

IN THE SUPREME COURT OF OHIO

GEORGE SULLIVAN, *et al.*, : Case No. **08-0691**  
Appellees, :  
vs. : **On Appeal from the Hamilton**  
ANDERSON TOWNSHIP, *et al.*, : **County Court of Appeals, First**  
Appellants. : **Appellate District, Judgment filed**  
: **March 28, 2008**  
: **Court of Appeals Case No. CA-070253**

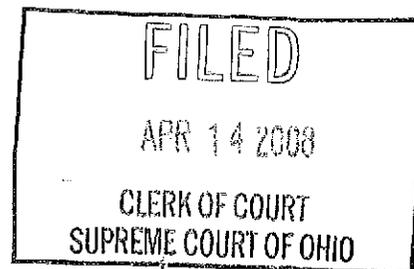
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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT  
ANDERSON TOWNSHIP

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**TABLE OF CONTENTS**

**I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION..... 1**

**II. STATEMENT OF THE CASE AND FACTS..... 3**

**III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW..... 6**

Proposition of Law No. I: In a case with multiple claims and/or parties, when a court issues an order that denies a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744 of the Ohio Revised Code or any other provision of the law, the subject order is final and appealable and does not require a Civ.R. 54(B) certification.....6

**IV. CONCLUSION ..... 10**

**CERTIFICATE OF SERVICE..... 11**

**APPENDIX:** **Appx. Page**

Opinion of the Hamilton County Court of Appeals  
(March 28, 2008).....1

Judgment Entry of the Hamilton County Court of Appeals  
(March 28, 2008).....8

**I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The facts and circumstances of this case and the decision of the Hamilton County Court of Appeals require the attention of this Honorable Court to resolve an issue of public or great general interest and a substantial constitutional question pertaining to the implementation of the General Assembly's express intent that orders denying a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability is a final order that is immediately appealable. Specifically, this appeal raises the question of whether a political subdivision, subject to such an order issued in a case with multiple claims and/or parties, is constrained to seek a Civ.R. 54(B) certification that there is "no just reason for delay," which is discretionary with the trial court, or whether the subdivision may take an immediate appeal over which a court of appeals "must exercise jurisdiction."<sup>1</sup>

Resolution of this issue is important to give effect to the General Assembly's express intent that an "order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or

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<sup>1</sup> On or about April 7, 2008, the Appellant, pursuant to App.R. 25, filed a motion with the Hamilton County Court of Appeals, seeking certification of a conflict of the following proposition: "Whether an order that denies a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744 of the Ohio Revised Code or any other provision of the law is a final and appealable order when the subject order lacks a Civ.R. 54(B) certification." The Appellant proposed *Drew v. Laferty* (June 1, 1999), 4<sup>th</sup> Dist. No. 98CA522, as the conflict case." The Appellant has filed with this Court, contemporaneously herewith and pursuant to S. Ct. Prac. R. II, Section 2(B)(3) and S. Ct. Prac. R. IV, Section 4(A), notice that a motion to certify a conflict is pending with the Hamilton County Court of Appeals.

any other provision of the law is a final order.” R.C. 2744.02(C). This Honorable Court recently held that such an order is final *and appealable*. *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, syllabus. The Court’s guidance is also essential in order to clarify inconsistent appellate court determinations of this issue.

As adopted in Chapter 2744 of the Ohio Revised Code, the exceptions and defenses to political subdivision immunity are in derogation of a general grant of immunity and, therefore, must be narrowly construed and applied. In that vein, political subdivisions should be permitted to seek immediate review of an order denying the benefit of an alleged immunity without first subjecting the legislature’s intent to a discretionary ruling on Rule 54(B) certification. If the First District Court of Appeals’ decision were to stand, it would force political subdivisions that were unable to obtain a favorable Rule 54(B) ruling to wait, perhaps as long as final judgment, for appellate review. This outcome is contrary to the conservation of resources noted by this Court in support of its finding that “[j]udicial economy is actually better served by a plain reading of R.C. 2744.02(C)[.]” *Hubbell*, 2007-Ohio-4839, at ¶ 24-26. These concerns give rise to a substantial constitutional question regarding the scope and extent of the legislature’s authority to craft immediate review of a potential deprivation of immunity.

This Honorable Court’s guidance is also required on this matter of public or great general interest. In addition to the issues referenced, *supra*, the lower court’s decision raises the issue of the expenditure of public resources, both taxpayer funds and personnel, to

continue litigation beyond the point that the General Assembly and this Court have indicated a court of appeals must accept review. As interpreted below, R.C. 2744.02(C) and the *Hubbell* decision are of limited authority when a case involves immunity and other claims and/or a political subdivision and other defendants. Furthermore, the decision ignores the potential, as stated, *supra*, both statutory and binding judicial authority, may be subject to a trial court's discretionary denial of Rule 54(B) certification. Despite this Court's instruction that a "court of appeals must exercise jurisdiction over an appeal of a trial court's decision" denying a political subdivision the benefit of an alleged immunity, the court below holds that directive hostage to a discretionary call.

Because the issues presented in this appeal have the potential to impact the ability of political subdivisions to seek immediate review pursuant to R.C. 2744.02(C) and as stated in *Hubbell*, and because the decision below conflicts with the clear statutory language and this Court's unambiguous holding in *Hubbell*, this Honorable Court should grant jurisdiction to hear this case and review the erroneous decision of the Court of Appeals.

## **II. STATEMENT OF THE CASE AND FACTS**

The Plaintiff-Appellee, George Sullivan ("Appellee"), initiated his lawsuit against the Defendant-Appellant, Anderson Township ("Anderson" or "Township"), and Defendant below, Trend Construction, Inc. ("Trend"),<sup>2</sup> on or about September 7, 2006. The Appellee

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<sup>2</sup> The proper party is The Ford Development Corp. dba Trend Construction. Trend is not a party to the instant Appeal.

asserted claims for breach of contract, breach of promises, negligence, vicarious liability, negligent supervision and trespass against Anderson. Following service of its Answer, Anderson filed a Motion for Judgment on the Pleadings, pursuant to Civ.R. 12(C). Anderson argued the Plaintiff failed to plead an express contract or breach, that it was statutorily immune from claims of promissory estoppel, trespass, *respondeat superior* and negligent supervision and that Anderson was not amenable to an award of punitive damages. On or about March 21, 2007, the trial court issued an Order and Opinion granting in part and denying in part Anderson's motion.

The trial court held that Anderson could not be liable for trespass and that the court could not award punitive damages against the Township. The court also found that the Appellee did not plead the existence of a written contract but then concluded, "any contract which may have existed between Plaintiff and Defendant-Anderson was oral." Because the court held the case involved an oral contract, it overruled Anderson's promissory estoppel argument. The court also determined that Trend could be Anderson's agent and, therefore, an "employee" pursuant to R.C. 2744.02(B)(1), although Appellee had pled Trend was a "sub-contractor." A key to the court's holding that Anderson was potentially vicariously liable or liable for negligent supervision was its implicit finding, by its citation to R.C. 2744.02(B)(2), that Anderson was performing a proprietary function in widening Eight Mile Road. Anderson filed its Notice of Appeal from the trial court's denial of immunity,

pursuant to R.C. 2744.02(C), on or about April 10, 2007, in the Hamilton County Court of Appeals.

In the Court of Appeals, the Appellee moved to dismiss the instant Appeal on the grounds that the trial court's decision was not final and appealable under R.C. 2744.02(C), but did not argue the lack of a Civ.R. 54(B) certification mandated dismissal. The court of appeals, on or about June 6, 2007, overruled Appellee's motion. The Appellee did not reassert R.C. 2744.02(C) as a basis for dismissal in his merit brief and did not, at any time, raise a Rule 54(B) argument.<sup>3</sup>

At oral argument, the court of appeals raised, *sua sponte*, Rule 54(B). The Appellant offered, and sought leave, to file a supplemental brief on the issue. The court of appeals denied leave; however, it accepted for its consideration the case Appellant attached to its proffered brief: *Drew v. Laferty* (June 1, 1999), 4<sup>th</sup> Dist. No. 98CA522. On or about March 28, 2008, the court of appeals dismissed Appellant's R.C. 2744.02(C) appeal, holding that the trial court's order was final but not immediately appealable for want of a Civ.R. 54(B) certification.

In the trial court, this matter has not progressed beyond Anderson's Civ.R. 12(C) motion; therefore, the facts are gleaned from the parties' pleadings. The Appellee alleged he sustained property damage as a direct and proximate result of a "road widening" project

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<sup>3</sup> Although the Appellee stated in his list of issues presented for review, "Whether denial of a Motion for Judgment on the Pleadings is immediately appealable[.]" he did not argue the issue nor did he cite either R.C. 2744.02(C) or Civ.R. 54(B) in support of this issue.

performed by, or at the direction of, the Township.<sup>4</sup> Specifically, the Appellee claimed the Township “failed to honor promises,” breached a contract, trespassed upon his property, was responsible for any negligence committed by Trend as Anderson’s “sub-contractor,” and negligently failed to supervise Trend’s work.

The Appellee asserted he met with Township representatives on or about November 8, 2005 regarding the project, which involved Eight Mile Road, which lies adjacent to his residence. He cited to an unattached “letter memorializing that meeting and the initial requirements to the agreement[.] \* \* \*” The Appellee maintained that the Township, among others, subsequently made certain “additional promises” to him to be able to complete the project. The Appellee averred harm because of the Township’s alleged breach of promises and contract, trespass, vicarious liability based on Trend’s alleged negligence and for failure to supervise Trend’s work. The Appellee claimed compensatory and punitive damages against Anderson.

### **III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

Proposition of Law No. I: In a case with multiple claims and/or parties, when a court issues an order that denies a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744 of the Ohio Revised Code or any other provision of the law, the subject order is final and appealable and does not require a Civ.R. 54(B) certification.

This Honorable Court should grant jurisdiction on this proposition of law to give effect to the express intent of the Ohio General Assembly that orders, which deny “the

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<sup>4</sup> Anderson asserts that the project was to install a sidewalk along Eight Mile Road.

benefit of an alleged immunity from liability,” are final orders, R.C. 2744.02(C); orders this Court held are “final [and] appealable.” *Hubbell*, 2007-Ohio-4839, syllabus. In *Hubbell*, the Court considered an appellate panel’s dismissal of the city of Xenia’s appeal from denial of its summary judgment motion on immunity issues. *Id.* at ¶ 1. This Court reversed the decision of the Second District Court of Appeals and reasoned that, although “[g]enerally, the denial of summary judgment is not a final, appealable order,” the General Assembly’s unambiguous intent as expressed in the “plain language of R.C. 2744.02(C) does not require a final denial of immunity before the political subdivision has the right to an interlocutory appeal.” *Id.* at ¶ 9, 12. The Court held, therefore, that a “court of appeals must exercise jurisdiction over an appeal of a trial court’s decision overruling a \* \* \* motion \* \* \* in which a political subdivision or its employee seeks immunity.” *Id.* at ¶ 21.

This Court noted that application of the statute’s unambiguous language fosters the dual policy concerns of public resource conservation and judicial economy:

Judicial economy is actually better served by a plain reading of R.C. 2744.02(C):

“[D]etermination of whether a political subdivision is immune from liability is usually pivotal to the ultimate outcome of a lawsuit. Early resolution of the issue of whether a political subdivision is immune from liability pursuant to R.C. Chapter 2744 is beneficial to both of the parties. If the appellate court holds that the political subdivision is immune, the litigation can come to an early end, with the same outcome that otherwise would have been reached only after trial, resulting in a savings to all parties of costs and attorney fees. Alternatively, if the appellate court holds that immunity does *not* apply, that early finding will encourage the political subdivision to settle promptly with the victim rather than pursue a lengthy trial and appeals. Under either scenario,

both the plaintiff and the political subdivision may save the time, effort, and expense of a trial and appeal, which could take years.

“\* \* \* As the General Assembly envisioned, the determination of immunity could be made prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses pursuant to amendments made to R.C. 2744.02(C) and 2501.02.” (Emphasis sic.) *Burger v. Cleveland Hts.* (1999), 87 Ohio St.3d 188, 199-200, 718 N.E.2d 912 (Lundberg Stratton, J., dissenting).

*Id.* at ¶ 24-26. Requiring Rule 54(B) certification prior to appeal would thwart these considerations by subjecting political subdivisions to additional delay, up to and including final judgment, in seeking review.

Generally, interlocutory appeals are subject to Civ.R. 54(B)'s terms. Revised Code Section 2744.02(C), however, is an exception to the traditional final and appealable order analysis that is informed by R.C. 2505.02 and, concomitantly, Civ.R. 54(B). Instead of determining whether the order affects a substantial right, determines the action, denies a provisional remedy or is entered in a special proceeding, R.C. 2505.02(B), the legislature has determined the instant judgment is a final and appealable order, R.C. 2744.02(C); *Hubbell*, 2007-Ohio-4839, syllabus. Under a R.C. 2505.02 review, a Rule 54(B) certification is generally necessary when the order determines fewer than all claims or parties to the case, *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381, syllabus; however, an appeal pursuant to R.C. 2744.02(C) dispenses with the need for Rule 54(B):

Generally, if a trial court has rendered a judgment with respect to fewer than all of the parties or fewer than all of the claims in an action, the order must comply with Civ.R. 54(B) and include the “no just reason for delay” language in order to be deemed a “final order.” *Noble, supra*, at syllabus. *Chef Italiano*

*Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64. However, an exception arises when the issue before the court involves political subdivision immunity. Pursuant to R.C. 2744.02(C), “[a]n order that denies a political subdivision \* \* \* the benefit of an alleged immunity as provided in Chapter 2744 \* \* \* is a final order.”

*Drew v. Laferty* (June 1, 1999), 4<sup>th</sup> Dist. No. 98CA522, 1999 WL 366532, at \*5 (cited with approval on other grounds in *Hubbell*, 2007-Ohio-4839, at ¶ 20). As Rule 54(B) certification is not needed to make the instant judgment final and appealable, this Court should hold the order is final and appealable pursuant to R.C. 2744.02(C) and *Hubbell*.

Anderson’s posture is similar to a litigant subject to a court’s discovery order that mandates disclosure of privileged or confidential matters.

[Appellant] also argues that the orders are not appealable because Civ.R. 54(B) language was not included. However, that language is unnecessary, *since a discovery order is always interlocutory*, leaving other matters to be determined later. In that event, the order is judged on its own merits absent considerations of whether other claims are pending or whether Civ.R. 54(B) language was included.

*Central Benefits Mut. Ins. Co. v. State Emp. Comp. Bd.* (1992), 78 Ohio App.3d 172, 175, 604 N.E.2d 198, 200 (emphasis added); cf. *Calihan v. Fullen* (1992), 78 Ohio App.3d 266, 268, 604 N.E.2d 761, 762 (Rule 54(B) certification not needed because discovery order “disposed of all claims \* \* \* [in] the special proceeding.”) Because R.C. 2744.02(C) appeals will always arise from an interlocutory order, which the statute holds is final, courts should not require Rule 54(B) certification.

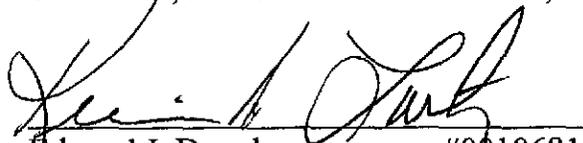
In addition, there is no question but that entry of Rule 54(B) certification is left to the discretion of the trial court. *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 354, 617 N.E.2d 1136, 1138. Under the traditional analysis, if a trial judge does not “make an express determination of no just reason for delay pursuant to Civ.R. 54(B) [the order is] not final and appealable.” *State ex rel. A & D Limited Partnership v. Keefe*, 77 Ohio St.3d 50, 56-57, 1996-Ohio-95, 671 N.E.2d 13, 18. If Rule 54(B) certification is a necessary prerequisite to appeals pursuant to R.C. 2744.02(C), trial courts would have authority to prohibit appeals that the legislature and this Court have determined proper under the statute; in effect, emasculating the statutory authority. This Honorable Court should exercise jurisdiction to address this issue raised by the decision of the First District Court of Appeals.

#### IV. CONCLUSION

For the reasons stated herein, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant, Anderson Township, respectfully requests that this Honorable Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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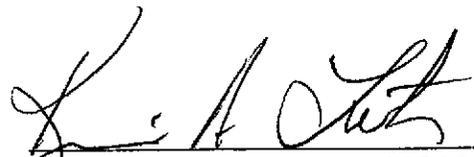
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served by Regular Mail upon the following, this 11th day of April, 2008:

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**APPENDIX**

Opinion of the Hamilton County Court of Appeals  
(March 28, 2008).....1

Judgment Entry of the Hamilton County Court of Appeals  
(March 28, 2008).....8

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

GEORGE SULLIVAN,	:	APPEAL NO. C-070253
Plaintiff-Appellee,	:	TRIAL NO. A-0607640
vs.	:	<i>DECISION.</i>
ANDERSON TOWNSHIP,	:	PRESENTED TO THE CLERK
Defendant-Appellant,	:	OF COURTS FOR FILING
and	:	MAR 28 2008
TREND CONSTRUCTION, INC.,	:	COURT OF APPEALS
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Appeal Dismissed

Date of Judgment Entry on Appeal: March 28, 2008

*A. Brian McIntosh*, for Plaintiff-Appellee,

*Edward J. Dowd and Kevin A. Lantz*, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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*Per Curiam.*

{¶1} Defendant-appellant, Anderson Township, Ohio, appeals from the trial court's order granting in part and denying in part its motion for judgment on the pleadings. Plaintiff-appellee George Sullivan had filed a complaint against the township and defendant Trend Construction, Inc.,<sup>1</sup> alleging damage to his property located on Eight Mile Road resulting from their "road widening" project. The township had argued that, as a political subdivision, it was immune under R.C. Chapter 2744 from Sullivan's claims. Even though the trial court's ruling was an "order that denie[d] a political subdivision \* \* \* the benefit of an alleged immunity from liability,"<sup>2</sup> the order was not a final, appealable order because it did not fully dispose of all the claims of all the parties, and because it lacked a certification pursuant to Civ.R. 54(B). We therefore dismiss the township's appeal.

{¶2} In his amended complaint, Sullivan asserted the following causes of action against the township: (1) breach of contract for failing "to honor its promises made to [Sullivan] in exchange for his permission" to enter upon his property; (2) trespass on Sullivan's property to conduct unauthorized work; (3) negligence under the doctrine of respondeat superior for the negligent acts of "its sub-contractor" Trend; and (4) negligence for improperly supervising "its sub-contractor" Trend. Sullivan sought compensatory and punitive damages.

{¶3} Against Trend, Sullivan asserted these claims: (1) breach of contract for failing "to honor its promises made to [Sullivan] in exchange for his permission" to enter

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<sup>1</sup> While the complaint and the trial court's order refer to "Trend Construction, Inc.," counsel for Trend maintains that The Ford Development Corporation, d.b.a. Trend Construction, is the proper party to this action. Trend has not filed an appellee's brief in this appeal.

<sup>2</sup> R.C. 2744.02(C).

**OHIO FIRST DISTRICT COURT OF APPEALS**

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upon his property; (2) trespass on Sullivan's property to conduct unauthorized work; and (3) negligence in conducting the work.

{¶4} The township raised its immunity defense in its answer. On November 29, 2006, the township moved for judgment on the pleadings pursuant to Civ.R. 12(C), asserting that Sullivan could prove no set of facts to support his claims for relief.<sup>3</sup> The township maintained that it was immune under R.C. Chapter 2744 from Sullivan's promissory-estoppel, trespass, vicarious-liability, negligent-supervision, and punitive-damages claims. The township also asserted that Sullivan had failed to plead an express contract.

{¶5} Although an active participant in several pretrial motions, Trend did not claim immunity in its answer, move for judgment on the pleadings, or file a memorandum in support of the township's motion. Nor did Sullivan file a response to the township's motion.

{¶6} On March 21, 2007, the trial court granted the township's motion in part and denied it in part. The trial court applied R.C. Chapter 2744 and found that the township was immune from Sullivan's trespass claim and from his request for punitive damages. But it concluded that the statute did not confer immunity from Sullivan's claim for breach of the oral contract, vicarious negligence, or negligent supervision of Trend. The record does not reflect that the township, or any other party, sought "an express determination" from the trial court that there was "no just reason for delay" of an immediate appeal of the order.<sup>4</sup> And the order did not contain the Civ.R. 54(B) certification.

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<sup>3</sup> See *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 1996-Ohio-459, 664 N.E.2d 931.

<sup>4</sup> See Civ.R. 54(B).

**OHIO FIRST DISTRICT COURT OF APPEALS**

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{¶7} Because an appellate court has jurisdiction to review only the final and appealable orders or judgments of the lower courts within its appellate district, it must determine its own jurisdiction to proceed before reaching the merits of any appeal.<sup>5</sup> If the order being challenged is not final and appealable, then the court must dismiss the appeal.<sup>6</sup> Because a challenge to jurisdiction is never waived, this court may evaluate its jurisdiction to proceed at any time, even on the consideration of a direct appeal.<sup>7</sup>

{¶8} Here, there is no doubt that the order being appealed is a final order. The plain text of R.C. 2744.02(C) provides that an “order that denies a political subdivision \* \* \* the benefit of an alleged immunity from liability \* \* \* is a final order.” The trial court’s order denied the township the benefit of immunity from some of Sullivan’s claims.

{¶9} In its recent decision in *Hubbell v. Xenia*, the Ohio Supreme Court restated that “[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.”<sup>8</sup> To achieve this purpose, the court stated that determining “whether a political subdivision is immune from liability is usually pivotal to the outcome of a lawsuit,” and it forcefully urged “[e]arly resolution of the issue of \* \* \* liability.”<sup>9</sup>

{¶10} Following the clear legislative and judicial intent to resolve governmental-immunity issues at the earliest opportunity, the *Hubbell* court admonished the court of appeals “not to avoid deciding difficult questions of immunity by pointing to the trial court’s use of the language ‘genuine issue of

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<sup>5</sup> See Section 3(B)(2), Article IV, Ohio Constitution; see, also, R.C. 2505.03(A); *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 1997-Ohio-366, 684 N.E.2d 72.

<sup>6</sup> See *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, at ¶9, citing *Gen. Acc. Ins. Co. v. Ins. Co. of North America* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266.

<sup>7</sup> See *Internatl. Lottery v. Kerouac* (1995), 102 Ohio App.3d 660, 670, 657 N.E.2d 820; see, also, Civ.R. 12(H)(3).

<sup>8</sup> *Hubbell v. Xenia*, 2007-Ohio-4839, at ¶23, quoting *Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450, 453, 1994-Ohio-394, 639 N.E.2d 105.

<sup>9</sup> *Id.* at ¶25, quoting *Burger v. Cleveland Hts.*, 87 Ohio St.3d 188, 199-200, 1999-Ohio-319, 718 N.E.2d 912 (Lundberg Stratton, J., dissenting).

material fact.’ ”<sup>10</sup> It held that “[w]hen a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C).”<sup>11</sup> The court therefore reversed the lower court’s dismissal of the political subdivision’s appeal challenging the denial of its summary-judgment motion.<sup>12</sup>

{¶11} But here the case involves multiple claims and multiple parties. Civ.R. 54(B) authorizes a trial court to “enter final judgment as to one or more but fewer than all of the \* \* \* parties[, but] only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, \* \* \*.” The question is whether, in the absence of a Civ.R. 54(B) certification, the trial court’s order denying immunity in this case may be regarded as both final and appealable.

{¶12} In *Carlson v. Woolpert Consultants*, a pre-*Hubbell* case, the Second Appellate District granted a motion to dismiss appeals from an order denying summary judgment based on immunity claims of township and county employees.<sup>13</sup> The appellate court acknowledged its precedent, recently ratified in *Hubbell v. Xenia*, that “a denial of summary judgment in immunity situations is a final order under \* \* \* R.C. 2744.02(C).”<sup>14</sup> But because the action was against multiple parties and the order denying summary judgment applied to only a few of the parties, unresolved claims remained in the

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<sup>10</sup> Id. at ¶20.

<sup>11</sup> Id., syllabus.

<sup>12</sup> See id. at ¶3 and ¶27.

<sup>13</sup> (Nov. 25, 1998), 2nd Dist. Nos. 17292 and 17303.

<sup>14</sup> Id.

trial court against additional parties. The court held that the order was not immediately appealable without a Civ.R. 54(B) certification by the trial court.<sup>15</sup> The Eighth Appellate District also concluded, albeit before *Hubbell*, that even if an order denying immunity was final, it was not immediately appealable where the order did not resolve all claims among all parties or contain an express certification of “no just reason for delay” of an appeal under Civ.R. 54(B).<sup>16</sup>

{¶13} In *Hubbell*, however, a sole plaintiff had brought a simple negligence action against a single political subdivision.<sup>17</sup> The city of Xenia was the only defendant that had a claim pending against it at the time of its appeal, and there was no need for the court to consider the application of Civ.R. 54(B).<sup>18</sup> Thus, we conclude that *Hubbell v. Xenia* is distinguishable from this case.<sup>19</sup>

{¶14} Therefore, we follow the reasoning of the *Carlson* and *Malloy* courts. We hold that even when the challenged governmental-immunity order is clearly final, this court has no jurisdiction to entertain an appeal from a judgment as to fewer than all the claims or all the parties in a multi-claim, multi-party case in the absence of the trial court’s determination, pursuant to Civ.R. 54(B), “that there is no just reason for delay.”<sup>20</sup> In so

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<sup>15</sup> See *id.* Cf. *Kagy v. Toledo-Lucas County Port Authority* (1998), 126 Ohio App.3d 675, 711 N.E.2d 256 (holding that because the political subdivision was the only defendant remaining at the time of appeal, the court had no reason to consider the application of Civ.R. 54[B]); see, also, *Rucker v. Newburgh Heights*, 8th Dist. No. 89487, 2008-Ohio-910 (post-*Hubbell* case permitting an interlocutory appeal from the denial of a motion for judgment on the pleadings where the only remaining defendant was a political subdivision).

<sup>16</sup> See *Malloy v. Brennan* (Mar. 25, 1999), 8th Dist. No. 75183; see, also, *Drum v. Washlock* (Aug. 24, 2000), 8th Dist. Nos. 74816 and 74817.

<sup>17</sup> See 2007-Ohio-4839, at ¶3.

<sup>18</sup> See, e.g., *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 2000-Ohio-486, 733 N.E.2d 1141, fn. 2 (noting that a trial court’s entry of summary judgment based on immunity under R.C. Chapter 2744 was final and appealable and included Civ.R. 54[B] certification).

<sup>19</sup> See S.Ct.R.Rep.Op. 1(B)(1) (“The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes.”).

<sup>20</sup> See *Internatl. Managed Care Strategies, Inc. v. Franciscan Health Partnership, Inc.*, 1st Dist. No. C-01634, 2002-Ohio-4801, at ¶8; see, also, *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 1993-Ohio-120, 617 N.E.2d 1136; *Whitacker-Merrel v. Guepel Constr. Co.* (1972), 29 Ohio St.2d 184, 280 N.E.2d 922, syllabus; *Phillips v. Conrad*, 1st Dist. No. C-020302, 2002-Ohio-7080, at ¶14.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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holding, we adhere to the rule that “Civ.R. 54(B) must be followed when a case involves multiple claims and/or multiple parties,”<sup>21</sup> and we advance the underlying policy of avoiding piecemeal litigation.<sup>22</sup>

{¶15} Absent the certification required by Civ.R. 54(B), an order that denies a political subdivision's immunity defense but that leaves pending for disposition other claims against multiple parties is not immediately appealable. Here, the trial court's order denied in part the township's governmental-immunity claim under R.C. 2744.02. But the order, while final pursuant to R.C. 2744.02(C), was not immediately appealable.

{¶16} Therefore, we dismiss the appeal. And the case is returned to the jurisdiction of the trial court for further proceedings, including, if the trial court sees fit, a certification under Civ.R. 54(B) that there is no just reason to delay an appeal by the township.

Appeal dismissed.

**SUNDERMANN, P.J., CUNNINGHAM and DINKELACKER, JJ.**

*Please Note:*

The court has recorded its own entry on the date of the release of this decision.

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<sup>21</sup> *State ex rel. A & D Ltd. Partnership v. Keefe*, 77 Ohio St.3d 50, 56, 1996-Ohio-956, 71 N.E.2d 13, citing *State ex rel. Wright v. Ohio Adult Parole Auth.* (1996), 75 Ohio St.3d 82, 85, 661 N.E.2d 728.  
<sup>22</sup> See *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96, 540 N.E.2d 1381.

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**



GEORGE SULLIVAN, :  
Plaintiff-Appellee, :  
vs. :  
ANDERSON TOWNSHIP, :  
Defendant-Appellant, :  
and :  
TREND CONSTRUCTION, INC., :  
Defendant. :

APPEAL NO. C-070253  
TRIAL NO. A-0607640  
*JUDGMENT ENTRY.*



This cause was heard upon the appeal, the record, the briefs, and arguments.

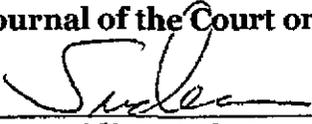
The appeal from the judgment of the trial court is dismissed for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

**To The Clerk:**

**Enter upon the Journal of the Court on March 28, 2008 per Order of the Court.**

By:   
Presiding Judge