

IN THE SUPREME COURT OF OHIO
CASE NO.S: 08-0817 AND 08-0691

On Appeal From The Court of Appeals
First Appellate District
Hamilton County, Ohio
Case No. C-070253

GEORGE SULLIVAN
Plaintiff-Appellee

vs.

ANDERSON TOWNSHIP, et al.,
Defendants-Appellants

**OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS' AMICUS CURIAE BRIEF IN
SUPPORT OF APPELLANT ANDERSON TOWNSHIP**

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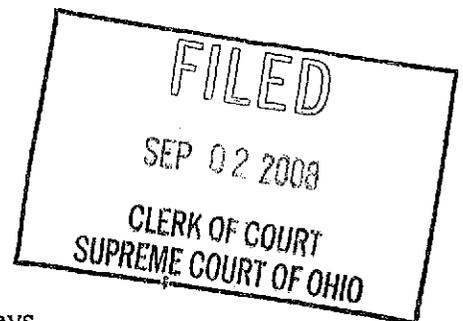


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I. STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION

The Ohio Association of Civil Trial Attorneys presents this amicus brief. OACTA is an organization of attorneys, corporate executives and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of claims against individuals, corporations and governmental entities.

The issue at stake in this case directly concerns amicus and its members. Amicus firmly believes that the Ohio General Assembly afforded a right to immediately appeal denials of immunity under R.C. § 2744.02(C) without the necessity of a trial court's certification under Civ.R. 54(B). The lower court's ruling, if allowed to stand, would completely destroy the benefit a public employee or entity would have to appeal in every case that the trial court failed – or refused – to certify. While the right to appeal denials of immunity always existed at the end of a case, the General Assembly created the right to *immediately* appeal when it enacted R.C. § 2744.02(C).

Immediate appeal prevents political subdivisions and their employees from devoting substantial time and resources to defend an action, only to have an appellate court determine after trial that they were immune from suit all along. Moreover, the early resolution of immunity is beneficial to both parties – no matter what the result of the appeal. If the governmental actor is immune, the need for costly discovery and a trial – as well as the looming threat of an employee's potentially devastating liability – is promptly at its end. If immunity is not proper, the finding will encourage early settlement and all parties will negotiate from a position of certainty about viable claims, rather than continue to litigate.

The judicial system must ensure that appeal does not come too late to be effective. OACTA's members, as representatives of governmental entities and their employees, have an

enormous stake in ensuring that R.C. § 2744.02(C) is interpreted properly and consistent with the Ohio General Assembly's intent.

The First District's ruling that a R.C. § 2744.02(C) appeal may be precluded in any case in which a trial court withholds Civ. R. 54(B) certification contradicts the General Assembly's intent to make orders denying immunity immediately appealable. R.C. § 2744.02(C).¹ While the decision is at odds with legislative intent, the ruling also misapplies Civil Rule 54(B). Rule 54(B) simply does not apply to an order where "claims or parties" are not "disposed of in the entry."² By its very nature, an order that denies the affirmative defense of immunity does not dispose of a claim or a party. The right to take an immediate appeal of a denial of immunity before trial is absolutely essential to enjoy any benefit from R.C. § 2744.02(C). As such, Amicus has a strong interest in clarifying the proper application of the interlocutory appeal provision that effectuates the General Assembly's intent.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae OACTA adopts the Appellant's statement of the case and facts.

III. LAW AND ARGUMENT

PROPOSITION OF LAW No. 1: 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.

A. Rule 54(B)³ does not apply to 2744.02(C) appeals.

¹ 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."

² See Miller v. First Internat'l Fid. & Trust Bldg., Ltd. (2007), 95 Ohio St. 3d 23, 25 and State ex rel. Butler Cty. v. Children Servs. Bd. (2002), 95 Ohio St.3d 23, 25, 2002-Ohio-1494.

³ Rule 54(B) states:

When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the

1. **Civil Rule 54(B) does not have meaning or application in cases like this, where claims or parties are not “disposed of in the entry.”**

The Ohio Constitution specifies that courts of appeals shall have appellate jurisdiction as provided by law only over “final orders” of inferior courts within their jurisdiction.⁴ The district appellate court erroneously ruled that the trial court’s failure to certify its order under Civ. R. 54(B) divested the appellate court of jurisdiction.

That finding is wrong.

The First District’s application of Civ. R. 54(B) is based on the overly broad premise that when there are multiple claims or multi parties, Civ. R. 54(B) is necessarily required. Of course, that is not true. An order is appealable even in R.C. § 2505.02 appeals “only if the requirements of both Civ. R. 54(B), **if applicable**, and R.C. 2505.02 are met [emphasis added].”⁵

The requirements of Rule 54(B) are not applicable here.

In Miller v. First Internatl. Fid. & Trust Bldg., Ltd., this Court has unequivocally held that “it is only in cases in which fewer than all the claims or fewer than all the parties are

same or separate transactions, or when multiple parties are involved, 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 not 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, **and the order** or other form of decision **is subject to revision** at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of the parties.

Civil Rule 54(B) (emphasis added).

⁴ Ohio Const. Art. IV, § 3(B)(2).

⁵ See Chef Italiano Corp. v. Kent State Univ. (1989), 44 Ohio St. 3d 86, 88;); State ex rel. Butler Cty, infra; Amato, infra.

disposed of in the entry that the phrase ‘no just reason for delay’ has meaning.”⁶ By its very nature, an order that denies the affirmative defense of immunity does not dispose of a claim or a party. Immunity under Chapter 2744 is an affirmative defense.⁷ Here, none of the claims or none of the parties is “disposed of” in the trial court entry. Civil Rule 54(B) does not apply to an appeal of a denial of immunity.

The Court has also held that Civ. R. 54(B) does not apply to orders that do not dispose of a claim for relief.⁸ For example, Civ. R. 54(B) does not apply to an order certifying a class action because “a class action is not a cause of action; rather it is a procedural mechanism through which many plaintiffs’ causes of action may be asserted.”⁹ Here, a dispute over the application of an affirmative defense clearly does not constitute a “cause of action” and an order denying such affirmative defense does not dispose of a claim or party. This Court has held that “claim for relief” as used in Civ. R. 54(B) is “synonymous with ‘cause of action’.”¹⁰ When a final order does not dispose of a claim for relief, Civ. R. 54(B) does not apply.

In State ex rel. Butler Cty. v. Children Servs. Bd., this Court held that provisional remedy orders under 2505.02(B)(4) are yet another class of interlocutory orders that do not have to comply with Civ. R. 54(B).¹¹ In Butler, a public entity sought to protect privileged records from being turned over during litigation by filing a mandamus action. The “discovery of privileged material” is a provisional remedy. R.C. § 2505.02(A)(3). This Court explained that a provisional

⁶ (2007), 113 Ohio St.3d 474, 476, 2007-Ohio-2457 at ¶ 10.

⁷ Whitehall ex rel. Wolfe v. Ohio Civ. Rights Comm. (1995), 74 Ohio St.3d 120, 123 1995-Ohio-302.

⁸ Amato v. General Motors Corp. (1981), 67 Ohio St.2d 253, 256 *overruled on other grounds by Polikoff v. Adam* (1993), 67 Ohio St. 3d 100.

⁹ Id.

¹⁰ Id. at 256.

¹¹ (2002), 95 Ohio St.3d 23, 25, 2002-Ohio-1494.

remedy is a remedy other than a claim for relief and was not subject to Civ. R. 54(B) certification. Immunity appeals under 2744.02(C) bear a striking resemblance to provisional remedy appeals. The purpose of the provisional remedy appeal is effectively destroyed if the only appeal was at the end of the litigation – for instance, in Butler, if the privileged material were disclosed, an appeal at the end of the case would not protect the holder of the privilege. That is why Ohio courts hold that Ohio R. Civ. P. 54(B) does not apply to procedural orders or to orders granting or denying a “provisional remedy” under section 2505.02(B)(4).¹² Ohio courts have viewed the concept in colorful terms, such as whether as a result of the trial court’s order “the cat is let out of the bag and can never be put back in.”¹³ Here, with regard to immunity, no amount of money could put the “cat back in the bag” or “unring the bell.” The political subdivision would be forever denied the benefit of an interlocutory appeal.

Ohio courts have frequently held in a variety of circumstances that when a final order does not dispose of a claim for relief, Civ. R. 54(B) does not apply. For instance, Civil Rule 54(B) does not apply to orders denying stay of action pending arbitration,¹⁴ orders denying immunity in the context of summary judgment under the prior but identical version of R.C. § 2744.02(C),¹⁵ orders denying provisional remedies,¹⁶ orders denying class certification, and orders of contempt.¹⁷ Appellate Rule 4(B)(5) expressly addresses the appeal deadline for appeals “other than a judgment or order entered under Civ.R. 54(B)” that takes into account interlocutory orders like denials of immunity and those stated above.

¹² See generally Butler, *supra*.

¹³ Mansfield Family Restaurant, 2000 WL 1886226 at *2; see Muncie, 91 Ohio St.3d at 451 (“in some instances, ‘the proverbial bell cannot be unringed ...’”).

¹⁴ Owens Flooring Co. v. Hummel Constr. Co. (Ohio Ct. App. 2001), 749 N.E.2d 782, 784.

¹⁵ Kagy v. Toledo-Lucas County Port Auth., 699 N.E.2d 566, 569 (Ohio Ct. App. 1997).

¹⁶ See, Butler, *supra*.

¹⁷ Contos v. Monroe Cty. (7th Dist. 2004), 2004-Ohio-6380, at ¶ 12.

While the First District erroneously ruled that Civ. R. 54(B) applied, a full reading of the text of Civil Rule 54(B) requires certification only when an order adjudicates “the rights and liabilities of fewer than all the parties.”¹⁸ An order that denies immunity does not adjudicate the “rights and liabilities” of a governmental entity or employee. The order merely denies immunity, which is an affirmative defense. The denial of immunity does not establish a legal responsibility or any enforceable civil remedy. The rights and liabilities of the plaintiffs and the governmental entity are still yet to be determined. Further, the text of Civil Rule 54(B) also requires the order to be “subject to revision at any time before the entry of judgment” adjudicated the remaining claims.¹⁹ The trial court’s denial of an immunity appeal under R.C. § 2744.02(C) cannot be “subject to revision at any time before the entry of judgment” in any practical sense. Certainly, if a case were to be erroneously forced to go to trial – or even engage in further litigation – the ability to take an interlocutory appeal would be forever lost.²⁰ The substitution of an appeal after a trial is not a substitute for an interlocutory appeal – which would be the consequence of the trial court’s failure to certify the order under Civ. R. 54(B). If that were so, the Legislature’s passage of the interlocutory appeal provision pursuant to R.C. § 2744.02(C) would be

¹⁸ Civ. R. 54(B) *at second sentence of Rule.*

¹⁹ *See* Civ. R. 54(B). While technically the order denying summary judgment itself could be subject to revision, the substantive effect of the order denying immunity could never be revised. That is, the governmental employee or entity would be forever denied the “benefit of immunity” and the ability to take an immediate appeal under R.C. § 2744.02(C).

²⁰ Even assuming that an order that denies immunity somehow “disposes of a claim or party,” jurisdiction would still exist over a R.C. § 2744.02(C) immunity appeal, because a trial court’s failure to certify would render moot the interlocutory appeal when there is no indication in that Section that the trial court has discretion to do so. This Court has held that “even though all the claims or parties are not expressly adjudicated by the trial court, if the effect of the judgment as to some of the claims is to render moot the remaining claims or parties, then compliance with Civ.R. 54(B) is not required to make the judgment final and appealable.” Gen. Acc. Ins. Co. v. Ins. Co. of N. Am. (1989), 44 Ohio St.3d 17, 21. Assuming – for argument’s sake – that an order denying immunity somehow disposes of a claim or party within the meaning of Civ. R. 54(B), this Court should not require Civ. R. 54(B) language.

superfluous in many cases because the right to appeal a denial of immunity at the end of a case always existed.

2. Analogous federal case law interpreting Fed.R.Civ.P. 54(b) – which Ohio Civ. R. 54(B) is modeled after – holds that qualified immunity appeals do not require certification.

Ohio Civ.R. 54(B) is based on Fed.R.Civ.P. 54(b).²¹ The language of the rules is virtually identical. Ohio courts look for guidance to authorities interpreting the federal rule.²² Federal courts in analogous interlocutory appeals of orders that deny qualified immunity do not require Federal Civil Rule 54(B) certification. Federal case law holds that Civil Rule 54(b) is incompatible with interlocutory appeals of denials of qualified immunity.²³ An order that denies immunity is immediately appealable in federal courts and is “not affected by Rule 54(b).”²⁴ Indeed, the issue rarely surfaces because the law is so well established that the review of orders made appealable by statute regardless of finality is “not touched” by Rule 54(b).²⁵

While the jurisdictional basis for appeals of the denial of qualified immunity is rooted in federal case law (i.e., the collateral order doctrine), Ohio’s Political Subdivision Tort Liability Act provides a statutory basis for an immediate appeal of a trial court’s denial of immunity.²⁶ Federal courts have determined that qualified immunity is a right “too important to be denied

²¹ See Staff Notes to Civ.R. 54(B).

²² Walker v. Firelands Community Hosp. (6th Dist. 2006), 2006 WL 1580038.

²³ See, e.g., Cottrell v. Caldwell (11th Cir. 1996), 85 F.3d 1480 (That jurisdiction exists independently of the final judgment rule exceptions contained in 28 U.S.C. § 1292 and Fed.R.Civ.P. 54(b).).

²⁴ Ramirez v. Webb (6th Cir. 1986), 1986 WL 17782, citing Redding & Co. v. Russwine Construction Corp. (D.C. Cir. 1969), 417 F.2d 721, 726 n. 33; Chabot v. Nat’l Securities & Research Corp. (2nd Cir. 1961), 290 F.2d 657, 658-59; and 6 Moore’s Federal Practice P. 54.31 (2nd ed. 1985).

²⁵ 10 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. § 2658 (3d Ed. 2008).

²⁶ R.C. § 2744.02(C); Hubbell, *supra*, at ¶¶ 20-21 (appellate court must conduct a de novo review of the facts even when they are purportedly in dispute).

review and too independent of the cause itself to be deferred until the whole case is adjudicated.”²⁷ Likewise, the Ohio General Assembly and this Court in Hubbell made the similar determination that early determination of immunity is in the best interests of not only the governmental actor, but all of the parties involved in the litigation.²⁸ Qualified immunity, like Chapter 2744 immunity, shields governmental officers who are performing discretionary functions from liability for civil damages and gives those actors freedom to perform their official duties without fear that even a slight misstep will trigger their financial ruin.²⁹ Like Ohio sovereign immunity, qualified immunity is an entitlement not to stand trial in certain circumstances.³⁰

Like qualified immunity, sovereign immunity also is effectively lost if the case is erroneously allowed to go to trial. Certainly, the benefit of an interlocutory appeal via R.C. § 2744.02(C) is lost. This Court has identified that “the manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.”³¹ The Legislature passed Ohio R.C. § 2744.02(C) expressly to allow political subdivisions and their employees to immediately appeal the denial of an immunity.³² Immediate appeal prevents political subdivisions and their employees from devoting substantial time and resources to defend an

²⁷ Webb, supra, citing Cohen v. Beneficial Industrial Loan Corp. (1949), 337 U.S. 541, 546.

²⁸ *E.g., Hubbell, supra* at ¶ 25.

²⁹ Wyatt v. Cole, 504 U.S. 158, 167 (1982).

³⁰ Mitchell v. Forsyth, 472 U.S. 511 at 525-26; *see, e.g., Sciulli v. City of Rocky River* (8th Dist. 1998), 1998 WL 414928 (rejecting dismissal as premature because the plaintiff had not had an opportunity to engage in discovery).

³¹ Wilson v. Stark Ctr. Dept. of Hum Serv. (1994), 70 Ohio St.3d 450, 453.

³² *See, e.g., Kagy v. Toledo-Lucas Ctr. Port Auth.* (6th Dist. 1997), 121 Ohio App.3d 239, 244.

action, only to have an appellate court determine after trial that they were immune from suit all along.³³

3. **If Civ. R. 54(B) is required, a trial court's most egregious errors would be impossible to correct by the same trial court's failure or refusal to certify.**

The First District's approach insulates even the most egregious trial court errors from appellate review by the trial court's decision to withhold "no just reason for delay" language. Under this approach, governmental employees could be denied an interlocutory appeal without the benefit of interlocutory appellate review under R.C. § 2744.02(C). As one federal court put it, if an appellate court must rely on the trial court's determination, a trial court "could always insulate its qualified immunity rulings from interlocutory review by mouthing the appropriate shibboleth."³⁴

Similarly, in the rare case where a judicial officer goes beyond the bounds of his authority, a trial court could insulate its immunity ruling by simply remaining silent on the issue of certification. In the more frequent case, Section 2744.02(C) protects against honest errors in trial court decisions on the sometimes complicated issue of immunity. In a case where the trial court does not believe it erred, it would be unlikely to certify such order, and deny an interlocutory appeal. This result would come at a great hardship to the litigants that the statute was designed to protect. Without the interlocutory appeal the Legislature envisioned, governmental employees would be forced to endure the expense, hardship, and the looming threat of liability throughout a full trial on the merits in which they could be immune all along. This result would unnecessarily drain the public resources fighting an expensive court

³³ Id.

³⁴ See Turner v. Scott, 119 F.3d 425, 428 (6th Cir.1997).

proceeding and take governmental employees away from their responsibilities to the public when they could be immune all along.

The First District ruled that a R.C. § 2744.02(C) appeal is precluded when a trial court withholds Civ. R. 54(B) certification. The First District determined that Civil Rule 54(B) must be “followed when a case involves multiple claims and/or multiple parties” and concluded that it advanced “the underlying policy of avoiding piecemeal litigation.”³⁵ First, the court’s ruling that Civ. Rule 54(B) applies is wrong. This Court’s jurisprudence regarding Civ. Rule 54(B) and federal jurisprudence interpreting Federal Civil Rule 54(b), which the Ohio rule is based, hold that orders made appealable by statute – regardless of finality – are not touched by Civ. R. 54(B) certification. Second, the court also improperly elevated *its* policy decision to deny an appeal over the General Assembly’s policy decision to provide an immediate appeal.

B. Neither R.C. § 2744.02(C) nor Hubbell requires certification.

- 1. The Act’s text does not permit the trial court to defeat an interlocutory appeal through that court’s discretionary certification decision.**

Ohio R.C. § 2744.02(C) does not require a trial court certify the order to be immediately appealable. Rather, Ohio’s Political Subdivision Tort Liability Act provides for an immediate appeal of the trial court’s denial of the benefit of immunity:

[A]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744 or any other provision of the law is a final order.³⁶

After interpreting the text of the Act, the Hubbell court broadly held that such order was “a final, appealable” order without qualification:

³⁵ Sullivan v. Anderson Township (1st Dist. 2008), 2008 WL 821766, 2008-Ohio-1438 at ¶ 14.

³⁶ R.C. § 2744.02(C) (emphasis added).

When 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).³⁷

The express language of the Act does not suggest the trial court has discretion to deny an immediate appeal on *any* grounds, and certainly does not support a certification requirement. Rather, judicially imposing a certification requirement would rewrite the statute to add the phrase, “if a trial court certifies the order with ‘no just reason for delay language’ under Civ. R. 54(b).” This Court has clearly held that in giving effect to the statutory language, a court may not delete words used or insert words not used.³⁸ This Court has also held that immunity appeals are to be given broad interpretation.³⁹

a. The Legislature’s intent – as interpreted by this Court – does not support a certification requirement.

What’s more, judicially imposing a Civ. R. 54(B) requirement is directly *contrary* to the Legislature’s intent – as interpreted in Hubbell – to provide an immediate appeal. A court's duty is to construe statutes in a manner to give effect to the legislative intent.⁴⁰ The Hubbell court’s concern was that “court of appeals may not avoid deciding difficult questions of immunity by pointing to the trial court's use of the language ‘genuine issue of material fact.’”⁴¹ Here, the concern is a court of appeals avoiding difficult questions of immunity by withholding certification under Civ. R. 54(B). Interpreting Civil Rule 54(B) to be a requirement before a R.C. § 2744.02(C) appeal would destroy the rationale supporting the Hubbell decision by:

³⁷ Hubbell v. City of Xenia (2007), 115 Ohio St.3d 77, *syllabus*.

³⁸ Sarmiento v. Grange Mut. Cas. Co. (2005), 106 Ohio St.3d 403, 2005-Ohio-5410, ¶ 29.

³⁹ Hubbell, *supra* at ¶ 12 (concluding that “the use of the words ‘benefit’ and ‘alleged’ [in R.C. § 2744.02(C)] illustrates that the scope of this provision is not limited to orders delineating a ‘final’ denial of immunity.”)

⁴⁰ Elston v. Howland Local Schools (2007), 113 Ohio St.3d 314, 2007-Ohio-2070, ¶ 25.

⁴¹ Hubbell at ¶ 20.

1. Elevating judicial preferences whether to certify an order as appealable, over the Ohio Legislature's express intent to provide an immediate appeal. Hubbell, *supra* at ¶ 22.
2. Allowing courts to "avoid dealing with difficult questions of immunity," by way of Civil Rule 54(B). Hubbell, *supra* at ¶ 20.
3. Authorizing court discretion to defeat the Legislature's purposes of immunity (conserving public resources). Hubbell, *supra* at ¶¶ 23-26.
4. Delay what should be an early determination of immunity for the benefit of all of the parties. Hubbell, *supra* at ¶ 26.

Amicus appreciates that R.C. § 2744.02(C) has resulted in additional appeals to intermediate appellate courts. But, this has no relevance to the proper interpretation of R.C. § 2744.02(C). The General Assembly's passage of the Act should not be compromised by the erroneous belief that it is unusual for appellate courts to disagree with trial courts immunity decisions, which has been articulated by the lower courts in the past.⁴² In accord with the General Assembly's intent, intermediate courts post-Hubbell have corrected countless unambiguous trial-court errors that would have resulted in unnecessary further litigation – including trials – and great expense to the taxpaying public.⁴³ Indeed, the immediate review of even partially erroneous trial court

⁴² Hubbell, *supra* at ¶ 31, (J. Pfeifer, dissenting), *citing* Hubbell v. Xenia (2nd Dist. 2006), 167 Ohio App.3d 294, 2006-Ohio-3369 at ¶ 14.

⁴³ *See e.g.s:* Martin v. Ironton (4th Dist. 2008), 2008 WL 2381737 (reversing denial of summary judgment on claim against city on misinterpretation of R.C. § 2744.02(B)(1) and against individual employee); Dubree v. Klide (8th Dist. 2008), 2008 WL 1972705 (reversing denial of motion to dismiss on cross-claims against city based on misinterpretation of R.C. § 2744.02(B)(3) exception to immunity); Rucker v. Village of Newburgh Heights (8th Dist. 2008), 2008 WL 597603 (reversing denial of immunity as to village); Snider v. Akron (9th Dist. 2008), 2008 WL 1961212 (reversing denial of summary judgment on claim against city on misinterpretation of R.C. § 2744.02(B)(3) exception to immunity); Smith v. Martin (10th Dist. 2008), 2008-Ohio-2978 (reversing denial of summary judgment against regional transit authority on misinterpretation of discretionary immunity under R.C. § 2744.03(A)(5)); Walters v. City of Columbus (10th Dist. 2008), 2008-Ohio-4258 (reversing denial of summary judgment); Alden v. Kovar (11th Dist. 2008), 2008-Ohio-4302 (reversing denial of summary judgment to school district).

immunity decisions will have the effect of improving the lower bench's and bar's understanding of immunity law. It will also eliminate unnecessary claims and parties for eventual trial or facilitate the early evaluation of a case for settlement because viable claims that would avoid immunity would be known.

b. Imposing a Civ. R. 54(B) requirement creates an absurd result.

The First District's ruling would lead to an absurd result because, in an immunity appeal, there will **always** be at least one pending claim, even in two-party cases like Hubbell. Under the First District's ruling, Civ. R. 54(B) would be implicated in every interlocutory appeal. This Court has never endorsed such an overly broad interpretation of the role of Civ. R. 54(B) in interlocutory appeals. An order that denies immunity does not resolve a claim. Governmental immunity is a defense, not a claim (i.e., cause of action). In Hubbell, for instance, Dottie Hubbell, the sole plaintiff, alleged a claim for negligence against the City of Xenia, the sole defendant. The trial court denied the city immunity. Yet, that negligence claim would still be pending unresolved. So, under the First District's decision, Civ. R. 54(B) would be required even in two-party cases. That result would be absurd under Hubbell and R.C. § 2744.02(C), because "When 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)." Hubbell, *supra* at syllabus.

The First District's decision would also be absurd because it improperly elevated *its* policy decision to "avoid piecemeal litigation" over the General Assembly's policy decision to provide an immediate appeal. The purpose of Civ.R. 54(B), in proper circumstances when it applies, allows a trial court " '... to make a reasonable accommodation of the policy against piecemeal appeals with the possible injustice sometimes created by the delay of appeals' ...

[Citations omitted].”⁴⁴ In passing R.C. § 2744.02(C), the General Assembly made the policy decision that the judicial economy is best served by avoiding piecemeal trials. This Court in Hubbell made clear: “Judicial economy is actually better served by a plain reading of R.C. 2744.02(C).” Hubbell, *supra*. Imposing a Civil Rule 54(B) requirement would undermine that plain reading. The Court explained:

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.

(Id. at ¶ 25.)

The First District’s decision is contrary to this Court’s recognition that a trial court should not have discretion to deny a public entity/party an appeal when it is denied immunity. In a stated effort to “avoid piecemeal litigation,” the First District erred because in this instance its discretion cannot override the General Assembly’s decision to provide an immediate appeal. The First District’s improper attempt to avoid piecemeal litigation is eclipsed because of the Legislature’s determination: “More important than the avoidance of piecemeal appeals is the avoidance of piecemeal trials.”⁴⁵

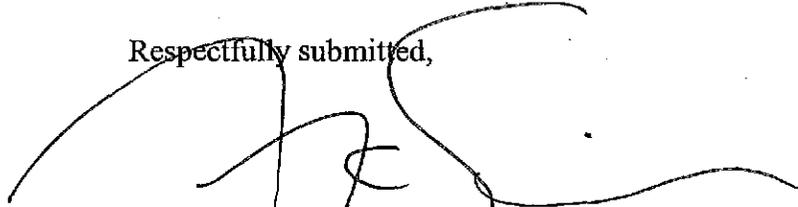
IV. CONCLUSION

Amicus Curiae on behalf of the Ohio Association of Civil Trial Attorneys respectfully asks this Court to reverse the intermediate appellate court.

⁴⁴ Pokorny v. Tilby Dev. Co. (1977), 52 Ohio St.2d 183, 186.

⁴⁵ Wisintaner v. Elcen Power Co. (1993) 67 Ohio St. 3d 352, 355; see Hubbell *supra* at ¶ 25.

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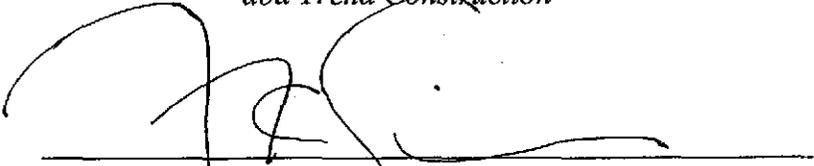
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