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April 1, 2024

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Chairman Hillyar, Vice-Chairman Mathews, Ranking Member Galonski, and Members of the House Civil Justice Committee. Thank you for the opportunity to offer testimony concerning HB 281. I support the proposed amendments to R.C. 2307.60(A), which would require an actual conviction for a criminal offense before a litigant may bring a civil action based on an alleged violation of a criminal statute.

I have been an assistant prosecuting attorney for 29 years. I currently am the Chief of the Civil Division of the office of the Cuyahoga County Prosecuting Attorney. In that capacity I oversee seventeen assistant prosecuting attorneys who devote a significant portion of the time to defending the county and its employees from civil lawsuits.

There are a significant number of laws, state and federal, that can form the basis of civil lawsuits against political subdivisions and their officers and employees. The *civil* tort and constitutional law governing such suits has been developed and refined (principally through decisional case law) over the last fifty years, such that a government lawyer familiar with that law is able to discern what conduct violates that law and thus may advise his or her client on such matters. Civil litigation imposes liability based upon such civil law.

One intersection of civil and criminal law occurs in the context of Sec. 2307.60 (A)(1)(A) of the Revised Code, which provides that; "Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action * * *." This permits a victim of a crime to seek civil damages against an individual who purportedly injured the victim.

Prior to the Ohio Supreme Court's decision in *Buddenberg v. Weisdack*, 161 Ohio St.3d 160, 2020-Ohio-3832, 161 N.E.3d 603. federal and state courts held that before plaintiffs could assert a civil claim under R.C. 2307.60, they were required to prove that the defendant in the civil case was *convicted* of a crime that caused the plaintiffs' injuries. Merely alleging in a complaint that the defendant violated some criminal law was not sufficient. However, in *Buddenberg*, the Ohio Supreme Court for the first time held that

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such a conviction is not necessary for such a lawsuit and the plaintiff in such a civil case need only allege the defendant's conduct violated some provision of the criminal code.

The *Buddenberg* decision is problematic because it gives plaintiffs near limitless ability to "creatively" characterize the conduct of government employees as criminal, often by invocation of various vague, underutilized criminal statutes, thereby allowing such plaintiffs to create new "causes of action." These new causes of action enact what amounts to a second regime of civil liability based, not upon the consequences of a prior criminal conviction, but rather solely upon allegations made in a civil complaint that a defendant's conduct could be construed to violate one or more provisions of the criminal code.

This engrafting of criminal statutes into the realm of civil litigation based solely upon allegations also permits plaintiffs to circumvent statutory prerequisites unique to the civil legal system. This is the case with certain employment-related claims.

R.C. 2307.60 creates near limitless liability.

Ordinary civil claims, especially including employment claims, are now routinely being accompanied with so-called R.C. 2307.60 claims. By eliminating the "conviction" requirement, plaintiffs now have access to claims that previously were not recognized under Ohio law. Plaintiffs may rely on any criminal statute, of which there are many, under Chapter 29 of the Ohio Revised Code as well as federal criminal code sections to serve as a basis for their R.C. 2307.60 civil claims. At least one criminal statute, R.C. 2921.60: Interfering with civil rights, presents an opportunity for abuse because it makes it a crime for a public servant to "deprive, or conspire or attempt to deprive any person of a constitutional or *statutory right*." (Emphasis added). So, any right created by the federal or state constitution or any right granted to a plaintiff by statute, is grounds for a civil claim under R.C. 2307.60, regardless of whether the defendant was convicted of the crime.

My office has seen a flurry of such claims since 2020. The following chart demonstrates examples of ways in which plaintiffs' attorneys have used R.C. 2307.60 to embellish and expand their lawsuits:

Criminal Statute	Claim
R.C. 2921.45 (Interfering with Civil Rights)	In one case, plaintiff claimed that a public official violated R.C. 2921.45 (interfering with civil rights) because he was placed on a prolonged, unpaid leave of absence under the civil service code. Plaintiff attempted to criminalize a statutory right under the Ohio Civil Service Code and relied on the language in R.C. 2921.45 that makes it a criminal offense to "knowingly deprive, or conspire or attempt to deprive any person of a constitutional or statutory right."

<p>R.C. 2917.21 (Telecommunications Harassment)</p>	<p>Plaintiff in a case included 17 claims against the county as “co-landlord” under a ground lease to a nonprofit operator of low-income housing for the elderly. Plaintiff asserted a claim for “telecommunication harassment” under R.C. 2917.21 based on an employee of the non-profit (not of the county) allegedly making harassing phone calls to plaintiff seeking unpaid rent due to the non-profit.</p>
<p>R.C. 2921.03 (Intimidation)</p>	<p>Plaintiff in a case alleged she was a witness to several crimes allegedly committed by defendants, and also alleged that they used a materially false or fraudulent writing to intimidate her as a public servant from carrying out her duties as a public servant.</p>
<p>R.C. 2721.04 (Intimidation of attorney, victim or witness in criminal case)</p>	<p>Plaintiff in a case claimed that she was a victim of a crime and a witness to alleged criminal acts, and that defendants intimidated her by disciplining her for violating employment policies and engaging in other misconduct.</p>
<p>R.C. 2921.13 (Falsification of Records)</p>	<p>Plaintiff in a case claimed that notes taken by a government employee during a disciplinary conference contained information that was untrue. Plaintiff claimed that by writing notes that purportedly contained false information, defendant falsified government records.</p>
<p>R.C. 2921.05 (Retaliation)</p>	<p>Plaintiff in a case claimed she was a public servant or witness and defendants retaliated against her so that she would not, someday, be a witness in a potential criminal case.</p>
<p>R.C. 2921.44 (Dereliction of Duty)</p>	<p>Dereliction of duty claims are often raised against public employees. Plaintiffs will claim that a public servant failed to perform a duty imposed by law or recklessly did an act forbidden by law.</p>

In the above examples, none of the defendants were convicted of the underlying criminal offense that served as a basis for the plaintiffs’ claims under R.C. 2307.60. These examples illustrate the ease and extent to which plaintiffs have used R.C. 2307.60 to bring tort claims that have never been recognized under Ohio law. But the scope of the claims available to plaintiffs after the *Buddenberg* decision is not the only issue.

Effect on Employment Claims

After *Buddenberg*, the protections granted to employers against questionable employment claims are all but eviscerated. This is evident with respect to claims under Title VII of Civil Rights Act of 1964; R.C. 4112.02 (Unlawful Discriminatory Practices); R.C. 4113.52 (Whistleblower statute); and *Greeley* or public policy wrongful termination claims.

Title VII and R.C. Chapter 4112 discrimination/retaliation claims

R.C. 2307.60 allows plaintiffs to avoid certain statutory requirements for filing employment claims under Title VII and R.C. 4112.02. Under Title VII, an employee claiming unlawful discrimination or retaliation must file an EEOC charge within 180 days (or in some cases 300 days) of the alleged misconduct. Rather than file an EEOC charge, plaintiffs can just cite a criminal statute (like R.C. 2921.45) and claim that the defendant violated a “statutory right” (Title VII). By pleading their claim under R.C. 2307.60, plaintiffs can bypass all the statutory prerequisites to suing under Title VII.

Similarly, the Ohio General Assembly recently amended R.C. Chapter 4112 to provide employers additional protection against costly employment claims. The amendments provide, amongst other things, the following:

1. An employee must first file a charge with the Ohio Civil Rights Commission before filing a lawsuit.
2. Elimination of individual liability for supervisors who are alleged to have engaged in discriminatory conduct.
3. Additional affirmative defenses (e.g., safe harbor defense).

After *Buddenberg*, plaintiffs may now bring a claim under R.C. 2307.60, cite to a criminal statute, and avoid the defenses, protections, and prerequisites to filing suit under R.C. Chapter 4112.

Whistleblower actions

The *Buddenberg* decision weakens the whistleblower statute, R.C. 4113.52, because a plaintiff can now bring claims under R.C. 2307.60 for retaliation and avoid the notice and reporting requirements under R.C. 4113.52. Before an employee can bring a whistleblower claim under R.C. 4113.52, he or she must do the following:

1. Orally notify his or her supervisor or other responsible company officer that the employer has committed a criminal offense; and then,
2. File with that supervisor or officer a detailed written report concerning the alleged criminal violation.

See R.C. 4113.52(A)(1)(a). After receiving the oral notice and written report, the employer then has 24 hours to correct the violation or make a good faith effort to do so and notify the employee of such corrective actions or efforts to correct. See R.C. 4113.52(A)(1)(b). If the employer refuses to take these steps, the employee must then file a detailed report with the appropriate prosecuting authority, a peace officer, inspector general, or other public official or agency with authority over the employer. Only after complying with the above, and assuming employer retaliation against the whistleblower employee, may the employee file a whistleblower claim. See R.C. 4113.52(D)(E).

After *Buddenberg*, an employee no longer is bound by the statutory requirements for bringing a whistleblower claim. An employee can frame their whistleblower claim as an R.C. 2307.60 action, and recover damages based on retaliation under R.C. 2921.05 (retaliation claim) or other criminal statute or code section.

Public Policy Wrongful Conviction Claims

The *Buddenberg* decision further frustrates the Ohio Supreme Court's decision in *House v. Iacovelli*, 159 Ohio St.3d 466, 2020-Ohio-435, 152 N.E.3d 178, which narrowed the scope of *Greeley* or public policy wrongful termination claims. Public policy wrongful termination claims are intended to protect employees at will from being terminated from their job where that termination violates a public policy of the state. In *House* and several other cases, the Ohio Supreme Court has resolutely limited the circumstances under which a public policy wrongful conviction claim may be actionable to not eliminate the employee "at-will" doctrine altogether.

In *House*, the Ohio Supreme Court reiterated that before an employee at will could be bring a *Greeley* claim, he or she must satisfy four elements:

- (1) Clarity – a clear public policy exists and is manifest in the Ohio or federal constitutions, statute or administrative regulation, or at common law;
- (2) Jeopardy – terminating an employee's employment would jeopardize the public policy;
- (3) Causation – the employee's termination was motivated by conduct related to the public policy; and
- (4) Overriding justification – the employer lacked a legitimate business justification for the termination.

Under the jeopardy element, if a statutory remedy exists that adequately discourages the employer's wrongful conduct and sufficiently protects society's interest, then the employee cannot bring a *Greeley* claim. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, 773 N.E.2d 526, ¶ 15. This is true regardless of whether the statutory scheme contains a sufficient personal remedy to the aggrieved employee. *House* at ¶ 20. The *House* decision effectively limits an employee's ability to premise a wrongful termination claim on the employer's violation of a criminal statute if the penalty provision(s) of the statute protects society's interests.

After *Buddenberg*, plaintiffs can bring a claim under R.C. 2307.60 and convert every criminal statute into a wrongful termination claim without having to first establish the elements they would otherwise be required to prove if they brought a public policy wrongful termination claim. In effect, the *Buddenberg* court has interpreted R.C. 2307.60 in such a way that limitation previously placed on the filing of *Greeley* claims are now inconsequential. Furthermore, it is anticipated that plaintiffs will use R.C. 2307.60 as a substitute for a *Greeley* claim because they will no longer be required to satisfy the four elements necessary to prove a wrongful termination in violation of public policy claim.

Conclusion

The purpose in enacting R.C. 2307.60 was to enable victims of crime *in cases in which the criminal defendant was convicted* to recover damages for their injuries where no existing statute or common law tort was available to make the victim whole. But plaintiffs, relying on the *Buddenberg* case, are using R.C. 2307.60 to replace existing statutory or common law remedies. Furthermore, the amendment would limit recovery to plaintiffs who were victims of an actual crime, rather than a speculative one. Accordingly, my office supports the proposed amendments to R.C. 2307.60(A).