likewise, the undisputed evidence in the record clearly demonstrates that Appellee's actions related to the police dog were not so divergent as to sever his employer-employee relationship with the County, as demonstrated by the testimonial evidence in the record. See, *Townsend v. Kettering*, 2nd Dist. Montgomery No. 29376, 2022-Ohio-2710, ¶ 27 (recognizing that even evidence of racial bias is not sufficient to create a material issue of fact when the alleged wrongful actions were "at least in part" related to the scope of employment). In this case, there is no evidence that Appellee acted manifestly outside the scope of his employment and Appellant's first proposition of law has no merit.

IV. Argument of Amicus Contrary to Appellant's Second Proposition of Law

Appellant's second proposition of law argues that the general provisions of strict liability for dog bite incidents set forth in R.C. 955.28(B) imposes liability on employees of political subdivisions under R.C. 2744.03(A)(6)(c). This argument, as noted above, is contrary to the greater weight of decisions from the various Ohio Courts of Appeals, which have held that R.C. 955.28(B) does not **expressly** impose liability under R.C. 2744. *Harris* at ¶ 47. Additionally, the case law relied upon by opposing Amicus, *Hauser*, is a plurality decision of limited application and questionable viability that does not address the application of R.C. 955.28(B) and the portion of that decision relied upon by opposing Amicus is in dicta.

The arguments of Appellant and opposing Amicus focus entirely on the general liability imposed by R.C. 955.28(B) without any argument or attention given to the modifying word "expressly" and the additional other explicit limitations within R.C. 2744.03(A)(6)(c), unambiguously stating that the general civil liability is not sufficient to invoke this exception to immunity. Again, Appellants attempt to have this Court broadly interpret the exception to immunity, which is directly contrary to the underlying purpose and plain, unambiguous language of the immunity statutes. To be sure, if the sort of general civil liability imposed by R.C. 955.28(B) is sufficient to **expressly impose** liability on employees of political subdivisions, it is difficult to imagine what sort of statute Appellant and opposing Amicus believe would not invoke this exception to immunity. If the arguments of Appellant and opposing Amicus were to prevail, the exception would be swallowed by the rule. Clearly, they are seeking to broaden the scope of immunity for this statute in order to serve their own interests, both specifically in this case and as to tort claims against political subdivisions in general, despite the fact that the General Assembly has revised these statutes several times in the face of clear and consistent multiple decisions from

across the state finding that R.C. 955.28(B) does not expressly impose liability under R.C. 2744. This is further evidence that there is no merit to Appellant's second assignment of error.

CONCLUSION

For the reasons set forth above, within Appellee's Merit Brief, and within the other Amici Briefs filed in support of Appellee and urging affirmance, the Court should find that Appellant has failed to meet his burden of presenting evidence sufficient to establish an issue of fact as to whether Appellee acted **manifestly** outside the scope of his employment. Specifically, there is no evidence that Appellee's actions were undertaken with malice and/or an intent to harm Appellant as is necessary to sever the employer-employee relationship and invoke the exception to immunity in R.C. 2744.03(A)(6)(a). Furthermore, the Court should also find that R.C. 955.28(B) does not **expressly** impose liability on employees of political subdivisions for the purposes of R.C. 2744.03(A)(6)(c). Thus, both of Appellant's propositions of law should be rejected and the holding of the Seventh District Court of Appeals finding summary judgment in Appellee's favor to be appropriate on the basis of statutory immunity should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served via electronic mail upon the following on the 10th day of January 2023:

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