

**IN THE SUPREME COURT OF OHIO**

**GEORGE SULLIVAN, et al.,** : **Case No. 2008-0691**  
 : **Case No. 2008-0817**  
**Appellees,** :  
 : **Certified Conflict and**  
**vs.** : **On Appeal from the Hamilton**  
 : **County Court of Appeals, First**  
 : **Appellate District, Judgment filed**  
**ANDERSON TOWNSHIP, et al.,** : **March 28, 2008**  
 :  
**Appellants.** : **Court of Appeals Case No. CA-070253**

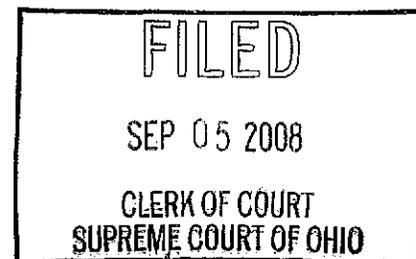
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**COMBINED MERIT BRIEF OF APPELLANT  
ANDERSON TOWNSHIP  
ON CERTIFIED CONFLICT AND DISCRETIONARY APPEAL**

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## I. STATEMENT OF FACTS

This appeal arises from the Decision of the Hamilton County Court of Appeals that dismissed the Appellant, Anderson Township's ("Anderson" or "Township"), appeal from a denial of immunity by the Hamilton County Court of Common Pleas for want of a final appealable order. Underlying the appeal is the Appellee, George Sullivan's, claim of property damage stemming from a "road widening" project along Eight Mile Road, which lies adjacent to his property.<sup>1, 2</sup> (Supp. at 002-003, Compl., ¶¶ 4, 6, 8-12). Anderson hired the Defendant below, Trend Construction, Inc. ("Trend"),<sup>3</sup> as the subcontractor for the project. (*Id.* at 003, Compl., ¶ 11). The Appellee asserted he met with Township representatives about the project on or about November 8, 2005. (*Id.* at 002, Compl., ¶ 4). He cited to an unattached "letter memorializing that meeting and the *initial requirements* to the agreement[.] \* \* \*" (*Id.*, Compl., ¶ 5 (emphasis added)). The Appellee maintained the Township, among others, subsequently made certain "additional promises" to him to be able to complete the project. 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. (*Id.* at 002-003, Compl., ¶¶ 8-12). The Appellee sought compensatory and punitive damages against Anderson. (*Id.* at 003-004, Compl., Prayer).

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<sup>1</sup> Because this Appeal arises from a Motion for Judgment on the Pleadings, Anderson will limit its factual recitation to those matters contained solely within the pleadings. See *Nelson v. Pleasant* (1991), 73 Ohio App.3d 479, 481, 597 N.E.2d 1137, 1138 (court's review restricted "solely to the allegations in the pleadings").

<sup>2</sup> Anderson asserts that the project was to install a sidewalk along Eight Mile Road. For purposes of this Appeal, the distinction is irrelevant.

<sup>3</sup> The proper party is The Ford Development Corp. dba Trend Construction. Trend is not a party to the instant Appeal.

The Appellee initiated his lawsuit against Anderson and Trend on or about September 7, 2006. (*Id.* at 001, Compl.) Following service of its Answer, Anderson filed a Motion for Judgment on the Pleadings. (*Id.* at 005-014, Mot. for J. on the Pleadings). 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. (*Id.*) On or about March 21, 2007, the trial court issued an Order and Opinion granting in part and denying in part Anderson's motion. (Appx. 025-030, Order and Opinion).<sup>4</sup>

The trial court held that Anderson could not be liable for trespass and that the Court could not award punitive damages against the Township. (*Id.* at 030, Order and Opinion at 6). 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." (*Id.* at 027, Order and Opinion at 3). Because the court held the case involved an oral contract, it overruled Anderson's promissory estoppel argument. (*Id.* at 028, Order and Opinion at 4). The court also determined that Trend could be Anderson's agent and, therefore, an "employee" pursuant to R.C. 2744.02(B)(1), (*id.* at 028-029, Order and Opinion at 4-5), although Appellee had pled Trend was a "sub-contractor," (Supp. at 003, Compl., ¶¶ 11-12). A key to the

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<sup>4</sup> Following the Township's filing of its Motion for Judgment on the Pleadings, the Plaintiff filed, on January 7, 2007, without leave of court, his Amended Complaint. The Township filed a Motion to Strike and requested therein that the trial court determine its pending Rule 12(C) motion. On March 14, 2007, the trial court denied Anderson's Motion to Strike noting the Amended Complaint "merely clarifie[d] Plaintiff's claim for damages." (Appx. at 031). Therefore, the trial court recognized that the Plaintiff did not alter the substance of his Complaint, upon which the Township based its Motion for Judgment on the Pleadings.

court's holding that Anderson was potentially vicariously liable or liable for negligent supervision was its finding, implicit in its citation to R.C. 2744.02(B)(2), that Anderson was performing a proprietary function in widening Eight Mile Road. (Appx. at 029, Order and Opinion at 5). Anderson filed its Notice of Appeal with the First District Court of Appeals from the trial court's denial of immunity, pursuant to R.C. 2744.02(C), on or about April 10, 2007.

In the Court of Appeals, the Appellee moved to dismiss 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. (Supp. at 015-017, Mot. to Dismiss). The Court of Appeals, on or about June 6, 2007, overruled Appellee's motion. (Appx. at 024). 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>5</sup> (Supp. at 018-038, Appellee's First Dist. Br.)

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 supplemental brief: *Drew v. Laferty* (June 1, 1999), 4<sup>th</sup> Dist. No. 98CA522, 1999 WL 366532. 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, (Appx. at 017-023), and entered final judgment upon its decision, (Appx. at 016).

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<sup>5</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. (Supp. at 019, 027, Appellee's First Dist. Br. at i, 4).

On or about April 7, 2008, the Appellant, pursuant to App.R. 25, filed a motion with the 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* as the conflict case. The appellate court certified a conflict on or about April 23, 2008. (Appx. at 013).<sup>6</sup>

On or about April 14, 2008, Anderson filed a Notice of Appeal with this Court and a Memorandum in Support of Jurisdiction, positing one proposition of law. (Appx. at 001-004).<sup>7</sup> The Township also filed a Notice of its pending motion in the First District to certify a conflict. (Appx. at 005-008). Once the First District certified a conflict, the Appellant filed a copy of the Court of Appeals’ order with this Court. (Appx. at 009-013). This Honorable Court determined a conflict existed on or about June 18, 2008. This Court also granted jurisdiction for a discretionary appeal. In its Entries, the Court ordered combined briefing of issues pertinent to the certified conflict and Appellant’s first proposition of law. (Appx. at 014 (Case No. 2008-0691); Appx. at 015 (Case No. 2008-0817)).

## II. ARGUMENT

### A. **Certified Conflict Issue: “Whether an order that denies a**

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<sup>6</sup> The attached Notice of Certified Conflict, (Appx. at 009-013), omits the conflicting cases that were attached to the original filing with this Court. The conflicting cases, *Sullivan v. Anderson Twp.*, 1<sup>st</sup> Dist. No. C-070253, 2008-Ohio-1438 and *Drew v. Laferty* (June 1, 1999), 4<sup>th</sup> Dist. No. 98CA522, 1999 WL 366532, are found at Appx. 017-023 and Appx. 032-038, respectively.

<sup>7</sup> The attached Notice of Appeal, (Appx. at 001-004), omits the Judgment Entry and Opinion that were attached to the original filing with this Court. The Judgment Entry and Opinion are found at Appx. 016 and Appx. 017-023, respectively.

**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.”**

1. Introduction

The General Assembly crafted an exception to standard appellate procedure for interlocutory orders that deny a political subdivision the benefit of an alleged immunity granted by Ohio Revised Code Chapter 2744. Generally, whether an interlocutory trial court order is appealable is governed by R.C. 2505.02’s definition of a “final order” and Civ.R. 54(B)’s certification of “no just reason for delay.” In the specific instance of an order that denies immunity, however, the General Assembly expressly deemed such orders to be final in R.C. 2744.02(C). When this Honorable Court construed the plain statutory language of R.C. 2744.02(C), it held orders denying the benefit of an alleged immunity to be “final and appealable.” The unambiguous statutory provision and this Court’s interpretation render inapposite Rule 54(B) certification. Moreover, to condition orders denying the benefit of immunity upon Rule 54(B) treatment would subject the General Assembly’s express intent that such orders are immediately appealable to a trial court’s discretion to deny certification. This Honorable Court should not grant to trial courts the authority to thwart manifest legislative intent.

2. The General Assembly established that appellate jurisdiction exists for interlocutory orders that deny a political subdivision or its employees the benefit of an alleged immunity.

The Ohio Constitution limits the extent of appellate court jurisdiction to that established by the General Assembly. “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[.] \* \* \*

Section 3(B)(2), Article IV of the Ohio Constitution. The Legislature restricted appellate review to final orders; without such finality, appellate jurisdiction does not exist. *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266; see R.C. 2505.03. Within its constitutional authority to determine what orders are final, the General Assembly enacted as part of the Political Subdivision Tort Liability Act the unambiguous provision, “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.*” R.C. 2744.02(C) (emphasis added).

In its recent interpretation of the statute, this Court held that a judgment denying benefit of alleged immunity is final *and* appealable. *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, syllabus. In clear terms, the Court held, “A court of appeals *must exercise jurisdiction* over an appeal of a trial court's decision overruling a Civ.R. 56(C) motion for summary judgment in which a political subdivision or its employee seeks immunity.” *Id.* at ¶ 21 (emphasis added). The Court's judgment was not limited to summary judgment decisions, it held when a trial court denies “*a motion* in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744,” the order is final and appealable. *Id.* at ¶ 27 (emphasis added); see *id.* at ¶ 33 (Pfeiffer, J., dissenting) (“multiple motions \* \* \* can now be immediately appealed”).

Ohio Revised Code Section 2744.02(C), therefore, is an exception to the traditional 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; Civ.R. 54(B). Nevertheless, 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*, at \*5.

3. The Fourth District Court of Appeals, in the certified conflict case of *Drew v. Laferty*, properly held that Civ.R. 54(B) certification is not required for orders deemed final and appealable pursuant to R.C. 2744.02(C).

In the certified conflict case, *Drew*, the Fourth District Court of Appeals followed the plain language of R.C. 2744.02(C) and considered an appeal from an order denying the Village of McArthur (“Village”) immunity upon a third-party plaintiff’s negligence claim against the Village. In *Drew*, the Village’s police chief sued multiple defendants upon various tort claims. In his third-party complaint against the Village, Defendant Laferty alleged, *inter alia*, that the Village negligently hired and supervised the police chief. *Id.* at \*1. The Village asserted Chapter 2744 immunity against the plaintiff’s

negligence claims; however, the trial court denied the Village's motion for summary judgment, holding the Village was not immune for its decision to hire and supervise the chief. *Id.*

The court's above-cited analysis concerning the inapplicability of Rule 54(B) certification came during its discussion of the portions of the Village's appeal over which the court had jurisdiction. The Village failed to utilize properly or argue the provisions under R.C. 2744.03(A)(3) and appealed the trial court's denial of its argument pertinent to a pending 42 U.S.C. 1983 claim, which is not subject to Chapter 2744 immunity. *Id.* at \*5. For these issues, the *Drew* panel held there was no final appealable order. *Id.* at \*5, \*6. Nevertheless, for the third-party negligence claim, against which the Village had properly asserted immunity, and despite the presence of multiple defendants, the Fourth District held, "In this case, we possess jurisdiction to review the trial court's denial of the Village's motion for summary judgment on Laferty's negligence claim because the trial court denied the Village's alleged immunity from liability on that claim." *Id.* The *Drew* court's analysis that R.C. 2744.02(C)'s plain language renders otherwise-interlocutory orders final and appealable is consistent with this Honorable Court's subsequent *Hubbell* decision. This Court cited *Drew* with approval in *Hubbell*, for the proposition that an appellate court may overturn a trial court's immunity determination upon *de novo* review. *Hubbell*, 2007-Ohio-4839, at ¶ 20.

4. The First District Court of Appeals erred when it distinguished *Hubbell* and failed to consider *Drew* and held the instant order is not final and appealable.

At odds with *Hubbell* and *Drew* is the First District's treatment of the issue below. The Court of Appeals recognized the plain language of R.C. 2744.02(C) when it

held, “there is no doubt that the order being appealed is a final order.” *Sullivan v. Anderson Twp.*, 1<sup>st</sup> Dist. No. C-070253, 2008-Ohio-1438, at ¶ 8 (Appx. at 020). The court noted this Court’s *Hubbell* decision rendering such orders “final [and] appealable.” *Id.* at ¶ 10 (quoting *Hubbell*, 2007-Ohio-4839, syllabus) (Appx. at 021). In addition, the First District specifically cited the legislature’s policy determination that:

“[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.” 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.”

*Id.* at ¶ 9 (footnotes omitted) (quoting *Hubbell*, 2007-Ohio-4839, at ¶ 23, 25) (Appx. at 020).

Notwithstanding these considerations, the panel distinguished *Hubbell* because the instant “case involves multiple claims and multiple parties.” *Id.* at ¶ 11 (Appx. at 021); *Hubbell*, 2007-Ohio-4839, at ¶ 3. Therefore, according to the lower court:

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

*Sullivan*, 2008-Ohio-1438, at ¶ 14 (footnotes omitted) (emphasis added) (Appx. at 022-023). The Court of Appeals cited as support three pre-*Hubbell* cases: *Carlson v. Woolpert Consultants* (Nov. 25, 1998), 2<sup>nd</sup> Dist. Nos. 17292, 17303, 1998 WL 811577 (Appx. at 039-042); *Malloy v. Brennan* (Mar. 25, 1999), 8th Dist. No. 75183, 1999 WL 166021 (Appx. at 053-055); and *Drum v. Washlock* (Aug. 24, 2000), 8th Dist. Nos. 74816, 74817, 2000 WL 1222003 (Appx. at 043-046). In its decision, the court below

did not cite to *Drew*, which Anderson submitted with its proffered supplemental brief.

The First District too narrowly applied *Hubbell* when it distinguished the case on the number of defendants. The court's error is two-fold. First, this Court's holding broadly states, "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*, 2007-Ohio-4839, syllabus (emphasis added). The Court clearly directed appellate courts that they "must exercise jurisdiction" over orders denying the benefit of an alleged immunity. *Id.* at ¶ 21. The Court's unequivocal instruction is not premised upon the number of defendants or claims, excepting R.C. 2744.02(C)'s limitation that the subject claims must concern the benefit of an alleged immunity.

Next, the Court of Appeals unadvisedly elevated judicial policy over public policy. The lower court held its application of Rule 54(B)'s prerequisite certification "advance[d] the underlying policy of avoiding piecemeal litigation." *Sullivan*, 2008-Ohio-1438, at ¶ 14 (footnote omitted). In *Hubbell*, this Honorable Court cautioned appellate panels not to trump the General Assembly's intent with judicial policy:

The court of appeals below identified two policy reasons in support of its refusal to apply R.C. 2744.02(C) to orders denying summary judgment on the issue of immunity: judicial economy and ease of application. [*Hubbell v. Xenia*,] 167 Ohio App.3d 294, 2006-Ohio-3369, 854 N.E.2d 1133, ¶ 14-15. However, "[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." *State v. Smorgala* (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672, superseded by statute on other grounds, as recognized in *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 54.

*Hubbell*, 2007-Ohio-4839, at ¶ 22. This Court identified the manifest public policy underlying Chapter 2744 as "the preservation of the fiscal integrity of political

subdivisions,” *id.* 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), and deemed “[j]udicial economy is actually better served by a plain reading of R.C. 2744.02(C),” *id.* at ¶ 24.

5. The First District’s decision permits a trial court’s discretion to thwart legislative intent.

The First District’s holding fosters neither legislative intent nor judicial economy. If political subdivisions are required to first seek Rule 54(B) certification in cases presenting multiple defendants or claims, they will be forced to expend additional time and resources filing appropriate motions and replies in support. Despite the Court of Appeals’ cognizance of this Court’s forceful urging of an early resolution of immunity, resolution would be delayed while seeking certification, assuming the trial court grants certification. Certainly, if the trial court withholds certification, a review of its immunity holding would be delayed possibly up to the entry of final judgment.

More important, this process would subject legislative intent and public policy to the trial court’s discretion. 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. Under the traditional analysis, if the trial court 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 the appellate court’s decision stands, trial courts would have authority to prohibit appeals that the legislature expressly intended and that this Court held are proper under the statute, by declining to grant certification.

The trial court's determination whether to grant Rule 54(B) certification is a factual decision that weighs mainly judicial policy and which permits the court to substitute its judgment regarding a subdivision's fiscal resources for that of the General Assembly:

In deciding that there is no just reason for delay, the trial judge makes what is essentially a *factual* determination-whether an interlocutory appeal is consistent with the interests of *sound judicial administration, i.e.,* whether it leads to *judicial economy*. Trial judges are granted the discretion to make such a determination because they stand in an unmatched position to determine whether an appeal of a final order dealing with fewer than all of the parties in a multiparty case is most efficiently heard prior to trial on the merits. *The trial court can best determine how the court's and the parties' resources may most effectively be utilized.* The trial court is most capable of ascertaining whether or not granting a final order might result in the case being tried twice. The trial court has seen the development of the case, is familiar with much of the evidence, is most familiar with the trial court calendar, and can best determine any likely detrimental effect of piecemeal litigation. More important than the avoidance of piecemeal appeals is the avoidance of piecemeal trials. It conserves expense for the parties and clarifies liability issues for jurors when cases are tried without "empty chairs."

*Wisintainer*, 67 Ohio St.3d at 354-55, 617 N.E.2d 1136 (emphasis supplied and in original).

Judicial economy -- the avoidance of piecemeal litigation -- is the overriding factor in the required Rule 54(B) analysis. When a court engages in this determination, it necessarily places judicial policy superior to public policy. In addition, notwithstanding the overriding legislative determination that public policy mandates immediate appeal, *Hubbell*, 2007-Ohio-4839, at ¶ 23, Rule 54(B) permits a trial court to weigh fiscal integrity among other factors and determine, in its discretion, to withhold certification.

The Second District case relied upon below, *Carlson*, upon which the *Malloy* Court also relied,<sup>8</sup> exemplifies this concern. The two *Carlson* appeals involved multiple defendants. In response to the appellees' motions to dismiss, the court of appeals:

noted that a denial of summary judgment in immunity situations is a final order under R.C. 2501.02 and R.C. 2744.02(C). As a result, we found no merit in Appellees' claim that an appeal could not be taken from the orders overruling the motions for summary judgment. However, we did agree with Appellees that the trial court's decisions were not appealable without a Ohio Civ.R. 54(B) certification.

*Carlson, supra*, at \*1 (Appx. at 39). The court stayed the appeals for thirty days "to give the trial court a chance to file amended entries with the appropriate certification." *Id.* In one appeal, the trial court "refused to file an entry with a Rule 54(B) certification." *Id.* In the other appeal, the appellate court did not receive notice that the trial court amended its entry to include Rule 54(B) certification. *Id.* (Appx. at 039-040). The court dismissed both appeals for want of a final appealable order. *Id.* Therefore, the trial court effectively rendered R.C. 2744.02(C) of no effect: on the one hand, by refusing to grant the required certification; on the other hand, by not rendering a decision within the time specified by the Second District.

In *Drum*, the Eighth District's dismissal of the appeal of a political subdivision and its employee was not based upon the lack of Civ.R. 54(B) certification; rather, the court dismissed the appeal because it found R.C. 2744.02(C) had not yet been reenacted in the aftermath of this Court's decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, which rendered House Bill 350, including

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<sup>8</sup> *Malloy, supra*, at \*2 (Appx. at 054).

former R.C. 2744.02(C), unconstitutional. *Drum, supra*, at \*1 (Appx. at 044).<sup>9</sup> Therefore, the court held, “Absent some other applicable *statutory* basis for asserting jurisdiction, we lack jurisdiction to review interlocutory orders denying summary judgment on immunity grounds.” *Id.* (emphasis added). The *Drum* Court’s decision was not based upon the lack of certification by Rule, but by the court’s determination that there was no statute that provided it with jurisdictional authority.

6. The instant order is akin to interlocutory discovery orders that avoid Rule 54(B) certification.

By way of analogy, 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 and appealable, courts should not require Rule 54(B) certification.

The Court should ensure that trial and appellate courts give effect to the General Assembly’s intent through consistent application of R.C. 2744.02(C) as construed in *Hubbell*. The erection of procedural obstacles through required compliance with Civ.R.

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<sup>9</sup> As the Court noted in *Hubbell*, “the current version of R.C. 2744.02(C) [was] enacted in 2002[.] \* \* \*” *Hubbell*, 2007-Ohio-4839, at ¶ 15 n.2.

54(B) runs counter to the Legislature's intent and this Court's direction regarding the status of the instant order as final and appealable. Moreover, Rule 54(B) does not further fiscal integrity or judicial economy but makes the former concern inappropriately subservient to the latter. This Court should reverse the First District's decision below to give full effect to the General Assembly intent that orders that deny to political subdivisions and their employees the benefit of an alleged immunity are final and appealable.

- B. **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.**

Anderson incorporates its arguments concerning the certified conflict issue for its position regarding Proposition of Law I. In addition, Anderson requests that the Court consider the arguments of *Amici Curiae*, the Ohio Association of Civil Trial Attorneys ("OACTA") and the Ohio Municipal League. As noted by OACTA, the Court should hold that Civ.R. 54(B) would have no application to the present procedure because it concerns an affirmative defense deemed immediately appealable by the General Assembly. OACTA succinctly states, "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." (Br. of OACTA at 4).

### **III. CONCLUSION**

This Honorable Court should reverse the decision below and remand this case because the General Assembly and this Court have determined that orders which deny a political subdivision or its employees the benefit of an alleged immunity are final and

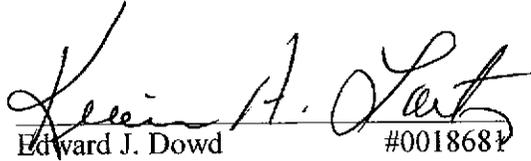
appealable. The analysis courts generally apply: whether the order is final and whether no just reason for delay exists is inapplicable to order such as the one at bar. The Legislature has deemed them to be final pursuant to R.C. 2744.02(C) and this Court constructed the statute's plain language to find such orders final and appealable in *Hubbell*.

The First District erred when it dismissed Anderson's appeal because it held the subject order required Rule 54(B) certification. To reach its decision, the appellate panel construed *Hubbell's* unequivocal holding too narrowly and elevated judicial economy over public policy. Furthermore, the lower court's holding subjects such orders to a trial court's discretionary determination whether to grant certification, the analysis of which emphasizes judicial economy over public policy and permits a trial court to substitute its factual determination of a political subdivision's fiscal integrity over the General Assembly's extant determination that an immediate appeal furthers public concern regarding a subdivisions financial state. By withholding certification, a trial court may thwart the legislative intent expressed in R.C. 2744.02(C) and as interpreted by the *Hubbell* Court.

For the reasons herein, the Appellant, Anderson Township, respectfully requests that this Honorable Court reverse the decision of the First District Court of Appeals and remand this case for further proceedings not inconsistent with the Court's opinion.

Respectfully submitted,

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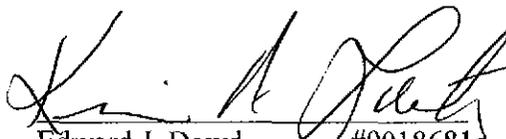
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served by Regular Mail upon the following, this 4th day of September, 2008:

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IN THE SUPREME COURT OF OHIO

GEORGE SULLIVAN, *et al.*, : Case No. 08-0691  
Appellee, :  
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

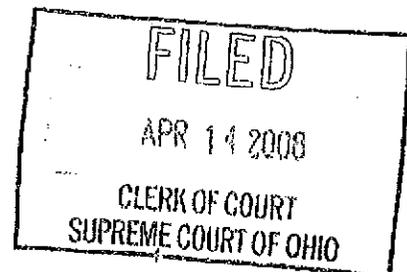
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NOTICE OF APPEAL OF APPELLANT  
ANDERSON TOWNSHIP

---

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The Appellant, Anderson Township, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in *George Sullivan v. Anderson Tp., et al.*, Hamilton County Court of Appeals Case No. CA-070253, on March 28, 2008.

This case raises a substantial constitutional question and is one of public or great general interest.

The Appellant also directs this Honorable Court's attention to the accompanying Notice, pursuant to S. Ct. Prac. R. II, Section 2(B)(3) and S. Ct. Prac. R. IV, Section 4(A), filed contemporaneously herewith, that a motion to certify a conflict is pending with the Hamilton County Court of Appeals.

Respectfully submitted,

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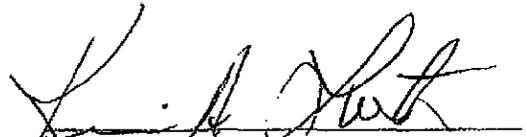
**CERTIFICATE OF SERVICE**

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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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

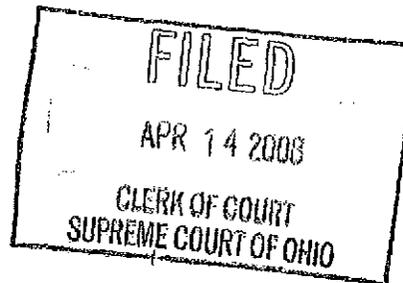
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APPELLANT ANDERSON TOWNSHIP'S NOTICE OF PENDING MOTION TO  
CERTIFY CONFLICT IN THE HAMILTON COUNTY COURT OF APPEALS

---

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The Appellant, Anderson Township, pursuant to S. Ct. Prac. R. II, Section 2(B)(3) and S. Ct. Prac. R. IV, Section 4(A), and contemporaneous with its Notice of Appeal, hereby gives notice to the Supreme Court of Ohio that Appellant filed a Motion to Certify Conflict, Pursuant to App.R. 25, with the Hamilton County Court of Appeals, First Appellate District, in the case of *George Sullivan v. Anderson Twp., et al.*, Hamilton County Court of Appeals Case No. CA-070253, on or about April 7, 2008. The aforementioned Motion is currently pending with the Court of Appeals.

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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IN THE SUPREME COURT OF OHIO

GEORGE SULLIVAN, : Case No. 08-0817  
Appellee, :  
vs. : Notice of Certified Conflict from the  
ANDERSON TOWNSHIP, *et al.*, : Hamilton County Court of Appeals,  
Appellants. : First Appellate District, Entry Filed  
: April 23, 2008  
: Court of Appeals Case No. C-070253

---

NOTICE OF CERTIFIED CONFLICT

---

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FILED  
APR 30 2008  
CLERK OF COURT  
SUPREME COURT OF OHIO

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Appellant Anderson Township hereby gives notice of a certified conflict to the Supreme Court of Ohio, pursuant to S. Ct. Pract. R. IV, Sections 1 and 4(C), as certified by the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-070253 on April 23, 2008. The Court of Appeals framed the certified question as: "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."

In compliance with the aforementioned rule, Appellant attaches to this Notice the Entry of the Court of Appeals certifying a conflict, (Exhibit A), and the following conflicting Court of Appeals' decisions, as cited by the Hamilton County Court of Appeals:

1. *Sullivan v. Anderson Tp.*, 1<sup>st</sup> Dist. No. C-070253, 2008-Ohio-1438 (Exhibit B); and,
2. *Drew v. Laferty* (June 1, 1999), 4<sup>th</sup> Dist. No. 98CA522, 1999 WL 366532 (Exhibit C).

Respectfully submitted,

SURDYK, DOWD & TURNER CO., L.P.A.



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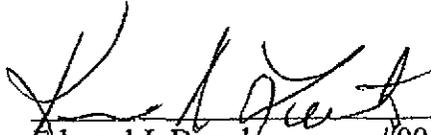
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served by Regular Mail upon the following, this 29th day of April, 2008:

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Kevin A. Lantz #0063822

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

GEORGE SULLIVAN,

Appellee,

vs.

APPEAL NO. C-070253  
TRIAL NO. A-0607640

ENTRY GRANTING APPELLANT'S  
MOTION TO CERTIFY CONFLICT

ANDERSON TOWNSHIP, et al.,

Appellants.

This cause came on to be considered upon the motion of the appellant to certify the decision as being in conflict with *Drew v. Laferty*, (June 1, 1999), 4<sup>th</sup> Dist. No. 98CA522, 1999 WL 366532.

The Court finds that the motion is well taken and is granted.

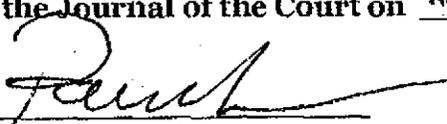
It is the order of this Court that the within appeal is certified to the Ohio Supreme Court as being in conflict with the above case regarding the following issue:

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.

To The Clerk:

Enter upon the Journal of the Court on APR 23 2008 per order of the Court.

By: \_\_\_\_\_

  
Presiding Judge

(Copies sent to all counsel)

George Sullivan

Case No. 2008-0691

v.

E N T R Y

Anderson Township and Trend  
Construction, Inc.

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal.

It is ordered by the Court, sua sponte, that this cause is consolidated with 2008-0817, *Sullivan v. Anderson Twp.*

It is further ordered by the Court that the briefing in Case Nos. 2008-0691 and 2008-0817 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct.Prac.R. VI and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct.Prac.R. VI.

The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Hamilton County.

(Hamilton County Court of Appeals; No. C070253)

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THOMAS J. MOYER  
Chief Justice

George Sullivan

Case No. 2008-0817

v.

E N T R Y

Anderson Township et al.

This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Hamilton County. On review of the order certifying a conflict,

It is determined that a conflict exists. The parties are to brief the issue stated in the court of appeals' Entry filed April 23, 2008, as follows:

"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."

It is ordered by the Court, sua sponte, that this cause is consolidated with Supreme Court Case No. 2008-0691, *Sullivan v. Anderson Twp.*

It is further ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Hamilton County.

It is further ordered by the Court that the briefing in Case Nos. 2008-0691 and 2008-0817 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct.Prac.R. VI and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct.Prac.R. VI.

(Hamilton County Court of Appeals; No. C070253)

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THOMAS J. MOYER  
Chief Justice



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

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

*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).

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.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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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,

Appellee,

vs.

APPEAL NO. C-070253  
TRIAL NO. A-0607640

ENTRY OVERRULING APPELLEE'S  
MOTION TO DISMISS APPEAL

ANDERSON TOWNSHIP, et al.,

Appellants.

This cause came on to be considered upon the motion of the appellee to dismiss the appeal and the appellant's memorandum in opposition.

The Court finds that the motion is not well taken and is overruled.

To The Clerk:

Enter upon the Journal of the Court on JUN - 6 2007 per order of the Court.

By: \_\_\_\_\_  
Presiding Judge

(Copies sent to all counsel)



COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

ENTERED  
MAR 21 2007

<b>GEORGE SULLIVAN,</b>	:	<b>CASE NO. A0607640</b>
	:	
<b>Plaintiff,</b>	:	<b>Judge John Andrew West</b>
<b>v.</b>	:	
	:	
<b>ANDERSON TOWNSHIP, et al.,</b>	:	<b>ORDER AND OPINION</b>
	:	<b>GRANTING IN PART AND</b>
<b>Defendants.</b>	:	<b>DENYING IN PART MOTION</b>
	:	<b>FOR JUDGMENT ON THE</b>
	:	<b>PLEADINGS</b>

This matter came before the Court on Anderson Township's ("Defendant-Anderson") "Motion for Judgment on the Pleadings." After reviewing the written memorandum presented by Defendant-Anderson, the Court finds that Defendant-Anderson's Motion is well taken in part.

After the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings.<sup>1</sup> A determination of a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings.<sup>2</sup> A trial court must construe the material allegations in the complaint, as well as reasonable inferences arising from them, in favor of the non-moving party.<sup>3</sup> In order to grant a motion for judgment on the pleadings, the trial court must conclude beyond a doubt that the non-movant can show no set of facts that would entitle him to relief.<sup>4</sup>

<sup>1</sup> / OHIO R. CIV. P. 12(C).  
<sup>2</sup> / *Peterson v. Teodosio* (1973), 34 Ohio St 2d 161, 165.  
<sup>3</sup> / *Euvrard v. Christ Hosp. & Health Alliance* (2001), 141 Ohio App. 3d 572, 575 (Ohio App. 1<sup>st</sup> Dist.).  
<sup>4</sup> / *Id.*



The Ohio Rules of Civil Procedure were promulgated with the purpose to promote "the resolution of cases upon their merits, not upon pleading deficiencies."<sup>5</sup> The rules are to be applied "to effect just results," Civ.R. 1(B), and pleadings are to be "construed as to do substantial justice." Civ.R. 8(F). Thus, under Civ.R.8(A), a "claim for relief" need only consist of "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled." This concept of "notice" pleading, embodied in Civ.R. 8(A), serves "to simplify pleadings to a 'short and plain statement of the claim' and to simplify statements of the relief demanded ... to the end that the adverse party will receive fair notice of the claim and an opportunity to prepare his response thereto."<sup>6</sup>

Defendant-Anderson argues that Plaintiff failed to plead the existence of an express contract or breach thereof. In his complaint, Plaintiff set forth that there was an agreement between Defendant-Anderson and Plaintiff in regard to widening a portion of Eight Mile Road in front of Plaintiff's home; a letter memorializing a meeting and initial requirements of the agreement was drafted by one of Defendant-Anderson's employees; and that Defendant-Anderson and its employees made additional promises to Plaintiff. Plaintiff did not contend that an actual written contract existed, nor did Plaintiff ever attach a written contract to the complaint.

Where a complaint filed in a civil action is founded upon a written contract, Civil Rule 10(D) requires that "a copy thereof must be attached to the pleading. If not so attached, the reason for the omission must be stated in the pleading."<sup>7</sup> Plaintiff did not attach a written instrument to his complaint and has not given this Court any indication

<sup>5</sup> / *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 175.

<sup>6</sup> / *Fancher v. Fancher* (1982), 8 Ohio App. 3d 79, 83 (Ohio App. 1<sup>st</sup> Dist.).

that a written instrument may have existed. The only reference to a written instrument in the Complaint is the letter, which Plaintiff clearly states simply memorialized a meeting and initial requirements of an agreement. Plaintiff's failure to attach a written contract to the complaint and failure to otherwise indicate the existence of a written contract leads this Court to conclude that any contract which may have existed between Plaintiff and Defendant-Anderson was oral. Having concluded that Plaintiff's claim for breach of contract involves an oral contract, the issue before the Court is whether Plaintiff can show a set of facts entitling him to relief for breach of oral contract, trespass, *respondeat superior*, and negligent supervision.

Defendant-Anderson argues that it is immune from the claims that were asserted against it in Plaintiff's complaint. According to the Complaint, Defendant-Anderson is a township that sought to widen the road that runs in front of Plaintiff's home. Pursuant to Section 2744.01(F) of the Ohio Revised Code, a township is considered a political subdivision of the state. A governmental function means "a function of a political subdivision"<sup>8</sup> and "includes the regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds."<sup>9</sup> A clear reading of the statute indicates that the act of widening Eight Mile Road constituted a governmental function by Defendant-Anderson.

In its motion, Defendant-Anderson cited a decision by the Ohio Supreme Court, which held that "the doctrines of equitable estoppel and promissory estoppel are inapplicable against a political subdivision when the political subdivision is engaged in a

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<sup>7</sup> / OHIO R. CIV. P. 10(D).

<sup>8</sup> / Ohio Rev. Code § 2744.01(C)(1).

<sup>9</sup> / Ohio Rev. Code § 2744.01(C)(2)(e).

governmental function.”<sup>10</sup> The application of said holding is limited in this matter, however, because Plaintiff asserted a claim against Defendant-Anderson for breach of an oral contract, rather than promissory estoppel or equitable estoppel. Political subdivision tort immunity does not extend to “civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability.”<sup>11</sup> Defendant-Anderson is not immune to Plaintiff’s claim for breach of contract. After construing the material allegations in the complaint, as well as reasonable inferences arising from them, in favor of Plaintiff, this Court finds that Plaintiff can prove a set of facts that would entitle him to relief.

Defendant-Anderson also argues that it is immune from liability for trespass, *respondeat superior*, and negligent supervision. Ohio Revised Code Section 2744.02(A)(1) states:

Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

Plaintiff’s claim for trespass, an intentional tort, does not fall within any of the exceptions listed in Ohio Rev. Code Section 2744.02(B). According to the definitions listed in the chapter on political subdivision tort liability, “Employee” means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer’s, agent’s, employee’s, or servant’s employment for a political subdivision. ‘Employee’ does not include an

<sup>10</sup> / *Hortman v. City of Miamisburg* (2006), 110 Ohio St. 3d 194, 199.

<sup>11</sup> / Ohio Rev. Code § 2744.09(A).

independent contractor...."<sup>12</sup> In addition, "political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions."<sup>13</sup> Defendant-Anderson asserts that Defendant-Trend Construction, Inc. was merely an independent contractor, and thus, Defendant-Anderson cannot be liable for its acts. Plaintiff asserted that Defendant-Trend acted on behalf of Defendant-Anderson. Clearly, the statute permits a political subdivision to be liable for negligent acts by its employees or agents. After construing the material allegations in the complaint, as well as reasonable inferences arising from them, in favor of Plaintiff, this Court finds that Plaintiff can prove a set of facts that would entitle him to relief.

Finally, Defendant-Anderson argued that Plaintiff's claim for punitive damages should be dismissed, because an award of punitive damages against a political subdivision is statutorily prohibited. The Ohio Revised Code states:

Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function:

(A) Punitive or exemplary damages shall not be awarded.<sup>14</sup>

The Ohio Supreme Court also held that the assessment of punitive damages is prohibited against municipalities.<sup>15</sup> In light of statutory authority and case law, it is clear that Plaintiff's request for punitive damages against Defendant-Anderson is inappropriate and must be dismissed.

Accordingly, IT IS THE ORDER OF THE COURT that:

<sup>12</sup> / Ohio Rev. Code § 2744.01(B).

<sup>13</sup> / Ohio Rev. Code § 2744.02(B)(2).

<sup>14</sup> / Ohio Rev. Code § 2744.05(A).

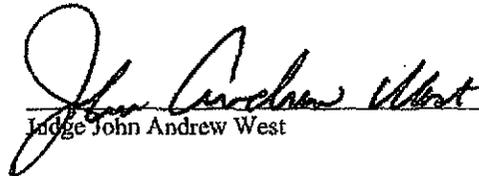
<sup>15</sup> / *Spires v. Lancaster*, 28 Ohio St. 3d 76, 79; see *Ranells v. Cleveland* (1975), 41 Ohio St. 2d 1.

(1) Defendant-Anderson's Motion for Judgment on the Pleadings is hereby DENIED in regard to Plaintiff's claims for breach of contract, *respondeat superior*, and negligent supervision.

(2) Defendant-Anderson's Motion for Judgment on the Pleadings is hereby GRANTED in regard to Plaintiff's claim for trespass and request for punitive damages against Defendant-Anderson.

Be it so Ordered.

Date: 3-21-07

  
Judge John Andrew West

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

**ENTERED**  
MAR 14 2007

GEORGE SULLIVAN,

Plaintiff,

v.

ANDERSON TOWNSHIP, et al.,

Defendants.

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CASE NO. A0607640

Judge John Andrew West

ENTRY DENYING  
MOTION TO STRIKE

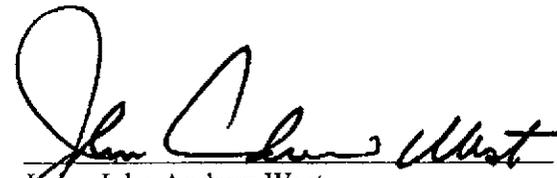
This matter came before the Court on Anderson Township's and Trend Construction, Inc.'s ("Defendants") "Joint Motion to Strike Plaintiff's Amended Complaint." After reviewing the written memoranda presented by the parties, the Court finds that Defendants' Joint Motion is not well taken.

Defendants request that this Court strike George Sullivan's ("Plaintiff") Amended Complaint, because Plaintiff did not request leave to amend his Complaint. The Court acknowledges Defendants' concern and agrees that Plaintiff should have requested leave to amend the Complaint pursuant to Civil Rule 15(A); however, Defendants have not asserted that they would be prejudiced if the amendment was allowed to remain in the record. In addition, the amendment merely clarifies Plaintiff's prayer for damages.

Accordingly, IT IS THE ORDER OF THE COURT that Defendants' Joint Motion to Strike Plaintiff's Amended Complaint is hereby denied.

Be it so Ordered.

Date: 3-13-07

  
Judge John Andrew West



**C**  
Drew v. Laferty  
Ohio App. 4 Dist., 1999.  
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT  
RULES FOR REPORTING OF OPINIONS  
AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District,  
Vinton County.  
Joseph DREW, Plaintiff,  
v.  
Harlis Ray LAFERTY, et. al, Defendants/  
Third Party Plaintiffs-Appellee,  
v.  
Village of McArthur, Third Party Defendant-Appellant.  
No. 98CA522.

June 1, 1999.

William S. Cole, Jackson, Ohio, for appellant.  
John P. Lavelle, Athens, Ohio, for appellee.

*DECISION AND JUDGMENT ENTRY*

KLINE, J.  
\*1 The Village of McArthur ("the Village") appeals the Vinton County Court of Common Pleas' denial of its motion for summary judgment in a tort action brought by Harlis Ray Laferty. The Village contends that R.C. 2744.03(A) grants it immunity from liability for its alleged negligence in hiring and supervising McArthur Police Chief Joseph Drew. We agree. Because the hiring and supervision of Chief Drew constitute discretionary functions in acquiring and determining how to use per-

sonnel, and because Laferty did not allege that the Village acted maliciously or recklessly, the Village is immune from liability for its actions pursuant to R.C. 2744.03(A)(5).

The Village also cites R.C. 2744.03(A)(3) in support of its claim that it is immune from liability. Additionally, the Village asserts that the trial court erred in denying its motion for summary judgment as to Laferty's Title 42, Section 1983, U.S.Code ("Section 1983") claim. We dismiss the appeal insofar as it relates to R.C. 2744.03(A)(3) and Section 1983, because the trial court has not issued a final, appealable order regarding those issues.

Accordingly, we reverse the judgment of the trial court, dismiss the remainder of the Village's appeal that involves R.C. 2744.03(A)(3) and Section 1983, and remand this cause to the trial court for further proceedings consistent with this opinion.

I.

Chief Drew initiated the underlying lawsuit in this case by filing claims against Laferty and others for intentional infliction of emotional distress, assault, fraud, and conspiracy to maliciously prosecute. Laferty counterclaimed, and filed a third party complaint against the Village and against Chief Drew, both in his individual capacity and in his capacity as a representative of the Village.

Laferty alleged in his counterclaim and third party complaint that Chief Drew arrested Laferty on two occasions without having probable cause or a warrant. In the course of these arrests, Chief Drew allegedly committed the torts of assault, bat-

tery, false imprisonment, false arrest, and intentional infliction of emotional distress. Laferty asserted that in committing these torts, Chief Drew acted under color of state law, hence in violation of his Section 1983 civil rights. Finally, Laferty alleged that Chief Drew acted with malice, ill will, a spirit of revenge, and a reckless disregard of Laferty's rights.

In his third party complaint, Laferty alleged that the Village "negligently hired Joseph Drew, negligently supervised him, [and] negligently permitted him to wear a badge, uniform, and carry a gun." Laferty further charged that the Village "knew or should have known of the reckless tendencies" of Chief Drew, and that, through its negligence, the Village caused him compensable harm. Finally, Laferty asserted that the Village violated Laferty's civil rights in contravention of Section 1983.

The Village filed a motion for summary judgment and asserted that it is immune from liability for negligence in its discretionary acquisition and use of personnel, facilities and other resources. The trial court denied the Village's motion, finding that in hiring, supervising, and permitting Chief Drew to hold himself out as a police officer, the Village engaged in the implementation of discretionary decisions rather than in making discretionary decisions. The Village's motion for summary judgment did not address Laferty's intentional tort claims against Chief Drew in his capacity as a representative of the Village or Laferty's Section 1983 claim against the Village.

\*2 As authorized by R.C. 2744.02(C), the Village appealed the trial court's finding that it is not immune from liability on Laferty's claims. The Village asserts the following assignments of error:

I. THE VILLAGE OF McARTHUR IS IMMUNE FROM SUIT FOR ITS DECISION TO HIRE CHIEF JOSEPH DREW.

II. THE COURT OF COMMON PLEAS ERRONEOUSLY RELIED UPON *HOWELL V. THE UNION TOWNSHIP TRUSTEES*, AN INAPPLICABLE CASE, IN REACHING ITS DECISION.

III. THE VINTON COUNTY COURT OF COMMON PLEAS ERRED IN FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF THE APPELLANT VILLAGE OF McARTHUR AS TO APPELLEE'S SECTION 1983 CLAIM.

IV. THE VINTON COUNTY COURT OF COMMON PLEAS' FAILURE TO GRANT SUMMARY JUDGMENT IN FAVOR OF APPELLANT WAS AN ERROR AND IGNORED THE APPLICABLE STANDARD FOR SUCH MOTIONS.

II.

The Village asserts in its first, second and fourth assignments of error that the trial court erred by failing to recognize that it is immune from liability for the negligent hiring and supervision of Chief Drew. Specifically, the Village asserts that its discretionary decisions are protected, that hiring a police chief is discretionary, and that the trial court erroneously relied upon a case which involved only non-discretionary decisions. Additionally, the Village asserts that the trial court erred by failing to recognize that, because Laferty merely alleged that the Village was negligent, not reckless or wanton, in its hiring and supervision of Chief Drew, Laferty did not meet his burden to survive summary judgment. Laferty asserts that the trial court correctly ruled

that the Village is not entitled to immunity because hiring, supervising, searching and arresting are not discretionary activities, and because genuine issues of material fact remain for trial.

Summary judgment is appropriate only when it has been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(A). See *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411, 599 N.E.2d 786. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 535, 629 N.E.2d 402.

In reviewing whether an entry of summary judgment is appropriate, an appellate court must independently review the record and the inferences which can be drawn from it to determine if the opposing party can possibly prevail. *Morehead*, 75 Ohio App.3d at 411-12, 599 N.E.2d 786. "Accordingly, we afford no deference to the trial court's decision in answering that legal question." *Id.* See, also, *Schwartz v. Bank-One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809, 619 N.E.2d 10.

\*3 The Village asserts that it is immune from liability for its decisions in hiring and supervising Chief Drew. R.C. 2744.03(A)(5) provides that a subdivision is immune from liability if the plaintiff's alleged loss "resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, \* \* \* personnel, facilities, and other resources

unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner." *Doe v. Jefferson Area School Dist.* (1994), 97 Ohio App.3d 11, 13, 646 N.E.2d 187.

Political subdivision immunity only extends to activities which involve weighing alternatives or making decisions involving a high degree of official judgment or discretion. *Enghauser Mfg. Co. v. Eriksson Engineering Ltd.* (1983), 6 Ohio St.3d 31, 451 N.E.2d 228, paragraph two of the syllabus. A discretionary activity is one which involves more than simple day-to-day decision making. *Winwood v. Dayton* (1988), 37 Ohio St.3d 282, 284, 525 N.E.2d 808. To qualify for immunity, the subdivision's function must require it to weigh multiple considerations, "not merely to 'rubber stamp' [a proposal] found to be in compliance with all requisite technical requirements." *Id.* at 284, 525 N.E.2d 808.

As the trial court noted, while political subdivisions are immune from liability stemming from their discretionary decisions, they are not immune from liability arising from negligence in implementing those discretionary decisions. *Howell v. Union Township Trustees* (March 18, 1997), Scioto App. No. 96CA2430, unreported, citing *Reynolds v. State* (1984), 14 Ohio St.3d 68, 471 N.E.2d 776. In *Howell*, this court determined that the Union Township Trustees exercised their discretion in deciding to use oil, rather than another substance, to control dust on the roads. However, where standards governing the proper amount of oil and method of application existed, the trustees were liable for negligence in the application of the oil to the road. *Id.*

The Village's acts challenged in this case are: (1) determining who would best serve the Village as police chief, (2) supervising

the police chief, and (3) permitting the police chief to wear or carry a uniform, badge, and gun. The Village asserts that these activities involve weighing alternatives and making decisions requiring a high degree of official judgment. Further, the Village asserts that these activities are unlike those challenged in *Howell*, because they require the Village to do more than merely rubber stamp decisions governed by established standards. Finally, the Village notes that it cannot be held liable for its discretionary acts unless a plaintiff alleges it acted recklessly or wantonly.

\*4 The decision to hire or promote one individual over another, particularly to a post conferring the high degree of power held by a police chief, involves considering strengths and weaknesses of each individual candidate and requires a high degree of official judgment in selecting the best qualified candidate. A police chief is permitted to wear a uniform and badge and carry a gun by virtue of his position as police chief, and therefore the activity is encompassed within the discretionary hiring decision. By selecting an individual to hold the highest law enforcement position in the subdivision, the subdivision implicitly grants that individual a high degree of discretion, review of which we find requires an equally high degree of discretion.

Because the hiring and supervision of Chief Drew are activities which involve the Village's exercise of discretion in the acquisition and use of personnel, the Village is immune from liability for those actions, unless the Village exercised its discretion with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 2744.03(A)(5); *Doe v. Jefferson Area School Dist.*, 97 Ohio App.3d at 13, 646 N.E.2d 187. In his complaint, Laferty spe-

cifically alleged that the Village acted negligently. Thus, even when construing the facts in the light most favorable to Laferty, we cannot find that the Village acted maliciously or recklessly. See *Id.* at 15, 646 N.E.2d 187.

Accordingly, we find that the Village is entitled to summary judgment on Laferty's claims that it negligently hired and supervised Chief Drew.

### III.

The Village also cites R.C. 2744.03(A)(3) to support its contention that it is immune from liability for its decision to hire Chief Drew. Additionally, the Village asserts that Laferty failed to allege sufficient facts to support a Section 1983 claim. We dismiss the appeal as to each of these issues for lack of a final, appealable order.

It is axiomatic that appellate courts do not address errors which were assigned and briefed but which were never raised in the trial court. See *In re Adoption of Lassiter* (1995), 101 Ohio App.3d 367, 372, 655 N.E.2d 781, citing *Republic Steel Corp. v. Cuyahoga Cty. Bd. of Revision* (1963), 175 Ohio St. 179, 192 N.E.2d 47. Appellate courts in Ohio have jurisdiction to review the "final orders" or judgments of inferior courts within their district. Section 3(B)(2), Article IV of the Ohio Constitution, R.C. 2501.02 and 2505.03. If an order is not final and appealable, an appellate court lacks jurisdiction to decide the appeal. *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, 540 N.E.2d 1381. We are required to raise jurisdictional issues *sua sponte* and dismiss an appeal which is not taken from a final appealable order. *Whitaker Merrill v. Geupel Co.* (1972), 29 Ohio St.2d 184, 186, 280 N.E.2d 922.

\*5 A “final order” is defined as one that affects a substantial right and either determines the action or is entered in a special proceeding. R.C. 2505.02. 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.”

A.

The Village cited R.C. 2744.03(A)(3) in support of its contention that it is immune from liability on Laferty's negligence claim. R.C. 2744.03(A)(3) provides that a political subdivision is immune from liability “if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee \* \* \*.” By its plain language, R.C. 2744.03(A)(3) applies to claims stemming from the actions of subdivision employees, not to claims stemming from the actions of the subdivision itself. See, also, *Nungester v. Cincinnati* (1995), 100 Ohio App.3d 561, 566, 654 N.E.2d 423. Thus, R.C. 2744.03(A)(3) does not apply to the Village's hiring decision.

We recognize that Laferty sued Chief Drew both personally and in his official capacity as a representative of the Village. However, while the Village cited R.C.

2744.03(A)(3) in its motion for summary judgment, it did not assert that it is immune from liability for Chief Drew's actions. Further, the trial court did not address R.C. 2744.03(A)(3) in denying the Village's motion for summary judgment. On appeal, the Village again cited R.C. 2744.03(A)(3) in its brief, but failed to state an assignment of error or argue the viability of an immunity defense to Laferty's claims against Chief Drew in his representative capacity.

Pursuant to App.R. 12(A)(2), we need not address an assignment of error which the appellant failed to specifically set forth or argue separately. However, even if the Village had properly raised R.C. 2744.03(A)(3) immunity on appeal, we would decline to consider the issue for lack of a final, appealable order.

In this case, we possess jurisdiction to review the trial court's denial of the Village's motion for summary judgment on Laferty's negligence claim because the trial court denied the Village's alleged immunity from liability on that claim. See R.C. 2744.02. However, the Village never alleged that it is immune from liability on Laferty's claim for the allegedly malicious actions Chief Drew took in his capacity as an agent of the Village. Thus, the trial court did not address the Village's immunity from such a claim in its entry. Because no order exists regarding the Village's immunity from such a claim, there is no final order upon which we can base our jurisdiction. Therefore, we must dismiss the Village's appeal to the extent that it encompasses a claim of immunity under R.C. 2744.03(A)(3).

B.

\*6 In its third assignment of error, the Village asserts that the trial court erred by

failing to grant the Village summary judgment on Laferty's Section 1983 claim. However, in its motion for summary judgment and supporting memorandum, the Village did not mention Laferty's Section 1983 claim. Instead, the Village devoted its entire argument to its claim that it is immune from liability pursuant to R.C. 2744.03(A)(5). Ohio's sovereign immunity statute, including R.C. 2744.03, does not bar actions brought under federal civil rights laws such as Section 1983. *Brewer v. Cleveland City Schools* (1997), 122 Ohio App.3d 378, 383, 701 N.E.2d 1023, citing *Wohl v. Cleveland Bd. of Educ.* (1990), 741 F.Supp. 688. The Village asserts on appeal that Laferty failed to allege sufficient facts to establish a Section 1983 claim.

Because neither the Village nor the trial court raised or addressed any issues concerning Laferty's Section 1983 claim in the trial court, we find that no final, appealable order exists upon which we may base our jurisdiction. Accordingly, we dismiss this appeal as to the Village's claim that the trial court erred by failing to dismiss Laferty's Section 1983 claim against the Village.

#### IV.

In conclusion, we find that the trial court erred as a matter of law by denying the Village's motion for summary judgment for negligent hiring and supervision. We dismiss the appeal regarding the Village's immunity from Laferty's claims brought against Chief Drew in his capacity as a representative of the Village for lack of a final, appealable order on the matter. Likewise, we dismiss the appeal regarding the Village's defenses of immunity or failure to state a claim on Laferty's Section 1983 claim for lack of a final, appealable order.

Accordingly, we reverse the judgment of the trial court, dismiss the appeal that involves R.C. 2744.03(A)(3) and Section 1983, and remand this cause for further proceedings consistent with this opinion on all remaining issues.

**JUDGMENT REVERSED IN PART,  
APPEAL DISMISSED IN PART, AND  
CAUSE REMANDED.**

#### JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED, that the APPEAL BE DISMISSED IN PART, and the cause remanded to the trial court for further proceedings consistent with this opinion, costs herein taxed to appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Vinton County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

GREY, J.<sup>FN\*</sup>: Concurs in Judgment and Opinion.

FN\* Lawrence Grey is a retired judge from the Fourth District Court of Appeals, sitting by assignment. HARSHA, J., Concurring.

I agree we have no final appealable order and thus, no jurisdiction to review the issues relating to appellees 42 U.S.Code

1983 claims. However, while the principal opinion reaches the correct result concerning the state law causes of action, I believe we need only apply R.C.2744.02(A) and (B) to properly dispose of the rest of this case. Because R.C. 2744.03(A) should not control our disposition, I concur in judgment only.

**NOTICE TO COUNSEL**

Ohio App. 4 Dist.,1999.  
Drew v. Laferty  
Not Reported in N.E.2d, 1999 WL 366532  
(Ohio App. 4 Dist.)

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**H**

Carlson v. Woolpert Consultants  
Ohio App. 2 Dist., 1998.  
Only the Westlaw citation is currently  
available.

CHECK OHIO SUPREME COURT  
RULES FOR REPORTING OF OPIN-  
IONS AND WEIGHT OF LEGAL AU-  
THORITY.

Court of Appeals of Ohio, Second District,  
Montgomery County.

John CARLSON, et al., Plaintiff-Appellees,

v.

WOOLPERT CONSULTANTS, et al., Defendant-Appellants.  
Nos. 17292, 17303.

Nov. 25, 1998.

DECISION AND FINAL JUDGMENT  
ENTRY

PER CURIAM.

\*1 In these two cases, Washington Township employees, Gary Huff, Bill Johnson, and Thomas Toberan, and Montgomery County employees, Bruce B. Bollinger, John J. Davies, Benton L. Kesling, and Joseph J. Klosterman, appeal from the trial court's denial of their motions for summary judgment. The summary judgment motions were based on the immunity from liability set out in R.C. 2744.03(A)(6).

The Appellees filed motions to dismiss both appeals, claiming that the trial court's decision was not a final, appealable order. After considering Appellees' motions, we filed a Decision and Entry in each appellate case on September 9, 1998, staying the appeals and remanding the cases to the trial

court. In our decisions, we noted that a denial of summary judgment in immunity situations is a final order under R.C. 2501.02 and R.C. 2744.02(C). As a result, we found no merit in Appellees' claim that an appeal could not be taken from the orders overruling the motions for summary judgment. However, we did agree with Appellees that the trial court's decisions were not appealable without a Ohio Civ.R. 54(B) certification. Consequently, we said we would stay the appeals for thirty days to give the trial court a chance to file amended entries with the appropriate certification. We also asked the parties to let us know if the trial court chose to do so.

Subsequently, on October 13, 1998, the Appellants in Case No. 17292 filed a notice indicating that the trial court had refused to file an entry with a Rule 54(B) certification. A copy of the trial court's decision was attached to the notice. Unfortunately, the decision does not comment on the reason for the court's refusal to certify, other than to make a passing reference to a memorandum that is not before us. In any event, because we said in our September 9, 1998 Decision and Entry that we would dismiss the appeal if no certification were forthcoming within thirty days, the appeal in Case No. 17292 is hereby dismissed, for lack of a final, appealable order. In dismissing the appeal, we incorporate the comments and reasoning in our Decision and Entry of September 9, 1998.

We have not received notice concerning whether the trial court has amended the entry in Case No. 17303 to provide the Rule 54(B) certification. However, since we said in our decision that the appeal would be dismissed in the absence of an amended entry within thirty days, and since

more than thirty days have passed, the appeal in Case No. 17303 is also dismissed. Again, as support for our decision, we incorporate our comments in the September 9, 1998 Decision and Entry filed in Case No. 17303.

As a further matter, we note that on September 16, 1998, Appellants filed a motion in Case No. 17292 to certify a conflict. Appellees have not filed a response to the motion, which raises the issue of whether our September 9, 1998 decision conflicts with *Kagy v. Toledo-Lucas Cty. Port Authority* (July 15, 1997), Fulton App. Nos. F-97-006 and F-97-009, unreported (now reported at 121 Ohio App.3d 239). Specifically, in *Kagy*, the Port Authority filed a motion for summary judgment based on the immunity granted by Chapter 2744 to political subdivisions. After summary judgment was denied by the trial court, the Port Authority appealed. Ultimately, the appeal was allowed, based on the fact that denials of summary judgment motions in immunity cases are final orders under R.C. 2501.02 and R.C. 2744.02. This holding is consistent with our September 9, 1998 decision and with a prior decision in our court. See, *Weber v. Haley* (May 1, 1998), Clark App. No. 97 CA 108, unreported.

\*2 In addition to the final order holding, however, the *Kagy* court rejected a claim that R.C. 2501.02 and R.C. 2744.02 conflict with Ohio Civ. R. 54(B). In particular, the court found Rule 54(B) inapplicable and irrelevant because the trial court's judgment on the immunity defense did not dispose of a "claim," but invalidated a "defense" to a claim. In the court's opinion, Ohio Civ.R. 54(B) does not apply to "defenses."

After considering *Kagy*, we find it distinguishable. In the present cases, our de-

cision to dismiss the appeals is based on the fact that claims against multiple parties remain at the trial court level, not on whether the summary judgment decision involves a "claim" or a "defense." According to Ohio Civ.R. 54(B):

[w]hen 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 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 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, 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 all the parties.

In *Chef Italiano Corp. v. Kent State University* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, the Ohio Supreme Court explicitly said in the syllabus that "[a]n order of a court is a final, appealable order only if the requirements of both Civ.R. 54(B), if applicable, and R.C. 2505.02 are met. Under the clear language of Ohio Civ.R. 54(B), "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." See, e.g., *Mezerkor v. Mezerkor* (1994), 70 Ohio St.3d 304, 638 N.E.2d 1007 (rejecting appeals of summary judgment decisions where claims against other

parties remained and the trial court did not include a Rule 54(B) certification). Thus, if multiple parties are involved and an order is entered as to fewer than all parties, Ohio Civ.R. 54(B) applies. In such cases, the court of appeals cannot hear the appeal without the appropriate certification from the trial court.

We also note that while multiple defendants may have originally been present in *Kagy*, the Port Authority appears to have been the only defendant remaining at the time the Port Authority's appeal was filed. See, procedural history in *Kagy v. Toledo-Lucas County Port Authority*. (March 20, 1998), Fulton App. No. 97-FU-9, unreported. Specifically, by the time of the appeal from the denial of summary judgment on immunity, one defendant had been dismissed and summary judgment for the other (Burlington Air Express) had been granted on the basis of preemption. As a result, the *Kagy* court had no reason to consider the application of the "multiple parties" prong of Ohio Civ.R. 54(B).

\*3 Based on the preceding analysis, we find no conflict between our decision of September 9, 1998 and *Kagy*. Accordingly, the motion to certify a conflict is denied.

The final issue remaining is a motion for protective order filed by Appellants in Case No. 17292 on October 13, 1998. In the motion, Appellants asked us to prevent any party in the underlying cases from taking depositions until the questions involved in the present appeal are finally determined by the Ohio Supreme Court. Various parties have opposed this motion, pointing out, first, that the Rules of Appellate Procedure do not provide for protective orders. If any mechanism exists, it is said to be a motion for a stay pursuant to Ohio App.R. 7. However, according to the opposing

parties, Appellants failed to comply with Ohio App. Ohio App.R. R. 7, as they have not requested a stay from the trial court. Moreover, there is no pending "order" or judgment that Appellants have sought to stay. Instead, all that has happened is that notices for depositions were filed. Finally, the opposing parties note that if a stay of depositions were granted, they would be hampered in preparing for the trial, which has already been scheduled. As an alternative, these parties suggest that if we are inclined to rule in favor of a "protective order," we should simply stay the entire proceeding below until the appeal process is concluded.

Appellants' response to these points is that Ohio App.R. 7 applies only to stays of judgments or orders of the trial court. Appellants also contend that the filing of a notice of appeal deprives the lower court of jurisdiction not inconsistent with a reviewing court's power to modify, affirm, or reverse. In this context, Appellants claim that forcing them to undergo costly discovery is inconsistent with our power to modify, affirm, or reverse the lower court's ruling.

In view of the reasons for our dismissal of the appeal, the issue of whether a protective order should be granted is moot. Furthermore, even if we were to consider the merits of Appellant's motion, we do not have authority to issue "protective orders," except in original actions, which proceed as civil actions under the Rules of Civil Procedure. See, Loc. R. 8 of the Second District Court of Appeals. And finally, even if we considered the request as one for a "stay" under Ohio App.R. 7, we would reject it for two reasons. First, Appellants have not applied to the trial court for a stay, as required by Ohio App.R. 7(A). Second, Appellants do not seek to

stay an order or judgment of the trial court, but simply want us to intervene in the deposition process. Such interference in the trial process by an appellate court is inappropriate.

Accordingly, for the reasons mentioned, the motion for protective order is denied.

In view of the preceding discussion, the motions to dismiss the appeals in Case Nos. 17292 and 17303 are Granted. The motions to certify a conflict and for a protective order in Case No. 17292 are Denied.

**\*4 IT IS SO ORDERED.**

Ohio App. 2 Dist., 1998.  
Carlson v. Woolpert Consultants  
Not Reported in N.E.2d, 1998 WL 811577  
(Ohio App. 2 Dist.)

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**H**

Drum v. Washlock  
Ohio App. 8 Dist., 2000.  
Only the Westlaw citation is currently  
available.

**CHECK OHIO SUPREME COURT  
RULES FOR REPORTING OF OPIN-  
IONS AND WEIGHT OF LEGAL AU-  
THORITY.**

Court of Appeals of Ohio, Eighth District,  
Cuyahoga County.

Angela M. DRUM, et al., Plaintiffs-ap-  
pellees

v.

Michael WASHLOCK, et al., Defendants-  
appellants  
No. 74816, 74817.

Aug. 24, 2000.

Character of Proceeding: Civil appeals  
from Common Pleas Court, Case No. CV-  
325962. Motion No. 97100 to dismiss is  
granted. Appeals dismissed.

Thomas Lobe, Esq., George F. Lonjak,  
Esq., Cleveland, for plaintiffs-appellees.  
Robert J. Foulds, Esq., Mayfield Heights,,  
for defendant Michael Washlock.

Thomas J. Downs, Esq., John A.  
Podgurski, Esq., Dinn, Hockman & Potter,  
Cleveland, for defendants-appellants, May-  
field City Board of Education.

Jennifer M. Orr, Esq., James A. Sennett,  
Esq., Matthew J. Grimm, Esq., Williams,  
Sennett & Scully Co., L.P.A., Twinsburg,  
for defendant-appellant Marlane Renner.

Beth A. Sebaugh, Esq., Quandt, Giffels &  
Buck, Cleveland, for defendants-appellants  
Marlane & Daniel Renner.

Lisa M. Chesler, Esq., Paul M. Friedman,  
Esq., John G. Farnan, Esq., Weston, Hurd,

Fallon, Paisley & Howle, Cleveland, for  
Wester Reserve Mutual Casualty Co.

**JOURNAL ENTRY AND OPINION**

KARPINSKI, J.

\*1 These consolidated appeals arise from a  
personal injury action filed by a student  
and her parents against an alleged rapist, a  
school district, one of its employees, and  
her spouse. The claims stem from a crime  
in which a volunteer sexually assaulted a  
student during an extra-curricular activity  
at the employee's residence.

During the course of the proceedings, the  
school district, Mayfield City Board of  
Education ("Mayfield"), and its employee,  
Marlane Renner, filed motions for sum-  
mary judgment arguing they were not li-  
able for the criminal rape, because inter  
alia, they had immunity under the Ohio  
Political Subdivision Tort Liability Act.  
R.C. 2744.01 et seq.; see also e.g., Hodge  
v. City of Cleveland (Oct. 22, 1998).  
Cuyahoga App. No. 72283, unreported.  
The trial court denied their motions for  
summary judgment.

There have been no proceedings on the  
substantive claims against these two de-  
fendants or the remaining two defendants,  
Dr. Renner, or the alleged rapist, Michael  
Washlock. Nor does the trial court's journal  
entry denying summary judgment contain a  
Civ.R. 54(B) certification of no just reason  
for delay of an appeal.

Mayfield and Marlane Renner, neverthe-  
less, filed notices of appeal from the denial  
of their motions for summary judgment.  
This court of appeals consolidated the two  
appeals for hearing, briefing, and disposi-  
tion. Before addressing the merits of the

parties' respective arguments, however, this court must address our jurisdiction in these appeals.

Plaintiffs filed a motion to dismiss the appeals for lack of a final appealable order.<sup>FN1</sup> Mayfield and Marlane Renner each opposed the motion to dismiss. We find that the order denying Mayfield and Marlane Renner's motions for summary judgment is neither final nor appealable.

FN1. For the reasons set forth in this opinion, we grant the motion to dismiss the appeals, Motion No. 97100, by separate journal entry.

Recent statutory amendments which classify orders denying sovereign immunity to political subdivisions and their employees as final orders have been found invalid and, therefore, do not confer jurisdiction over these appeals.

Effective January 27, 1997, Am.Sub.H.B. No. 350 ("House Bill 350") amended R.C. 2744.02 and defined a final order in part as follows:

(C) 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 Chapter 2744 or any other provision of the law is a final order.

House Bill 350 also amended R.C. 2501.02 to include appellate court jurisdiction over judgments or final orders.

The Ohio Supreme Court, however, subsequently found House Bill 350 unconstitutional in toto. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062, syllabus paragraph three. As a result, the amendments to R.C. 2744.02(C) and R.C.

2501.02 are invalid and, therefore, do not confer jurisdiction over appeals from orders denying immunity. E.g., *Burger v. Cleveland Heights* (1999), 87 Ohio St.3d 188, 718 N.E.2d 912; *Braden v. Cleveland Board of Education* (1999), 87 Ohio St.3d 207.<sup>FN2</sup>

FN2.R.C. 2744.02 was also amended after House Bill 350. However, this amendment, in Am.Sub.H.B. No. 215 ("House Bill 215"), effective June 30, 1997, was to subsection (B)(2) and did not reenact or re-adopt R.C. 2744.02(C). We have specifically held that this subsequent amendment was not sufficient to render orders denying immunity immediately appealable final orders. See *Darst v. Bay Village Bd. Of Education* (Nov. 22, 1999), Cuyahoga App. No. 76091, unreported, reconsideration denied, (Dec. 10, 1999) Motion No. 12347; *Taylor v. County of Cuyahoga* (Jan. 20, 2000), Cuyahoga App. No. 75473, unreported.

Absent some other applicable statutory basis for asserting jurisdiction, we lack jurisdiction to review interlocutory orders denying summary judgment on immunity grounds. It is well established that orders denying motions for summary judgment are not final orders. *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 90, 554 N.E.2d 1292; *State ex rel. Overmeyer v. Walinski* (1966), 8 Ohio St.2d 23, 222 N.E.2d 312. Before the House Bill 350 amendments to R.C. 2744.02(C) and R.C. 2501.02, courts uniformly dismissed appeals from the denial of summary judgment on immunity grounds.

\*2 Neither Mayfield nor Marlane Renner has shown that an order denying immunity

otherwise qualifies as a final order under R.C. 2505.02. *Haynes v. City of Franklin* (Oct. 18, 1999), Warren App. No. CA99-02-023, unreported, recently summarized the relevant principles and specifically concluded that an order denying immunity did not satisfy any of the five categories of final appealable orders listed in R.C. 2505.02.

Because the only potentially applicable category of final order is the one recently adopted for provisional remedies set forth in R.C. 2505.02(A)(4), effective July 22, 1998, we limit our discussion to this provision. We agree with the Eleventh District Court that denial of a sovereign immunity defense does not satisfy the requirements of this provision.<sup>FN3</sup> Although the order would determine the action with respect to the provisional remedy as required by R.C. 2505.02(A)(4)(a), an appealing party could be afforded a meaningful and effective remedy by appeal following final judgment on all matters in the action. R.C. 2505.02(A)(4)(b).Id. at 4; *Taylor v. County of Cuyahoga*, supra, at 3.

FN3. It is not clear whether an order denying a motion for summary judgment constitutes a provisional remedy. A provisional remedy is defined as a proceeding ancillary to an action. R.C. 2505.02(A)(3). In an analogous context of workers' compensation immunity, courts have held that consideration of a motion for summary judgment is not ancillary. Nor is it provisional \* \* \* [i]t is the remedy. *Bishop v. Dresser Indus., Inc.* (Oct. 21, 1999), Marion App. No. 9-99-31, unreported at 2. We make no ruling on this issue, however, and assume without deciding, for purposes of our analysis,

that an order denying political subdivision immunity is an ancillary proceeding.

Finally, even if the order denying immunity in the case at bar satisfied statutory requirements contrary to our holding above, the order in the case at bar is nevertheless not immediately appealable because it did not resolve all claims among all parties or contain an express certification of no just reason for delay of the appeal under Civ.R. 54(B). *Malloy v. Brennan* (Mar. 25, 1999), Cuyahoga App. No. 75183, unreported at 4-6.

Accordingly, these consolidated appeals are hereby dismissed.

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, A.J., and TERRENCE O'DONNELL, J., concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist., 2000.  
*Drum v. Washlock*  
Not Reported in N.E.2d, 2000 WL

1222003 (Ohio App. 8 Dist.)

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## **2505.02**

### **Statutes and Session Law**

#### **TITLE [25] XXV COURTS -- APPELLATE**

#### **CHAPTER 2505: PROCEDURE ON APPEAL**

#### **2505.02 Final orders.**

#### **2505.02 Final orders.**

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Effective Date: 07-22-1998; 09-01-2004; 09-02-2004; 09-13-2004; 12-30-2004; 04-07-2005; 2007 SB7 10-10-2007

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**2505.03**

**Statutes and Session Law**

**TITLE [25] XXV COURTS -- APPELLATE**

**CHAPTER 2505: PROCEDURE ON APPEAL**

**2505.03 Appeal of final order, judgment, or decree.**

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**2505.03 Appeal of final order, judgment, or decree.**

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

Effective Date: 03-17-1987

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## **2744.02**

### **Statutes and Session Law**

#### **TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES**

#### **CHAPTER 2744: POLITICAL SUBDIVISION TORT LIABILITY**

#### **2744.02 Governmental functions and proprietary functions of political subdivisions.**

#### **2744.02 Governmental functions and proprietary functions of political subdivisions.**

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) 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.

Effective Date: 04-09-2003; 2007 HB119 09-29-2007

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**RULE 54**

**Ohio Court Rules**

**RULES OF CIVIL PROCEDURE**

**TITLE VII. JUDGMENT**

**RULE 54 Judgments; Costs**

**RULE 54. Judgments; Costs**

**(A) Definition; Form.**

"Judgment" as used in these rules includes a decree and any order from which an appeal lies as provided in section 2505.02 of the Revised Code. A judgment shall not contain a recital of pleadings, the magistrate's decision in a referred matter, or the record of prior proceedings.

**(B) Judgment upon multiple claims or involving multiple parties.**

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 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 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, 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 all the parties.

**(C) Demand for judgment.**

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings.

**(D) Costs.**

Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.

[Effective: July 1, 1970; amended effective July 1, 1989; July 1, 1992; July 1, 1994; July 1, 1996.]

Staff Note (July 1, 1996 Amendment)

RULE 54(A) Definition; Form

The amendment changed the rule's reference from "report of a referee" to "magistrate's decision" in division (A) in order to harmonize the rule with the language adopted in the 1995 amendments to Civ. R. 53. The amendment is technical only and no substantive change is intended.

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**C**

Malloy v. Brennan  
Ohio App. 8 Dist., 1999.  
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT  
RULES FOR REPORTING OF OPINIONS  
AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,  
Cuyahoga County.  
Margaret A. MALLOY, Plaintiff-appellee,  
v.  
Patrick Thomas BRENNAN, et al., Defendants/third-party plaintiffs-appellees  
v.  
City of Rocky River, Third-party defendant-appellant.  
No. 75183.

March 25, 1999.

Civil appeal from Common Pleas Court,  
No. CV-336992.

Martin T. Franey, Gravens & Franey Co.,  
Cleveland, OH, for plaintiff-appellee.  
James A. Sennett, Williams, Sennett &  
Scully, Twinsburg, OH, for defendants/  
third-party plaintiffs-appellees.  
Stephen P. Bond, Baumgartner & O'Toole,  
Elyria, OH, for third-party defendant-appellant  
City of Rocky River.

JOURNAL ENTRY AND OPINION

PER CURIAM:

\*1 Third-party defendant City of Rocky River (hereafter "Rocky River") appeals from an order that denied Rocky River's motion for judgment on the pleadings. That order did not fully dispose of the claims of

all the parties, however, and lacked certification pursuant to Civ. R. 54(B). Because the order appealed is not, therefore, a final appealable order, we must dismiss Rocky River's appeal.

Plaintiff Margaret A. Malloy filed this action against defendants Patrick Thomas Brennan and Mary M. Brennan on July 3, 1997. Malloy alleged that she was injured on July 7, 1995, when she tripped and fell on the sidewalk that abutted the defendants' property.

The defendants answered Malloy's complaint and filed a third-party complaint for indemnity and contribution against third-party defendant City of Rocky River.

Rocky River moved for dismissal of the third-party complaint on April 3, 1998, pursuant to Civ. R. 12(B)(6). Rocky River's motion was denied on June 5, 1998.

On June 10, 1998, Rocky River moved for judgment on the pleadings. Rocky River maintained that it was no longer subject to liability under R.C. 2744.02(B)(3) because of statutory amendments to R.C. 2501.02 and R.C. 2744.02 contained in H.B. 350. On the same date, Rocky River answered the third-party complaint and asserted combined counterclaims/cross-claims.

Rocky River's motion for judgment on the pleadings was denied on August 13, 1998. The court referred this case to arbitration on August 21, 1998. On September 8, 1998, Rocky River brought this appeal from the denial of its motion for judgment on the pleadings pursuant to R.C. 2744.02(C).

Our appellate jurisdiction is restricted to the review of orders that are final and ap-

pealable. Section 3(B)(2), Article IV, Ohio Const.; R.C. 2505.03. To be final and appealable, an order which does not adjudicate all the claims, rights, and liabilities of all the parties must meet the requirements of R.C. 2505.02 and Civ.R. 54(B). *State ex rel. A & D Limited Partnership v. Keefe* (1996), 77 Ohio St.3d 50; *Noble v. Colwell* (1989), 44 Ohio St.3d 92, syllabus.

In the instant case, the trial court denied Rocky River's motion for judgment on the pleadings and thereby denied Rocky River the governmental immunity it invoked pursuant to R.C. 2744.02.

Effective January 27, 1997, amended R.C. 2501.02 provides, in relevant part, as follows:

In addition to the original jurisdiction conferred by Section 3 of Article IV, Ohio Constitution, the court [of appeals] shall have jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals within the district, \* \* \* including an order denying a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744. or another provision of the Revised Code, for prejudicial error committed by a lower court of that nature. \* \* \*

\*2 R.C. 2744.02(C), also effective January 27, 1997, defines a final order in this context as follows: "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 Chapter 2744. or any other provision of the law is a final order."

But even if R.C. 2744.02(C) were suffi-

cient to cause the order here to be a "final order" that may be subject to appellate review, that ruling did not adjudicate all the rights and liabilities of all the parties. Consequently, the requirement of Civ.R. 54(B) must still be met. *State ex rel. A & D Limited Partnership v. Keefe, supra*; *Noble v. Colwell, supra*.

Civil Rule 54(B) states, in relevant part,

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 all the parties.

In the case at bar, the trial court did not certify, pursuant to Civ.R. 54(B), that there was no just reason for delay when it denied Rocky River's motion for judgment on the pleadings. Since this ruling did not adjudicate all the rights and liabilities of all the parties, it is interlocutory and is subject to revision by the trial court. See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 90, n. 6.

Consequently, absent the certification required by Civil Rule 54(B), an order that denies the government's immunity defense but that leaves pending for disposition other claims against multiple parties is not immediately appealable. This was the position of the Second District Court of Appeals in *Carlson v. Woolpert Consultants* (Nov. 25, 1998), Montgomery App. Nos. 17292, 17303, unreported, and we agree.

We are aware that at least one Ohio court has said that Civil Rule 54(B) is inapplicable if the trial court's order rejects only the government's immunity defense to a claim but does not dispose of the claim. *Kagy v. Toledo-Lucas Cty. Port Auth.* (1997), 121 Ohio App.3d 239 (*Kagy I*). The *Kagy I* court denied a motion to dismiss the appeal from an order that lacked the Civ.R. 54(B) certification.

We think that case is distinguishable, however, from the instant case because multiple claims against multiple parties remain pending for disposition at the trial court level, that is, plaintiff Malloy's claim against the defendants Brennan. In the *Kagy* case, by contrast, the Port Authority appears to have been the only remaining defendant that had claims pending against it at the time of its appeal. See *Kagy v. Toledo-Lucas County Port Auth.* (Mar. 20, 1998), Fulton App. No. 97-FU-9, unreported (*Kagy II*), at p. 2, fn. 9. Given that procedural posture, the *Kagy I* court arguably "had no reason to consider the application of the 'multiple parties' prong of Ohio Civ.R. 54(B)." *Carlson v. Woolpert Consultants, supra*, at p. 2.

\*3 Under the circumstances of this case, we conclude that the order before us is not subject at this time to appellate review under either R.C. 2505.02 or R.C. 2744.02(C) and that Rocky River's appeal must be dismissed.

If the trial court sees fit, however, to certify pursuant to Civ.R. 54(B) that there is no just reason to delay an appeal by Rocky River, then Rocky River may seek reinstatement of this appeal within thirty (30) days of this entry and this case will be reset for immediate hearing and disposition without additional briefing.

The appeal is dismissed.

It is ordered that appellees recover of appellant their costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KARPINSKI, P.J., SPELLACY and ROCCO, JJ., concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist., 1999.  
Malloy v. Brennan  
Not Reported in N.E.2d, 1999 WL 166021  
(Ohio App. 8 Dist.)

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