IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

CASE NO. 2021-CA-00033

BARBARA KOLKOWSKI,

Plaintiff-Appellant,

v.

ASHTABULA AREA
TEACHERS ASSOCIATION
et al.,

Defendants-Appellees.

ASSIGNMENTS OF ERROR AND MERIT BRIEF OF APPELLANT BARBARA KOLKOWSKI

ORAL ARGUMENT REQUESTED

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PROCEDURAL POSTURE

This is an appeal from an Order granting the Defendants' Motions to Dismiss the action in its entirety pursuant to Ohio R. Civ. P. 12(C). Plaintiff-Appellant Ms. Kolkowski filed her initial complaint on January 27, 2021, against Defendants Ashtabula Area Teachers' Association ("AATA" or "the Union") and Ashtabula Area City School District ("the District"). (T.d. 1. Complt.,1/27/2). The Defendants moved to dismiss the Complaint. (T.d. 2, Mot. to Dismiss, 5/5/21). Prior to a hearing on the Defendants' Motion to Dismiss, Ms. Kolkowski filed an Amended Complaint adding the Ohio Education Association ("OEA") as an additional defendant and making certain changes to the original complaint. (T.d. 2, Am. Complt., 6/4/21). The District filed a renewed Motion to Dismiss in Response to the Amended Complaint and the AATA and the OEA filed a Joint Motion to Dismiss the Amended Complaint. (T.d. 3, Mot. to Dismiss, 7/9/21; Jt. Mot. to Dismiss 7/12/21). Ms. Kolkowski responded in opposition on July 27, 2021. (T.d. 3, Brief in Opp., 7/27/21). The Defendants filed Replies and Ms. Kolkowski filed a sur-reply. (T.d. 4, Reply, 8/10/21; Surreply, 8/26/21). On October 5, 2021, the Court granted the Defendants Motions to Dismiss (T.d, 5, Judgment Entry, 10/5/21). Ms. Kolkowski filed a timely notice of appeal to this Court. (T.d.4, Not. of Appeal, 11/2/21).

STATEMENT OF FACTS

Plaintiff-Appellant Barbara Kolkowski is a guidance counselor employed by the Ashtabula Area City School District ("the District"). Although she is not a member of the Ashtabula Area Teachers' Association ("AATA" or "the Union") or the Ohio Education

Association ("OEA"), she is employed pursuant to the terms of a Collective Bargaining Agreement ("CBA") and by law, is a member of the bargaining unit exclusively represented by the Ashtabula Area Teachers' Association. (Am.Cmplt. ¶1). The CBA to which Ms. Kolkowski is bound contains a multi-level procedure to address employee grievances. See CBA, Article XVI.

On September 16, 2020, Ms. Kolkowski initiated the contractual grievance procedure relating to a dispute over a supplemental contract and the duties assigned to her by filing a "Level One" request to have her grievance adjusted. (Id. at ¶ 16). Ms. Kolkowski represented herself in pursuing her grievance. (Id. ¶17). On September 25, 2020, the District denied her grievance at Level 1. (Id.)

Ms. Kolkowski, again, representing herself and without assistance from the Union, sought a "Level Two" review of her grievance on September 28, 2020. (Id. at ¶19). On October 20, 2020, that too, was denied. (Id.)

Following the Level Two denial, Ms. Kolkowski chose to submit her grievance to arbitration. The CBA provides that an aggrieved employee may demand mediation (Level Three) or Arbitration (Level Four) relating to the grievance. CBA, Art. XVI (C) (Attached and incorporated as Exhibit A to the Complaint). Notably, the CBA specifically recognizes—consistent with Ohio statute—that a bargaining unit member can pursue a grievance on his or her own behalf. (Id. at ¶20; Ex. To Cam. Cmplt. Art. XVI). In other words, the grievance and the rights to adjust it belong to the aggrieved bargaining unit member.

The CBA, which as a bargaining unit member Ms. Kolkowski is bound to follow, requires that an aggrieved employee seeking arbitration of the grievance demand that

the Union submit the grievance to arbitration. See CBA at Art. XVI(C). On November 5, 2020, pursuant to Article XVI (C) of the CBA, Ms. Kolkowski demanded that the Union submit a demand for arbitration on her behalf against the District with the American Arbitration Association. (Id.). In her letter demanding arbitration, Ms. Kolkowski was clear that she did not want the Union's representation in the arbitration proceedings and intended to use her own counsel at her own expense. (Id. at ¶ 22, Exhibit B, attached to Complaint). On November 25, 2020, the Union responded by email to Ms. Kolkowski's counsel stating that while it would submit the grievance to arbitration it would not permit Ms. Kolkowski to be represented by her own counsel in that proceeding. (Id. at 24, Ex. C. to the Am. Cmplt). A copy of the email is attached as Exhibit C. On December 14, 2020, the AATA submitted the grievance for arbitration to the AAA. (Id. at ¶24). Ms. Kolkowski filed this action to assert her right to choose her own counsel at the arbitration.

LAW AND ARGUMENT

ASSIGNMENT OF ERROR NO. 1: The trial court erred by applying the U.S. Supreme Court's holding in *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 104 S. Ct. 1058, 79 L.Ed 2d 299 (1984) to this case, which is factually distinct.

Issue Presented for Review: : In *Knight*, the U.S. Supreme Court held that a Minnesota restriction on bargaining unit members' ability to participate in "meet and confer" sessions with management did not offend the First Amendment because the bargaining unit members still enjoyed their free-speech and association rights in other forums and while the Constitution plainly allowed the plaintiffs to speak, it did not require the state to listen. Here, Ms. Kolkowski asserts her right to choose her own counsel in the arbitration of her own grievance. Are Ms. Kolkowski's Fifth Amendment right to choose her counsel and the associated First Amendment rights inherent in speaking through that counsel distinguishable from the issues in Knight? **Yes.**

1. Standard of Review

This Court reviews decisions granting a motion to dismiss *de novo*, treating all of

the complaint's factual allegations as true and drawing all reasonable inferences in the nonmoving party's favor. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12, citing *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). To grant the motion, "it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought." *Sherman v. Ohio Pub. Employees Retirement Sys.*, 163 Ohio St.3d 258, 2020-Ohio-4960, 169 N.E.3d 602.

2. Ms. Kolkowski's Right to Her Own Counsel at Arbitration is Distinguishable from the First Amendment Rights at Issue in *Knight* and *Thompson*.

The constitutional right to retain one's own counsel arises out of the Fifth Amendment's Due Process Clause and is well established in both federal and Ohio law. *Anderson v. Sheppard*, 856 F.2d 741, 748 (6th Cir. 1988); *A.B.B. Sanitec W., Inc. v. Jeffrey J. Weinsten*, 8th Dist. Cuyahoga No. 88258, 2007-Ohio-2116, ¶25; *see also* Ohio Constitution, Art. I, Sec. 1; Sec. 16. The First Amendment rights asserted in the Amended Complaint and related to the right to speak through one's own counsel—the rights to speak freely, to avoid compelled speech, and to choose not to associate with a particular group—are likewise well-established. *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

So too is the ability to enforce these rights in Ohio's courts. Ohio Const., Art. 1, §16; *Franklin Cty. Law Enf't Ass'n v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 171, 572 N.E.2d 87, 91 (1991). While Ohio law grants SERB exclusive jurisdiction in disputes relating to the "new rights and remedies" created by R.C. 4117, "if

a party asserts rights that are independent of R.C. Chapter 4117, then the party's complaint may properly be heard in common pleas court." *Id.* at 171. Thus, the Ohio Supreme explained, "[b]ecause constitutional rights exist independently of R.C. Chapter 4117, such claims may be raised in common pleas court even though they may touch on the collective bargaining relationships between employer, employee, and union." *Id.* at 172; see also, *Weinfurtner v. Nelsonville-York School Dist. Bd. of Edn.*, 77 Ohio App.3d 348, 356, 602 N.E.2d 318, 323 (4th Dist.1991) ("since federal civil rights claims exist independently of R.C. Chapter 4117," common pleas courts have jurisdiction over claims brought under 42 U.S.C. § 1983).

The trial court correctly acknowledged that Ms. Kolkowski had raised constitutional claims independent of R.C. 4117 but erred in applying the U.S. Supreme Court's holding in *Minnesota State of Bd. of Community Colleges v. Knight, supra,* and the Sixth Circuit's holding in *Thompson v. Marietta,* 972 F. 3d 809 (2020), to dismiss those claims. The *Knight* case involved bargaining unit members' ability to participate in "meet and confer" sessions with management, during which administration officials met with representatives of the faculty union to "obtain advise on policy questions. *Knight*, 465 U.S. at 280. The Court described these sessions as occasions for "public employers, acting solely as instrumentalities of the state, to receive policy advice from their professional employees." *Id.* The CBA in *Knight* limited participation in the meet and confer sessions to representatives of the union.

The *Knight* court upheld the limitation against a First Amendment challenge, reasoning that while the *Knight* plaintiffs generally had the right to speak on any topic of their choosing, they did not have the right to compel their employer—in that case, the

State of Minnesota—to listen in any sort of formal setting. *Id.*at 282. The *Knight* court also explained that this limitation served an important public policy goal: it provided a limit to individual argument in governmental matters. *See Knight*, 465 U.S. at 285 ("There must be a limit to individual argument in such matters if government is to go on. Absent statutory restrictions, the state must be free to consult or not to consult whomever it pleases.") (internal citation omitted). In other words, if any individual employee could compel state officials to sit down with him or her and listen to their concerns, those state officials would be unable to do their jobs. In Thompson, the plaintiff challenged Ohio's exclusive representation statute on the basis that it forced Ms. Thompson to associate with an organization—the union—with which she did not wish to associate. The Sixth Circuit held that *Knight*'s decision allowing the state to exclude individual bargaining unit members from meet and confer extended to "more traditional collective bargaining activities." *Thompson*, 972 F3d at. 814.

The right to choose one's counsel in an arbitration, however, is fundamentally different situation from "traditional collective bargaining activities" like the meet and confer sessions in *Knight* or the associational rights raised in *Thompson*. And the policy rationales of preserving state resources and allowing the exclusive representative to speak with one voice are not present here. An arbitration, like a trial, is an individualized adjudicatory proceeding. See *Greenwald v. Shayne*, 10th Dist. Franklin No. 09AP-599, 2010-Ohio-413, ¶ 9 (recognizing "the adjudicatory purpose of arbitration."). The arbitrator makes factual determinations and applies the law just as a judge would. Indeed, where an arbitration affords basic elements of adjudicatory procedures, such as the presentation of evidence, legal argument in support of a party's contention, and a final ruling, collateral

estoppel and res judicata will apply. See *Universal Am. Barge Corp. v. J-Chem, Inc*., 946 F.2d 1131, 1137 (5th Cir.1991).

Apart from slightly relaxed formalities, most arbitrations are procedurally indistinguishable from bench trials. Because of its presumptive finality—and because it is the only step in the grievance process where the grievant can be heard before a neutral third party—"the guiding hand of counsel" in preparing and presenting a case is all the more important. Unlike the general First Amendment rights at issue in Knight and Thompson, Ms. Kolkowski's right to retain counsel in civil matters arises from the Due Process protections of the Fifth Amendment and Art. I, Section 16 of the Ohio Constitution and is, by definition, participatory. See *Anderson* 856 F.2d at 748 (" the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement").

Unlike the plaintiffs in *Knight*, who could speak their minds on public policy issues in other forums, Ms. Kolkowski has no other forum for her claim. The CBA provides for arbitration and that arbitration is her only opportunity to make her case before a neutral third party. Simply put, arbitration is the process that the Union and the District has chosen to resolve individual disputes relating to workplace grievances.

Moreover, the First Amendment rights that Ms. Kolkowski asserts are fundamentally different than those in *Knight* and *Thompson*. The First Amendment rights she asserts are tied to and inseparable from her Fifth Amendment right to have her own lawyer at her own expense. Ms. Kolkowski is not merely seeking to "speak" or "avoid association," she is seeking to litigate her rights in the only forum allowed to her by speaking through her own attorney.

Further, unlike *Knight*, there is no public policy interest in the arbitrator hearing from the Union instead of Ms. Kolkowski. On the contrary, public policy—embodied in the case law recognizing a right choose one's own counsel—supports Ms. Kolkowski. The arbitrator is no more burdened by hearing a case presented by Ms. Kolkowski's counsel of choice than he or she would be burdened by hearing a case put on by a non-lawyer Union representative. Indeed, allowing Ms. Kolkowski to use her own counsel would likely result in quicker, more focused, and fairer arbitration. This does not place any additional burden on the state, as the meet and confer demand did in *Knight* because, unlike *Knight*, Ms. Kolkowski is not demanding that the state—her employer—listen to her public policy views. Rather, She is demanding that the demanding that the arbitrator—the person that the District and the Union designated to resolve employee grievances—listen to her legal and factual arguments presented by the lawyer of her choosing, rather than a non-lawyer Union representative.

Further, *Knight's* holding can also be distinguished by the contractual rights available. The CBA in *Knight* did not explicitly grant an employee the right to participate in a meet and confer session. In contrast, the CBA here provides employees with the right to bring grievances on their own behalf and, consistent with R.C. 4117 and this Court's holding in *Gaydosh*, have them adjusted without Union interference. The trial court's reliance on *Knight* is therefore misplaced.

Assignment of Error No. 2: The Trial Court Erred by Not Properly Applying Ohio Law, Including *Johnson v. Metro Health Medical Centr.*, 8th Dist. Cuyahoga No. 79403, 2001 WL 1685585, (Dec. 20, 2001) and this Court's Decision in *Gaydosh v. Trumbull County*, 94 N.E. 3d 932, 2017-Ohio-5859 (11th Dist. 2017).

Issue Presented for Review: Ohio courts have recognized a bargaining unit member's right to choose his or her own counsel in grievance arbitration, so long as the employee has not accepted Union representation during the process. Ms. Kolkowski's complaint

states that she neither sought nor accepted Union representation in the grievance process, and in fact, refused such representation. The trial court, however, held that Ms. Kolkowski lacked standing to bring her claims because she demanded that the Union submit her grievance to arbitration. Did Ms. Kolkowski accept Union representation? **No.**

1. Standard of Review

As set forth above this Court reviews the trial court's decision de novo and must treat all of the complaint's factual allegations as true and make all reasonable inferences in the nonmoving party's favor. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12

2. Ms. Kolkowski Did Not Seek or Accept Union Representation and Thus, Under *Johnson*, et al. Has Standing

In addition to Ms. Kolkowski's facts being distinguishable from those in *Knight* and *Thompson,* Ohio courts, including this Court, have heard similar cases and recognized an aggrieved bargaining unit member's right to pursue his or her own grievance. *See, e.g., Johnson v. Metro Health Medical Centr.*, 8th Dist. Cuyahoga No. 79403, 2001 WL 1685585, (Dec. 20, 2001). The rule advanced in *Johnson* is that parties to an arbitration, like Ms. Kolkowski, have the right to hire their own counsel for that arbitration, provided that they have not already accepted Union representation. *Id*. at *2. In other words, the grievance belongs to the Ms. Kolkowski unless and until she accepts the Union's assistance in adjusting it. As the amended complaint makes clear, Ms. Kolkowski has represented herself without assistance from the Union and has specifically demanded the right to continue to do so in arbitration. Am. Complt. at ¶¶s 16, 17, 19, 22. Treating the complaint's allegations as true, and drawing all reasonable inferences in favor of Ms. Kolkowski, she has preserved her rights under *Johnson*, *et al*., to arbitrate using the retained counsel of her choice.

In *Johnson,* the Eighth District Court of Appeals, interpreting R.C. 4117.03(A)(5),

held that employees have an individual right to pursue a grievance through arbitration without the intervention of the bargaining representative [the Union] as long as the employee has not invoked Union representation. *Johnson*, 2001 WL 1685585 * 2. The *Johnson* court created a rule akin to subrogation. If the grievant submits his or her claim to the Union and accepts its representation, the Union essentially steps into the grievant's shoes and becomes the real party in interest. The grievant's standing to pursue the claim is thus extinguished. But unlike the plaintiff in *Johnson*—who requested and accepted Union representation throughout the grievance process and through the end of the arbitration, or the plaintiff in *Gaydosh*—who explicitly assigned her grievance related claims to the Union—Ms. Kolkowski specifically rejected Union representation. See Am. Cmplt. at ¶¶s 4, 26, 30, 36, 37. Indeed, Ms. Kolkowski brought this action to affirm her right to choose her own legal representation in arbitration and to avoid being compelled to accept the Union's representative.

Ms. Kolkowski made this clear in her amended complaint. The Amended Complaint's second paragraph states that when she demanded arbitration, Ms. Kolkowski "wanted to use (and pay for) her own counsel to represent her throughout the arbitration process." (Cmplt. at ¶ 2). The Complaint also specifically stated that Ms. Kolkowski had neither requested nor received representation, or any other assistance from the Union during the first two stages of the grievance process. See Complt at ¶ 16 ("Ms. Kolkowski initiated the contractual grievance process"); ¶17 ("Ms. Kolkowski has thus far represented herself in pursuing her grievance"). Indeed, Ms. Kolkowski filed this pre-arbitration action to avoid surrendering her grievance to the Union by proceeding to arbitration with Union representation.

Nevertheless, the trial court held that by merely requesting that the Union submit the grievance to arbitration—as the CBA required—Ms. Kolkowski ceded her standing to adjust the grievance to the Union. The trial court's finding simply cannot be squared with the complaint's allegations that Ms. Kolkowski did not seek nor accept Union representation—or any substantive assistance from the Union. On a motion to dismiss, the trial court was required to treat Ms. Kolkowski's allegations that she did not seek any representation from Union and was affirmatively seeking to avoid Union representation, as true.

Instead, notwithstanding the allegations of the complaint, the trial court found that by merely seeking arbitration through the Union—as required by the CBA—Ms. Kolkowski abandoned any right she had to litigate this case on her own. This view, however, would render *Johnson'*s holding toothless.

The *Johnson* court premised its decision on the grievant's original ownership of the claim. Again, the rule is like an insurer's right of subrogation. When the claim is paid, the insurer steps into the original claimant's shoes. Johnson "submitted her claim" when she requested and accepted the Union's assistance. Ms. Kolkowski, cognizant of the *Johnson* rule, neither requested nor accepted such assistance. See Am. Complt. ¶¶s See Am. Complt. at ¶¶s 16, ./17, 19, 21, 22, 39.

Compare, for example, Ms. Kolkowski's facts with those of *Gaydosh*, where the plaintiff signed a document specifically authorizing the Union to represent him in the grievance proceedings, and the union represented him at the initial grievance phase and prepared the arbitration package. The union in *Gaydosh* then withdrew its arbitration demand, at which point, the plaintiff hired his own counsel and sought to pursue the

arbitration on his own. *Gaydosh,* 2017-Ohio-5859, 94 N.E.3d 932, ¶ 24. The court relied on *Johnson* to hold that "once an employee subject to a collective bargaining agreement authorizes his or her union to pursue a grievance, the cause of action belongs to the union, and the employee lacks standing to prosecute the case." *Id*. at ¶ 23. The unescapable conclusion, again, is that the grievance belongs to the employee until he or she transfers it to the Union. *Id.*, see also, *Waiters v. Lavelle*, 8th Dist. Cuyahoga No. 95270, 2011-Ohio-116, ¶ 11 ("Our interpretation [is] that the statute requires the employee to invoke the provisions of R.C. 4117.03(A)(5) in lieu of union representation at the outset of presenting the grievance"). Here, Ms. Kolkowski's amended complaint unequivocally states that she did not seek or accept the Union's assistance. See Am. Complt. at ¶¶s 16, 17, 19, 21, 22. Indeed, the Amended Complaint explains that Ms. Kolkowski filed this pre-arbitration cause of action in reliance on the *Johnson* rule and to avoid any claim that she had released the claim to the Union. Am. Complt. at ¶¶s 38, 39.

And while *Johnson* has answered the question definitively, the CBA itself also indicates that the grievance and the right to pursue relief is a personal right belonging to the aggrieved person. The CBA defines "An aggrieved person" as the "person making the claim for himself/herself or for the Association . . . ." CBA, attached as Ex. A to Am. Complt., at Art. XVI (3)., p73 (*emphasis added*). The disjunctive conjunction "or" contemplates an aggrieved person like Ms. Kolkowski pursuing the claim on her own behalf. Likewise, the CBA defines "a party in interest" as "the person(s) making the claim and any person who may be required to take action or against whom action might be taken in order to resolve the claim." *Id.* at Art. XVI (A)(4). Under the CBA's plain language, Ms. Kolkowski is both the "aggrieved person" and a "party in interest." The

Union, on the other hand is neither an "aggrieved person" nor "a party in interest."

The CBA's language regarding arbitration implies that the right to determine whether to seek arbitration belongs solely the grievant. The CBA states that "[*i]f*, after receiving the answer at Level II or Level III, *the bargaining unit member remains aggrieved, the Association shall notify the Board in writing of its intent to submit the grievance to arbitration.*" *Id.* at Art. XVI (C)(Level Four), 75 (emphasis added). Thus, upon receipt of the Level II answer, it is up to the bargaining unit member—not the Union—to determine whether the answer is satisfactory, or whether the bargaining unit member "remains aggrieved." The determination of whether one "remains aggrieved" is necessarily personal to the aggrieved person. More importantly, the CBA requires that the Union demand arbitration if the bargaining unit member remains aggrieved. Id.

Moreover, *Johnson* and *Gaydosh* premise the loss of standing on the employee's decision to seek Union *representation. See Gaydosh*, 2017-5659, ¶23 ("Mr. Gaydosh authorized the Union to represent him in the grievance process"). Indeed, the *Johnson* court specifically tied the loss of standing to choosing legal representation by the Union:

> Johnson correctly argues that public employees have a statutory right under R.C. 4117.03(A)(5) to "present grievances and have them adjusted, without intervention of the bargaining representative, * * * ." However, we interpret this right to exist only before the employee invokes union representation. Once the employee chooses union representation, that employee lacks standing on all matters including an appeal.

Johnson, 2001-Ohio-4259, 2001 WL 1685585 * *2*(Dec. 20, 2001).

Again, as is plain from the Amended Complaint, Ms. Kolkowski never sought Union representation. The only part that Ms. Kolkowski allowed the Union to play was that of transmitting the arbitration demand, which the Union was required to submit under the CBA. The trial court disagreed, holding that by merely asking the Union to submit the

arbitration demand—even when stating her intent to hire her own counsel for that arbitration—the Union became the real party in interest. Finding that Ms. Kolkowski surrendered her standing by engaging in the ministerial act of demanding arbitration through the channels set forth in the CBA is inconsistent with the *Johnson-Gaydosh* line of cases. Again, in those cases, the employee had explicitly accepted Union representation and had gone significantly down the path in arbitration. Ms. Kolkowski, on the other hand, made clear throughout the process that she did not want the Union's representation. If, as the trial court held, the mere request for arbitration amounts to Union "representation," then the guarantees provided by *Johnson* and *Gaydosh,* codified in R.C. 4117, and protected by the U.S. and Ohio Constitutions are illusory.

CONCLUSION

For all the foregoing reasons, the trial court's order should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of January 2022, the forgoing Merit Brief was served on all counsel of record by regular mail and email to the following addresses:

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