

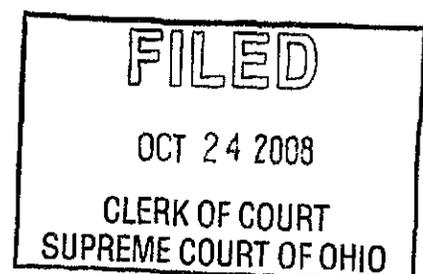
IN THE SUPREME COURT OF OHIO

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

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

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I. STATEMENT OF FACTS

Although the Appellee includes the heading, “Statement of Facts,” at page 1 of his brief, (Appellee’s Merit Brf. at 1), his brief is devoid of any factual recitation. The Appellant, Anderson Township (“Anderson” or “Township”), therefore, respectfully requests that this Honorable Court note the Appellee’s agreement with the Township’s Statement of Facts provided in its Merit Brief. S. Ct. Prac. R. VI, Section 3(A) (“A statement of facts may be omitted from the appellee’s brief if the appellee agrees with the statement of facts given in the appellant’s merit brief.”)

II. ARGUMENT

A. **Certified Conflict 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?”**

1. Introduction.

The Appellee’s argument for affirmance of the First District’s decision below is straightforward: Civ.R. 54(B)’s provisions are axiomatic, immutable and “appl[y] to all litigation without question,” (Appellee’s Merit Brf. at 1-2), apparently even to cases where the General Assembly and this Court deem them inapplicable. To reach his conclusion, the Appellee: (1) interprets R.C. 2744.02(C) too narrowly based upon this Court’s decision in *Hubbell v. City of Xenia*; (2) ignores other interlocutory orders that bypass Civ.R. 54(B);¹ (3) relies upon cases that do not address Ohio Revised Code Chapter 2744, including one decision that pre-dates both Chapter 2744 and Civ.R. 54; and (4) is forced to misconstrue the holding of *Drew v. Laferty* to support his argument. More

¹ Appx. at 052. Except as otherwise provided, references to the Appendix are to the Appendix attached to Anderson’s Merit Brief.

important, the Appellee's argument ignores the public policy underlying R.C. 2744.02(C),² which this Court recognized in *Hubbell*, and improperly elevates judicial policy in its place. This Court should hold that R.C. 2744.02(C) controls appellate procedure where interlocutory orders deny a political subdivision the benefit of an alleged immunity notwithstanding the number of claims or defendants.

2. Appeals pursuant to R.C. 2744.02(C) are final and appealable in accordance with legislative intent.

While it is true that R.C. 2744.02(C) speaks in terms of a "final order" and not a "final and appealable order," (Appellee's Merit Brf. at 1, 2), this Honorable Court has left no doubt about the legislature's intent. "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 v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, at syllabus (emphasis added). This Court instructed the courts of appeals that they "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. If the General Assembly's language was at all unclear, (Appellee's Merit Brf. at 2), this Honorable Court has remedied any uncertainty.

Notwithstanding Appellee's draconian view, interlocutory orders granting or denying a provisional remedy, R.C. 2505.02(A)(3), (B)(4),³ are not subject to Rule 54(B). *State ex rel. Butler Cty. Children Services Bd. v. Sage*, 95 Ohio St.3d 23, 25, 2002-Ohio-1494, 764 N.E.2d 1027. Just as the General Assembly determined certain orders concerning provisional remedies are immediately

² Appx. at 050.

appealable, cf. *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, at ¶ 25-26 (in case with multiple defendants, order finding *prima facie* proof of asbestos claim immediately appealable to “reduce litigation costs and thereby preserve the resources of asbestos defendants so that more injured plaintiffs can be made whole”), so also did the legislature provide that interlocutory orders denying the benefit of an alleged immunity are final and appealable. “[T]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.” *Hubbell*, 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). Stated otherwise: the Appellee has failed to show why the General Assembly’s intent as to interlocutory orders as expressed in R.C. 2744.02(C) should be subject to Rule 54(B) certification when legislative intent as to interlocutory orders pursuant to R.C. 2505.02(A)(3), (B)(4) is not.

The Appellee cites to two cases that do not address Chapter 2744. In *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381, this Court considered an appeal from a jury verdict finding that the plaintiff’s decedent was driving a motor vehicle involved in a fatal accident. *Id.* at 92-93. Arising from the dispute over whether the decedent or the surviving, injured defendant passenger was operating the vehicle, the passenger filed a counterclaim for his injuries. *Id.* at 93. Following a bifurcated trial, the jury reached its verdict, which was limited to who was driving the automobile and the plaintiffs appealed from the verdict and an unfavorable evidentiary ruling. *Id.* The court of appeals overturned the trial court’s evidentiary ruling in a split decision. *Id.* This Court determined it lacked subject matter jurisdiction to hear the appeal because there was no final, appealable order because defendant’s counterclaims remained pending. *Id.* at 96-97. The Court

³ Appx. at 047.

stated, “As a general rule, even where the issue of liability has been determined, but a factual adjudication of relief is unresolved, the finding of liability is not a final appealable order even if Rule 54(B) language was employed,” *id.* at 96, and commented that Rule 54(B) “accommodate[s] the strong [judicial] policy against piecemeal litigation with the possible injustice of delayed appeals in special situations,” *id.*

In another case that does not construe Chapter 2744 and could not, because the decision pre-existed its enactment, the Appellee relies upon *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 272 N.E.2d 127, in an effort to apply the Court’s treatment of R.C. 2505.02 to the instant case. *Lantsberry* was a personal jurisdiction case where the nonresident defendants appealed from a court of appeals’ decision overruling the trial court’s grant of their motion to quash service of summons. *Id.* at 305. This Court construed R.C. 2505.02 and held, because the trial court’s order not only quashed service but also dismissed the nonresident defendants, it was a final, appealable order because it disposed of the case. *Id.* at 306-07. The Court did not consider Civ.R. 54(B) because it had not been adopted at the time of the trial court’s judgment. *Id.* at 306.

In cases not involving Chapter 2744 immunity, Anderson has no dispute with the Court’s interpretation and application of R.C. 2505.02 and Rule 54(B). As the Township stated, “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.’” (Appellant’s Merit Brf. at 5). What the Appellee fails to address is the General Assembly’s exception to this procedure for political subdivision statutory immunity. This Court held the legislature clearly stated an exception to traditional final order analysis in R.C. 2744.02(C):

We conclude that the use of the words “benefit” and “alleged” illustrates that the scope of this provision is not limited to orders delineating a “final” denial of immunity. R.C. 2744.02(C) defines as final a denial of the “benefit” of an “alleged” immunity, not merely a denial of immunity. Therefore, the plain language of R.C. 2744.02(C) does not require a final denial of immunity before the political subdivision has the right to an interlocutory appeal.

Hubbell, 2007-Ohio-4839, at ¶ 12. Concerning Rule 54(B)’s absence from this process, the Appellee does not refute Anderson’s argument that applying the Rule would improperly elevate judicial over public policy, against which the *Hubbell* Court warned, *Hubbell*, 2007-Ohio-4839, at ¶ 22-23 (courts may not prefer judicial policy of avoiding piecemeal litigation over public policy favoring “preservation of the fiscal integrity of political subdivisions”), or subject legislative intent to a trial court’s discretion. (Appellant’s Merit Brf. at 11-14).

3. A proper construction of *Drew v. Laferty* supports Anderson’s argument.

Unfortunately, the Appellee resorts to an incomplete and misleading citation to the conflict case of *Drew v. Laferty* (June 1, 1999), 4th Dist. No. 98CA522, 1999 WL 366532.⁴ The Appellee’s selective citation makes it appear that *Drew* supports his argument and, consequently, invalidates the Court’s acceptance of a certified conflict. The Appellee cites to a portion of the opinion where the Fourth District Court of Appeals dismissed the Village of McArthur’s (“Village”) appeal of the trial court’s denial of summary judgment on the plaintiff’s 42 U.S.C. 1983 claim. *Id.* at *5. It is clear that federal civil rights actions are not subject to a claim of Chapter 2744 immunity. R.C. 2744.09(E).⁵ In addition, the Village did not argue this issue on summary judgment. *Drew*, at *5.

⁴ Appx. at 032.

⁵ Attached hereto as Appx. 056.

The salient portion of the decision, and the holding upon which the First District found a conflict, which this Court accepted, was the Fourth District's exercise of jurisdiction, under R.C. 2744.02(C), to hear the Village's immunity appeal on the third-party defendant's negligence claim, despite the presence of multiple defendants. *Drew*, at *3-4, 5. Had he cited to the relevant portions of the case, the Appellee would be hard-pressed to counter the Fourth District's clear distinction between typical appellate procedure and the analysis employed when a political subdivision seeks review of an order denying the benefit of an alleged immunity:

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."

Id. at *5. This Honorable Court should uphold the General Assembly's exception and reverse the First District Court of Appeals.

4. *Hubbell's* application to the instant case furthers public policy.

The Appellee argues the judicial policy of "finality" may be advanced through Rule 54(B) certification to the exception of public policy yet concludes by citing this Court's commentary about the General Assembly's public policy considerations. (Appellee's Merit Brf. at 1, 2-3). To the extent that Appellee believes judicial policy may outweigh legislative policy and thereby support application of Rule 54(B) to interlocutory immunity appeals, the Appellee is simply incorrect. As the

Court held, “[j]udicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.” *Hubbell*, 2007-Ohio- 4839, at ¶ 22 (quoting *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.). The First District Court of Appeals was also incorrect when it “advance[d] the underlying [judicial] policy of avoiding piecemeal litigation.” *Sullivan v. Anderson Twp.*, 1st Dist. No. C-070253, 2008-Ohio-1438, at ¶ 14.⁶

Ironically, the Appellee concludes his merit brief, (Appellee’s Merit Brf. at 2-3), by citing to this Court’s language in support of its acknowledgement that “[j]udicial economy is actually better served by a plain reading of R.C. 2744.02(C).” *Hubbell*, 2007-Ohio- 4839, at ¶ 24. The Court reached this conclusion immediately following its recognition of the legislature’s intent to preserve the “fiscal integrity of political subdivisions,” *id.* at ¶ 23, and continued:

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

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

⁶ Appx. at 022-023.

Id. at ¶¶ 25-26 (emphasis added and in original). This Court recognized the legislative preference that public policy is better-served by early determination of immunity.

These pertinent considerations apply whether there is one defendant or multiple defendants. Where a plaintiff sues a political subdivision and other defendants, when there is an early determination of immunity, the plaintiff and political subdivision still have an opportunity to save costs and fees as to plaintiff's claims against the subdivision. Either an early finding of immunity will terminate those claims or an early determination of no immunity will prompt the government to consider settlement. In either case, the political subdivision has an opportunity to save fiscal resources. A plaintiff's choice to combine public and private defendants does not alter these policies and should not force the political subdivision to await final judgment to bring an appeal. The position of the Appellee and the First District Court of Appeals would permit such a result, thwarting the General Assembly's intent and subjecting the political subdivision to a trial court's discretionary Rule 54(B) ruling.

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.

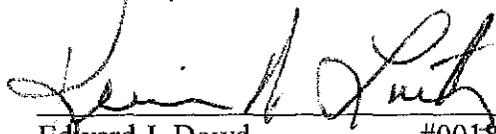
Anderson incorporates its arguments in reply concerning the certified conflict issue for its reply regarding Proposition of Law I.

III. CONCLUSION

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

Respectfully submitted,

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APPENDIX

STATUTES

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Statutes and Session Law**TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES****CHAPTER 2744: POLITICAL SUBDIVISION TORT LIABILITY****2744.09 Exceptions.**

2744.09 Exceptions.

This chapter does not apply to, and shall not be construed to apply to, the following:

- (A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;
- (B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;
- (C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;
- (D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;
- (E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

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