IN THE SUPREME COURT OF OHIO

LEOLA SUMMERVILLE,	:	Case No. 2009-2106
Plaintiff-Appellee,	:	
vs.	:	On Appeal from the Hamilton County Court of Appeals First Appellate District
CITY OF FOREST PARK, et al.	:	
Defendants-Appellants.	:	

ORIGINAL

APPELLEE LEOLA SUMMERVILLE'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

MARC D. MEZIBOV (0019316), *Counsel of Record*
SUSAN M. LAWRENCE(0082811)
THE LAW OFFICE OF MARC MEZIBOV
401 E. Court Street, Suite 600
Cincinnati, OH 45202
Phone: 513.621.8800
Fax: 513.621.8833
Email: mmezibov@mezibov.com

Attorneys for Plaintiff-Appellee Leola Summerville

LAWRENCE E. BARBIERE (0027106)
Schroeder, Maundrell, Barbiere & Power
5300 Socialville Foster Road, Suite 200
Mason, OH 45040
Phone: 513.583.4210
Fax: 513.583.4203
Email: lbarbiere@smbplaw.com

Attorney for Defendant Appellants City of Forest Park, Corey Hall and Adam Pape

RECEIVED
DEC 21 2009
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
DEC 21 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE FACTS AND CASE.....2

III. ARGUMENT IN OPPOSITION TO JURISDICTION.....3

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 appealable order under R.C. 2744.02(C).

A. R.C. 2744.02(C) does not apply to a trial court's denial of qualified immunity for claims arising under 42 U.S.C. § 1983.....3

B. Federal procedural practice is irrelevant to the issue of whether a state trial court's order denying a political subdivision or its employees the benefit of qualified immunity for claims under 42 U.S.C. § 1983 is a final, appealable order under Ohio law...7

IV. CONCLUSION.....8

CERTIFICATE OF SERVICE.....9

TABLE OF AUTHORITIES

Ohio Constitution

Section 3(B)(2), Article IV.....3

Ohio Statutes

R.C. 1.51.....6

R.C. 2305.27.....6

R.C. 2305.34.....6

R.C. 2305.39.....6

R.C. Chapter 2744.....1,4,5,6

R.C. 2744.01.....1

R.C. 2744.02.....1,2,3,4,5,6,8

R.C. 2744.07.....4,5

R.C. 2744.09.....1,4,5,6

Ohio Cases

Campbell v. City of Youngstown, 7th Dist. No. 006 MA 184, 2007-Ohio-7219.....4

Hubbell v. City of Xenia, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878.....3,4,8

Patton v. Wood County Humane Society (2003), 154 Ohio App.3d 670, 2003-Ohio-5200, 798 N.E.2d 676.....4

State Auto. Mut. Ins. Co. v. Titanium Metals Corp., et al., 108 Ohio St.3d 540, 2006-Ohio- 1713, 844 N.E.2d 1199.....3

State ex rel. Boda v. Brown (1952), 157 Ohio St.2d 368, 372, 105 N.E.2d 643.....5

Thomas v. Freeman (1997), 79Ohio St.3d 221, 224-225, 680 N.E.2d.....5

W.P. v. City of Dayton, 2nd Dist. No. 22549, 2009-Ohio-52.....4

Federal Statutes

42 U.S.C. § 1983.....1,2,3,4,7

Federal Cases

Johnson v. Fankell (1997), 520 U.S. 911, 912.....7

Johnson v. Jones (1995), 515 U.S. 304.....7

Turner v. Scott (1997), 119 F.3d 425.....7

I. INTRODUCTION

The primary issue raised by this appeal—whether R.C. 2744.02(C) renders a trial court's denial of qualified immunity for claims brought pursuant to 42 U.S.C. § 1983 a final appealable order—does not implicate a substantial constitutional question nor does it represent a matter of great general interest. In fact, as the First District Court of Appeals tacitly recognized by refusing to accept jurisdiction over this appeal, the issue turns upon nothing more than a routine interpretation and application of Ohio's Political Subdivision Tort Liability Act, R.C. 2744.01, et seq. ("the Act").

In drafting Chapter 2744, the Ohio General Assembly expressed an unequivocal intent to remove certain types of civil actions and claims from the purview of the Act, including "claims based upon alleged violations of the constitution or statutes of the United States." R.C. 2744.09(E). Accordingly, Ohio appellate courts have correctly and consistently held that political subdivisions and their employees are not entitled to the rights and immunities available under Chapter 2744 with regard to federal causes of action under 42 U.S.C. § 1983 and similar statutes.

Despite the unambiguous language of R.C. 2744.09 and the uniformity of its application by Ohio's judicial districts, Defendants assert in their proposition of law that this Chapter *should* apply to transform an otherwise non-appealable decision denying qualified immunity to a political subdivision and/or its employee into a final appealable order. Because this proposition is little more than a request for the Court to ignore the plain language of Chapter 2744 and provide a judicially created exception to Ohio's laws governing interlocutory appeals, this Court should not accept jurisdiction and the matter should be remanded to the trial court for disposition on the merits.

II. STATEMENT OF THE FACTS AND CASE

On September 15, 2005, Mrs. Summerville arrived home from work to find blood in the hallway of the suburban home she shared with her husband of 35 years, Roosevelt Summerville. After discovering that her non-responsive husband was barricaded in the couple's bedroom, Mrs. Summerville called 9-1-1 and the Forest Park Police Department dispatched Officers Adam Pape and Corey Hall to the Summerville's home. The officers found Mr. Summerville lying on the bedroom floor stabbing himself in the chest with a Leatherman tool. Although many of the details regarding the subsequent events are in dispute, one fact is definite: mere minutes after arriving at the scene the officers shot and killed the elderly Mr. Summerville, who was armed only with the Leatherman tool and was already suffering from a number of significant self-inflicted injuries.

Mrs. Summerville, on behalf of herself and her husband's estate, filed suit against the individual officers and the City of Forest Park in the Hamilton County Court of Common Pleas on September 6, 2007. In her complaint, Mrs. Summerville alleged federal claims under 42 U.S.C. § 1983 for excessive use of force and failure to train as well as several state law causes of action. On March 31, 2009, Defendants filed a motion for summary judgment requesting that the court dismiss all of Mrs. Summerville's claims. The matter was fully briefed and argued in the trial court. On September 28, 2009, the trial court entered an order of judgment: (1) denying the officers summary judgment with regard to Plaintiff's claim of excessive force under § 1983; (2) denying the City of Forest Park summary judgment with regard to Plaintiff's claim of failure to train under § 1983; and (3) granting summary judgment on the remaining claims.

On October 6, 2009, Defendants filed a Notice of Appeal in the First District Court of Appeals "pursuant to the authority of ORC 2744.02(C) and because the Court

denied Adam Pape and Corey Hall qualified immunity." Defendants also requested that this Court take jurisdiction over the City of Forest Park's related appeal. Plaintiff responded by filing a Motion to Dismiss premised upon the fact that the trial court's ruling was not a final, appealable order under Ohio law. On October 28, 2009, the appellate court granted Plaintiff's Motion to Dismiss.

III. ARGUMENT IN OPPOSITION TO JURISDICTION

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 appealable order under R.C. 2744.02(C).

It is well settled in Ohio that a trial court's order must be final before it can be reviewed at the appellate level. See Section 3(B)(2), Article IV, Ohio Constitution; *State Auto. Mut. Ins. Co. v. Titanium Metals Corp., et al.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199 at ¶8. "Generally, the denial of summary judgment is not a final, appealable order." *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878 at ¶9. Because no exception to this general rule applies when a trial court denies a political subdivision or its employee the benefit of qualified immunity with regard to federal claims brought against them, Defendants' proposition of law should be rejected.

A. R.C. 2744.02(C) does not apply to a trial court's denial of qualified immunity for claims arising under 42 U.S.C. § 1983.

R.C. 2744.02(C) states that "an order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this Chapter or any other provision of the law is a final order." In *Hubbell*, the Court determined that this language created an exception to Ohio's general rule that

summary judgment denials are not immediately appealable and ruled that all orders denying a political subdivision and/or its employees immunity under Chapter 2744 are final, appealable orders. 115 Ohio St.3d 77 at ¶27. Appellants now encourage the Court to extend this decision to orders denying a political subdivision and/or its employee qualified immunity for claims arising out of violations of the constitution or laws of the United States. However, the Court must decline this invitation because to do otherwise would contravene the clear intent of the legislature to completely exclude federal causes of action from the purview of Chapter 2744—including R.C. 2744.02.

R.C. 2744.09 expressly states that: "This chapter does not apply to, and shall not be construed to apply to...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." R.C. 2744.09(E). Thus, under the plain language of the statute, R.C. 2744.02 is wholly inapplicable to all claims which are premised upon a violation of federal law and therefore cannot serve as a basis for converting an otherwise non-appealable order into one that is final.

The clarity of this statutory scheme is evidenced by the fact that appellate courts across Ohio have uniformly refused to apply Chapter 2744 to federal causes of action under 42 U.S.C. § 1983. See, e.g., *W.P. v. City of Dayton*, 2nd Dist. No. 22549, 2009-Ohio-52 at ¶12 (R.C. 2744.02 provides no immunity from § 1983 liability); *Campbell v. City of Youngstown*, 7th Dist. No. 006 MA 184, 2007-Ohio-7219 at ¶15 ("Ohio's courts have recognized that R.C. Chapter 2744 does not apply to a claim raised under Title 42, U.S. Code, Section 1983"); *Patton v. Wood County Humane Society* (2003), 154 Ohio App.3d 670, 2003-Ohio-5200, 798 N.E.2d 676 at ¶33 ("Pursuant to R.C. 2744.09(E), the immunities found within R.C. Chapter 2744 do not apply to Section 1983 actions").

In addition to the plain language of the statute and its consistent and correct application by Ohio courts, relevant rules of statutory interpretation also militate in favor of this Court rejecting Appellants' proposition that R.C. 2744.02 can be applied to claims against political subdivisions for violations of the constitution and laws of the United States. Under the maxim of expressio unius est alterius[1], a statute which specifies one exception to a general rule will be assumed to exclude all other exceptions. *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 224-225, 680 N.E.2d. For example, this Court found that a statute which mandated retirement of public employees at age 70 but contained one exception to that rule for "elected officials" could not be read to permit any other employees from avoiding the mandatory retirement age. *State ex rel. Boda v. Brown* (1952), 157 Ohio St.2d 368, 372, 105 N.E.2d 643 (Express mention of one person or thing in a statute implies the exclusion of all others).

Here, R.C. 2744.09(E) stands for the general rule that Chapter 2744 does not apply to civil claims based upon alleged violations of federal law. However, the provision does contain one explicit exception, noting that "the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions."[2] R.C. 2744.09(E). Under the maxim of expressio unius est alterius, the explicit mention of that one exception is conclusive evidence that the legislature did not intend any other section of Chapter 2744 to apply to civil actions arising under federal law. Accordingly, this Court cannot reasonably extend R.C. 2744.02(C) to reach claims focused solely upon alleged violations of the laws of the United States.

---

[1]"The expression of one thing is the exclusion of the other."

[2] R.C. 2744.07 dictates the circumstances under which a political subdivision must provide for the defense of an employee against whom a legal action is filed.

Finally, Defendants' argument that R.C. 2744.02(C) and R.C. 2744.09(E) are in conflict and therefore R.C. 2744.02(C) should apply because it was enacted more recently should be rejected. It is well settled in Ohio that when two general statutory provisions conflict, "they shall be construed, if possible, so that effect is given to both." R.C. § 1.51. Here, Defendants contend that this is not possible because "if the General Assembly had intended that R.C. 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." (Motion for Jurisdiction at 8).

However, this argument ignores the fact that the clause "any other provision of the law" can refer to a multitude of other Ohio statutes that may confer immunity upon political subdivisions, such as R.C. 2305.34 (Immunity from tort liability of water supply operators), R.C. 2305.39 (Immunity from tort liability for damages caused while responding to oil discharges) or R.C. 2305.27 (Immunity from tort liability for employees who provide counseling). Thus, the two provisions are easily reconcilable by the general rule that pursuant to R.C. 2744.02(C), all orders denying an alleged immunity to political subdivisions and/or their employees will be a final order unless one of the exceptions listed in R.C. 2744.09 applies to remove that action or claim from the purview of Chapter 2744.

In sum, R.C. 2744.09(E) makes clear that the Ohio General Assembly did not intend for Chapter 2744 to apply to claims alleging violations of the constitution or laws of the United States. Because Defendants' proposition of law is premised upon the opposite conclusion—that R.C. 2744.02(C) applies to any claim of qualified immunity no matter the nature of the cause of action—this Court should deny Appellants' Motion for Jurisdiction.

B. Federal procedural practice is irrelevant to the issue of whether a state trial court's order denying a political subdivision or its employees the benefit of qualified immunity for claims under 42 U.S.C. § 1983 is a final, appealable order under Ohio law.

Defendants also contend that the fact an appeal of the trial court's order denying qualified immunity may have been available if this action had been brought in federal court is somehow relevant to the issue of whether such an order is subject to an interlocutory appeal if it is brought in state court.[3] However, the entitlement to an interlocutory appeal under federal law is "a federal procedural right that simply does not apply in a non-federal forum." *Johnson v. Fankell* (1997), 520 U.S. 911, 912.

In *Johnson*, the United States Supreme Court was faced with the issue of whether defendants in a state court §1983 action had the right to immediately appeal a denial of qualified immunity at the summary judgment stage. (1997) 520 U.S. 911. In ruling that they did not, the Court determined that: (1) state courts need not adopt the federal definition of "final decision" in construing the meaning of that term under their own appellate rules; and (2) state appellate rules are not pre-empted by §1983 to the extent they do not permit interlocutory appeals. Id. at 911-912. The Court went on to uphold the Idaho Supreme Court's decision refusing to permit an interlocutory appeal following a denial of qualified immunity on summary judgment on the basis that it was not a final, appealable order under that state's rules. Id. at 912.

Pursuant to this decision, political subdivisions and/or their employees cannot rely upon federal procedural practice to assert a right to an interlocutory appeal of a trial court's order denying them qualified immunity from liability under §1983. Rather, an

---

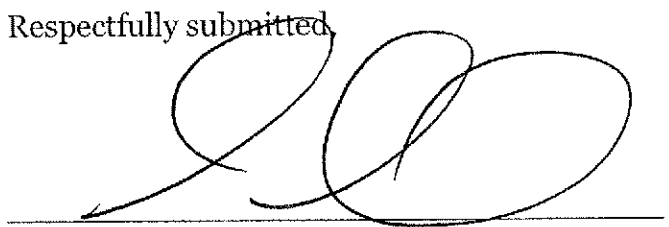
[3] Pursuant to the collateral order doctrine, defendants in federal court who are denied the benefit of qualified immunity from liability for violations of 29 U.S.C. 1983 may immediately appeal the judgment if it turns purely upon an issue of law. *Johnson v. Jones* (1995), 515 U.S. 304, see also *Turner v. Scott* (1997), 119 F.3d 425.

independent showing must be made that the order was final and appealable under Ohio law. Because, as demonstrated supra, R.C. 2744.02(C) does not apply to claims grounded in federal law and thus cannot convert trial court decisions denying qualified immunity from those claims into final orders, Ohio's general rule that denials of summary judgment are not immediately appealable must apply. *See Hubbell*, 115 Ohio St.3d 77 at ¶9.

IV. CONCLUSION

For these reasons, Plaintiff-Appellee Leola Summerville respectfully requests that this Court refuse to accept jurisdiction over the issues raised by Defendant-Appellants in this appeal.

Respectfully submitted,



MARC D. MEZIBOV (0019316)
SUSAN M. lAWRENCE (0082811)
THE LAW OFFICE OF MARC MEZIBOV
401 E. Court Street, Suite 600
Cincinnati, OH 45202
Telephone: (513)621-8800
Facsimile: (513)621-8833

Attorneys for Plaintiff-Appellee Leola Summerville

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 18th day of December, 2009, to Lawrence E. Barbiere, SCHROEDER MAUNDRELL BARBIERE & POWERS, 11935 Mason Rd., Suite 110, Cincinnati, OH 45249.

Marc D. Mezibov (OH No. 0019316)