

ORIGINAL

IN THE SUPREME COURT OF OHIO

09-2106

APPEAL FROM THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT  
HAMILTON COUNTY, OHIO  
CASE NO. C 09 00708

LEOLA SUMMERVILLE ADMINISTRATOR  
OF THE ESTATE OF ROOSEVELT  
SUMMERVILLE, DECEASED, and  
LEOLA SUMMERVILLE

*Plaintiff-Appellee,*

vs.

CITY OF FOREST PARK, ADAM PAPE  
and COREY HALL

*Defendants-Appellants*

FILED  
NOV 19 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANTS, CITY OF FOREST  
PARK, ADAM PAPE AND COREY HALL

**MARC D. MEZIBOV (0019316)**  
Law Offices of Marc Mezibov  
401 E. Court Street, Suite 600  
Cincinnati, OH 45202  
(513) 621-8800  
(513) 621-833 (fax)  
Email: [mmezibov@mezibov.com](mailto:mmezibov@mezibov.com)  
*Attorney for Plaintiff-Appellee,  
Leola Summerville, Administrator  
of the Estate of Roosevelt Summerville,  
Deceased and Leola Summerville*

**LAWRENCE E. BARBIERE (0027106)**  
Schroeder, Maundrell, Barbieri & Power  
5300 Socialville Foster Road, Suite 200  
Mason, OH 45040  
(513) 583-4210  
(513) 583-4203 (fax)  
Email: [lbarbieri@smbplaw.com](mailto:lbarbieri@smbplaw.com)  
*Attorney for Defendant-Appellants,  
City of Forest Park, Corey Hall and  
Adam Pape*

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

The issues presented by the current case affect the right and need of all political subdivisions and their employees in the State of Ohio to immediately appeal erroneous trial court decisions on the question of political subdivision immunity. While this Court must take into consideration and balance the interests of all parties in resolving cases expeditiously, the question here is ultimately one of statutory interpretation and constitutional separation of powers. The Ohio General Assembly, in Chapter 2744 of the Ohio Revised Code, expressly mandated that political subdivisions and their employees have the right to an immediate appeal from any order that denies them the benefit of an alleged immunity. See R.C. § 2744.02(C). It is these defendants-appellants' position that the denial of a motion for summary judgment in which it sought immunity as a matter of law with respect to claims brought pursuant to 42 U.S.C. §1983 is an order that denied it "the benefit of an alleged immunity." And, therefore, the order is a "final" and appealable order under R.C. § 2744.02(C).

This appeal is taken because the underlying decision is legally wrong and because this Court has not yet addressed this issue as it relates to immunity pursuant to Federal law. In enacting Chapter 2744, the Ohio General Assembly decided that political subdivision immunity is an important public interest, so much so that it specifically gave political subdivisions and their employees the right to immediately appeal any order denying them the benefit of an alleged immunity. This right to appeal erroneous summary judgment decisions on the question of immunity inherently serves

the essential purpose of preserving the fiscal integrity of political subdivisions of all types, particularly in a time when most are under-funded and suffer severe fiscal constraints.

For these reasons, as explained below, the City of Forest Park and Officers Hall and Pape respectfully request the Court accept discretionary jurisdiction of this appeal as a case involving a substantial constitutional question and a matter of public or general interest.

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

In her Complaint, Plaintiff-Appellee (hereinafter "Plaintiff") made claims under Federal law pursuant to 42 U.S.C. §1983 and pursuant to Ohio law. In an Entry filed September 28, 2009, the Court granted summary judgment based upon Chapter 2744 immunity with respect to the state law claims. The Court denied summary judgment to Police Officers Adam Pape and Corey Hall with respect to Plaintiff's excessive force claim brought pursuant to 42 U.S.C. §1983. In denying summary judgment on that claim, the Court denied Officers Pape and Hall qualified immunity. The Court denied summary judgment to the City of Forest Park on Plaintiff's claim for deliberate indifference in failing to adequately train which was also made pursuant to 42 U.S.C. §1983.

Defendants-Appellants (hereinafter "Defendants"), City of Forest Park, Adam Pape and Corey Hall, timely appealed the decision of the trial court to the First District Court of Appeals to the extent that it denied them summary judgment. The Notice of Appeal stated that it was filed pursuant to the authority of ORC §2744.02(C) as it relates to the denial of qualified immunity to Officers Pape and Hall. The City of Forest

Park requested that the Appellate Court exercise pendent appellate jurisdiction over the claims against it based upon the authority of *Mattox v. City of Forest Park*<sup>1</sup>. Both Ohio law and Federal law support the right of these Defendants to file an interlocutory appeal to the extent the Court denied them summary judgment.

Appellee filed a Motion to Dismiss the appeal and argued, among other things, that Chapter 2744 of the Ohio Revised Code did not apply to claims brought pursuant to 42 U.S.C. §1983. Appellants filed a Memorandum opposing the Motion to Dismiss the Appeal, but the Appellate Court granted the Motion to Dismiss the appeal without opinion on October 28, 2009.

### **APPELLANTS' PROPOSITION OF LAW**

**Proposition of Law:** A trial court's decision overruling a Motion for Summary Judgment in which a political subdivision or its employee sought immunity from claims brought pursuant to 42 U.S.C. §1983 is an order denying "the benefit of an alleged immunity" and is, therefore, a final and appealable order under R.C. 2744.02(C).

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

#### **A. The Plain Language of R.C. §2744.02(C) Provides For This Appeal.**

R.C. §2744.02(C) was added by an amendment which became effective April 9, 2003, and states:

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.

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<sup>1</sup> 1881 F.3d 515 (6th Cir. 1999).

The Appellate court did not give a reason for dismissing the appeal. Plaintiff argued the appeal should be dismissed because R.C. §2744.09(E) states that Chapter 2744 does not apply to civil claims based upon alleged violations of the Constitution or statutes of the United States. However, by its plain language, R.C. §2744.02(C) applies not only to Chapter 2744 but also to the denial of an alleged immunity based upon “**any other provision of the law.**” In this case, the trial court denied Defendants Hall and Pape qualified immunity pursuant to federal law and that denial of immunity clearly falls within R.C. §2744.02(C).

In *Hubbell v. City of Xenia*<sup>2</sup>, the Ohio Supreme Court ruled that a trial court's decision denying sovereign immunity based upon the existence of a genuine issue of material fact was a final appealable order. That decision resolved a split in the District Courts of Appeals. In making its ruling, the Ohio Supreme Court noted the language of R.C. §2744.02(C) was unambiguous and should be applied consistently with its plain meaning. In reaching its decision, the Court identified the strong policy considerations for allowing political subdivisions and their employees in the State of Ohio to file an interlocutory appeal from the denial of immunity. The Court noted it is beneficial to both parties to reach an early resolution of the issue and stated:

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.

Since rendering its decision in *Hubbell v. City of Xenia*, the Supreme Court has further strengthened the right of a political subdivision to an interlocutory appeal from

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<sup>2</sup> (2007), 115 Ohio St.3d 77, 873 N.E.2d 878.

the denial of immunity. In *Sullivan v. Anderson Township*<sup>3</sup>, the Court stated in its syllabus:

R.C. 2744.02(C) permits a political subdivision to appeal a trial court order that denies it the benefit of an alleged immunity from liability under R.C. Chapter 2744 even when the order makes no determination pursuant to Civ. R. 54(B).

Again, the Supreme Court resolved a conflict within the Ohio Appellate Districts and stated that because the General Assembly has expressly determined that the denial of immunity is immediately appealable, the trial court has no discretion to determine whether to separate claims or parties and permit an interlocutory appeal.

If the General Assembly had intended that 2744.02(C) only apply to the denial of immunity pursuant to that chapter, it would not have added the language “**or any other provision of the law**” to that section. By adding that language, the legislature intended to broaden the right to an interlocutory appeal to the denial of any immunity. Allowing an interlocutory appeal from the denial of qualified immunity in a case brought pursuant to 42 U.S.C. §1983 promotes the same policy considerations of judicial economy as allowing an appeal from the denial of immunity pursuant to Chapter 2744 of the Ohio Revised Code. Further, it should be noted that R.C. §2744.02(C) was enacted long after R.C. §2744.09(E).

**B. This Appeal Would Be Permitted Pursuant to Federal Law.**

The same policy considerations which caused the Ohio General Assembly to amend R.C. §2744.02(C) were long ago adopted by federal courts to allow an interlocutory appeal from the denial of qualified immunity. The United States Supreme

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<sup>3</sup> (2009), 122 Ohio St.3d 83, 909 N.E.2d 88.

Court ruled the qualified immunity defense shields public officials performing discretionary functions both from the burdens of trial and from liability for damages.

***Mitchell v. Forsyth***<sup>4</sup> . The right to an interlocutory appeal from the denial of qualified immunity was recently reaffirmed by the Supreme Court in ***Ashcroft v. Iqbal***<sup>5</sup> .

When an appeal is taken from the denial of qualified immunity to state officials, the initial inquiry is whether the officials have violated a constitutional right of the plaintiff. ***Mattox v. City of Forest Park***<sup>6</sup> . That is the inquiry in determining the liability the City of Forest Park in this case and the Court of Appeals therefore has pendent appellate jurisdiction to decide the claims against the City of Forest Park. ***Id.***<sup>7</sup>

Pursuant to federal jurisprudence, Defendants Pape, Hall and the City of Forest Park would be entitled to an interlocutory appeal to the extent the trial court's decision denied them summary judgment.

### III. CONCLUSION.

Based on the foregoing Defendants-Appellants, City of Forest Park, Adam Pape, and Corey Hall, respectfully request that the Court accept discretionary jurisdiction of this appeal as it involves questions of public or great general interest.

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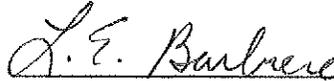
<sup>4</sup> 472 U.S. 511, 105 S.Ct. 2806 (1985).

<sup>5</sup> 129 S.Ct. 1937, 173 L.Ed.2d 8686 (May 18, 2009).

<sup>6</sup> 183 F.3d 515 (6th Cir. 1999).

<sup>7</sup> ***Id.*** See also, ***Brennan v. Township of Northville***, 78 F.3d 1152 (6th Cir. 1996).

Respectfully submitted,



Lawrence E. Barbieri

Ohio Bar Number: 0027106

**Attorney for Appellants, Forest Park, Adam  
Pape and Corey Hall**

**SCHROEDER, MAUNDRELL, BARBIERE & POWERS**

5300 Socialville Foster Road, Suite 200

Mason, OH 45040

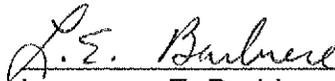
(513) 583-4200

(513) 583-4203 (fax)

Email: [lbarbieri@smbplaw.com](mailto:lbarbieri@smbplaw.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was mailed this 18<sup>th</sup>  
day of November, 2009, to: Marc D. Mezibov, Esq., **Attorney for Plaintiff**, 401 East Court  
Street, Suite 600, Cincinnati, Ohio 45202.



Lawrence E. Barbieri

## APPENDIX

	<u>App. Page</u>
<b>Entry Granting in Part and Denying in Part Defendants' Motion for Summary Judgment dated September 28, 2009</b>	<b>App-1</b>
<b>Entry of the Hamilton County Court of Appeals, First Appellate District dated October 28, 2009</b>	<b>App - 4</b>

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

LEOLA SUMMERVILLE, et al. : Case No. A07 07973

Plaintiffs,

vs.

CITY OF FOREST PARK, et al. :

Defendants :

ENTERED SEP 28 2009	COURT OF COMMON PLEAS ENTER HON. JODY M. LUEBBERS THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN
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**ENTRY GRANTING IN PART AND DENYING IN PART  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This cause came before the Court on the Defendants' Motion for Summary Judgment. The Court, having considered the Motion, the Memoranda in Support of and in Opposition to the Motion, the entire record filed herein, and the arguments of counsel, finds as follows:

1) Count One of the Complaint is a claim for the alleged use of excessive force pursuant to 42 U.S.C. §1983. The Court finds that there are genuine issues of material fact with respect to that claim and SUMMARY JUDGMENT IS THEREFORE DENIED. The Court ALSO DENIES Officer Adam Pape and Officer Corey Hall qualified immunity with respect to those claims.

2) Count Two of the Complaint is deliberate indifference in failing to provide adequate medical care which is a claim made pursuant to 42 U.S.C. §1983. The Court finds that no genuine issues of material fact exist with respect to Count Two of the Complaint and SUMMARY JUDGMENT IS GRANTED.

3) Count Three of the Complaint alleges deliberate indifference in failing to adequately train on the part of the City of Forest Park and Kenneth Hughes. That is



also a claim made pursuant to 42 U.S.C. §1983. The Court finds there is no genuine issue of material fact with respect to Kenneth Hughes and SUMMARY JUDGMENT IS GRANTED in his favor. The Court finds genuine issues of material fact exists with respect to the claims against the City of Forest Park, and SUMMARY JUDGMENT IS THEREFORE DENIED with respect to those claims.

4) Count Four of the Complaint is a claim for wrongful death. The Court finds that all defendants are entitled to immunity pursuant to Chapter 2744 of the Ohio Revised Code with respect to Count Four of the Complaint and SUMMARY JUDGMENT IS THEREFORE GRANTED with respect to that Count.

5. Count Five of the Complaint is a claim for negligent infliction of emotional distress. The Court finds that all defendants are entitled to immunity pursuant to Chapter 2744 of the Ohio Revised Code with respect to Count Five of the Complaint and SUMMARY JUDGMENT IS THEREFORE GRANTED with respect to that Count.

6. Count Six of the Complaint is for loss of consortium. The Court finds that all defendants are entitled to immunity pursuant to Chapter 2744 of the Ohio Revised Code with respect to Count Six of the Complaint and SUMMARY JUDGMENT IS THEREFORE GRANTED with respect to that Count.

Defendant, Kenneth Hughes IS GRANTED SUMMARY JUDGMENT on all claims in his official and individual capacities. The City of Forest Park IS GRANTED SUMMARY JUDGMENT with respect to Counts Two, Four, Five and Six of the Complaint. The only remaining claim against the City of Forest Park is Count Three of the Complaint which sets forth a claim for deliberate indifference in failure to train pursuant to 42 U.S.C. §1983. Corey Hall and Adam Pape ARE GRANTED SUMMARY

JUDGMENT with respect to Count Two, Count Four, Count Five and Count Six of the Complaint. The only remaining claims against Corey Hall and Adam Pape are for the alleged excessive use of force under 42 U.S.C. §1983 as alleged in Count One of the Complaint. Defendants Hall and Pape **ARE DENIED QUALIFIED IMMUNITY** with respect to Count One of the Complaint.

**IT IS SO ORDERED.**

\_\_\_\_\_  
JUDGE

*Marc Mezibov / LEB per auth*

Marc D. Mezibov (#0019316)  
**Attorney for Plaintiffs**  
Law Offices of Marc Mezibov  
401 E. Court Street, Suite 600  
Cincinnati, OH 45202  
(513) 621-8800  
(513) 621-8833(fax)  
Email: [mmezibov@mezibov.com](mailto:mmezibov@mezibov.com)

*L.E. Barbieri*

\_\_\_\_\_  
Lawrence E. Barbieri (#0027106)  
**Attorney for Defendants**  
**SCHROEDER, MAUNDRELL, BARBIERE & POWERS**  
5300 Socialville Foster Road, Suite 200  
Mason, OH 45040  
(513) 583-4200  
(513) 583-4203 (fax)  
Email: [lbarbieri@smbplaw.com](mailto:lbarbieri@smbplaw.com)

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

LEOLA SUMMERVILLE  
Administrator of the Estate of  
Roosevelt Summerville, Deceased and  
LEOLA SUMMERVILLE,

APPEAL NO. C-090708

Appellees,

vs.

ENTRY GRANTING APPELLEES'  
MOTION TO DISMISS APPEAL

CITY OF FOREST PARK, et al.,

Appellants.

This cause came on to be considered upon the appellees' motion to dismiss the appeal and upon appellants' memorandum in opposition.

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

It is further ordered that a certified copy of this judgment shall constitute the mandate to the trial court pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To The Clerk:

Enter upon the Journal of the Court on OCT 28 2009 per order of the Court.

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

  
Presiding Judge

(Copies sent to all counsel)