

IN THE SUPREME COURT OF OHIO

No. 2008-0691

and

No. 2008-0817

GEORGE SULLIVAN)

Appellee)

v.)

ANDERSON TOWNSHIP, et al.)

Appellant)

On Appeal from the Hamilton
County Court of Appeals
First Appellate District

Court of Appeals Case
No. C-070253

BRIEF OF AMICUS CURIAE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF APPELLANT ANDERSON TOWNSHIP

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INTRODUCTION

The Ohio Municipal League (the “League”), as amicus curiae on behalf of Anderson Township, Ohio, urges this Court to reverse the decision of the First District Court of Appeals, Hamilton County, which dismissed the appeal of Anderson Township. The court of appeals dismissed the case because there was more than one party to the action in the trial court and the trial court’s order did not recite the language of Civ.R. 54(B) that there was “no just reason for delay” of an interlocutory appeal. *Sullivan v. Anderson Township*, 2008-Ohio-1438, ¶ 16 (“Appendix i”).

Such a ruling thwarts intention and plain language of R.C. 2744.02(C) of the Ohio Revised Code by denying a political subdivision an immediate appeal from an order which denies “the benefit of an alleged immunity from liability as provided” by law.

This case should be remanded to the Hamilton County Court of Appeals with an instruction to consider the merits of the appeal of Anderson Township.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of more than 750 Ohio cities and villages, all of which are political subdivisions, as defined in R.C. Chapter 2744.01, and, as such, are granted certain defenses and immunities by R.C. Chapter 2744.

The League and its members have an interest in ensuring that an order denying the benefits of an alleged immunity from liability, as provided in Chapter 2744, is determined to be an immediately appealable order, as intended by the Ohio General Assembly.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and the statement of facts contained within the brief of Anderson Township.

ARGUMENT

PROPOSITION OF LAW: 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 Civil Rule 54(B) certification. (R.C. 2744.02(C) and *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, construed and applied.)

Contrary to the conclusion of the First District Court of Appeals, the statutory right of a political subdivision to appeal any order which denies the political subdivision the benefit of an alleged immunity does not depend on the number of parties or claims in a case, or whether or not a trial court certifies “there is no just reason for delay” of the interlocutory appeal. The political subdivision’s right of appeal vests immediately upon the denial of the benefit of the alleged immunity. The policy argument in favor of Civ.R. 54(B), which generally seeks to prevent piecemeal appellate litigation, must yield to the General Assembly’s specific determination that political subdivisions have an interest in having the legal issues regarding such immunities resolved before any trial of the case and, in many instances, before discovery is conducted.

R.C. 2744.02(C) provides: “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 any other provision of the law is a final order.”

In *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, this court noted that while the denial of summary judgment is not ordinarily a final, appealable order, R.C.

2744.02(C) is unambiguous and definite: “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.” *Hubbell, supra*, at ¶ 12. Accordingly, “[a] court of appeals must exercise jurisdiction over an appeal of a trial court’s decision overruling a ... motion for summary judgment in which a political subdivision or its employee seeks immunity”. *Id.*, at ¶ 21. (Emphasis added.)

In this case, the trial court’s order denied Anderson Township, a political subdivision, the benefit of an alleged immunity from liability arising from Sullivan’s claims for breach of oral contract, vicarious negligence, and negligent supervision of a sub-contractor. Trend Construction, Inc., the subcontractor, was also a named defendant in Sullivan’s complaint and the Hamilton County Court of Appeals erroneously concluded that existence of that other party in this case distinguished it from *Hubbell*: “In *Hubbell*, however, a sole plaintiff had brought a simple negligence action against a single political subdivision. 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). Thus, we conclude that *Hubbell v. Xenia* is distinguishable from this case.” *Sullivan, supra*, at ¶13.

This conclusion was erroneous as it did not apply the plain language of R.C. 2744.02(C) and substituted the court’s policy preference for the state legislature’s.

Civ.R. 54(B) states, in part, “the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay.” Pursuant to this language, the trial court is the gate keeper of the interlocutory appeal. An order adjudicating one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ.R. 54(B). *Noble v. Colwell*, 44 Ohio St.3d 92, 540 N.E.2d 1831, syllabus.

The Ohio General Assembly, however, has established a specific statutory trigger for the immediate appeal of judgments denying a political subdivision or an employee of the political subdivision the benefits of an alleged immunity, and the generally applicable rules (the interplay of R.C. 2505.02 and Civ.R. 54(B)) must yield to the specific statute. See, R.C. 1.51 (“If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.”)

Pursuant to *Hubbell*, the appellate courts’ jurisdiction to hear appeals of orders denying political subdivisions the benefits of alleged immunities from liability are clearly established by law. A court of appeals cannot refuse jurisdiction by requiring a Civ.R. 54(B) “no just reason for delay” certification. To determine otherwise is to permit the courts to alter jurisdiction granted by the Ohio General Assembly in violation of Article IV, Section 3 of the Ohio Constitution.

Article IV, Section 3 (B)(2) of the Ohio Constitution provides: “**Courts of appeals shall have such jurisdiction as may be provided by law** to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or action of administrative officers or agencies.” (Emphasis added.) In reviewing an earlier version of this constitutional provision, this court held that the purpose of the provision “is to accomplish the simple result of empowering the General Assembly to change the appellate jurisdiction of the Courts of Appeals if it should desire so to do; and unless and until there is such legislative action, the appellate jurisdiction of the Courts of Appeals remains as it was” *Youngstown Municipal*

Ry. Co. v. City of Youngstown (1946), 147 Ohio St. 221, 223, 70 N.E.2d 649, 34 O.O. 122. The enactment of R.C. 2744.02(C) by the Ohio General Assembly changed the jurisdiction of the Court of Appeals by providing for the immediate review of an order denying a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability. A court cannot change jurisdiction mandated by the Ohio General Assembly by requiring compliance with a rule of civil procedure which was enacted prior to the statute.

POLICY CONSIDERATIONS

The purpose of Civ.R. 54(B) “is to accommodate the strong policy against piecemeal litigation with the possible injustice of delayed appeals in special situations.” *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 160, 3 O.O.3d 174, 359 N.E.2d 702. The court below held that Civ.R. 54(B) must be followed when a case involves multiple claims and/or multiple parties and declared “we advance the underlying policy of avoiding piecemeal litigation.” *Sullivan, supra*, at ¶14. However, in advancing the policy established in *Alexander, supra*, a case decided decades before the enactment of R.C. 2744.02(C), the court failed to adhere the legislative policy enacted by the legislature, and identified and applied by this court in *Hubbell, supra*.

R.C. 2744.02(C) was an amendment to Chapter 2744, political subdivision tort liability, effective April 9, 2003. The General Assembly’s purpose in enacting Chapter 2744 “is the preservation of the fiscal integrity of political subdivisions.” *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 453, 639 N.E.2d 105. Requiring a Civ.R. 54(B) certification defeats the General Assembly’s purpose in preserving the tax dollars of political subdivisions as it delays an immunity determination resulting in the expenditure of additional public resources.

Furthermore, a Civ.R. 54(B) certification is contrary to this court's conclusion that judicial economy is best 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 any 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.” *Hubbell, supra*, at 883.

Additionally, this court has concluded that “[j]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.” *Hubbell, supra*, at 883, *State v. Smorgala* (1990), 50 Ohio St.3d 222, 553 N.E. 2d 672. The Ohio General Assembly, in enacting R.C. 2744.02(C), trumped the policy preference expressed by the court below, and this court should reverse the appellate court's decision in this case.

CONCLUSION

Based upon the foregoing, the League respectfully requests this court to reverse the judgment of the Hamilton County Court of Appeals and remand this case for a determination of the merits of the case: whether Anderson Township was denied the benefit of an immunity provided by law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the within *Brief of Amicus Curiae the Ohio Municipal League Urging Reversal on Behalf of the Appellant Anderson Township*, has been mailed regular U.S. mail on the 25th day of August, 2008 to:

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