

ORIGINAL

IN THE SUPREME COURT OF OHIO
No. 2009-2106

LEOLA SUMMERVILLE, et al.)	On Appeal from the Hamilton
)	County Court of Appeals
Plaintiff-Appellees)	First Appellate District
)	
v.)	Court of Appeals Case
)	No. C-09-00708
CITY OF FOREST PARK, et al.)	
)	
Defendant-Appellants.)	

BRIEF OF *AMICUS CURIAE*
THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF APPELLANTS
THE CITY OF FOREST PARK, ET AL.

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INTRODUCTION

The Ohio Municipal League (the “League”), as *amicus curiae* on behalf of the City of Forest Park, Ohio, et al. (the “City”), urges this Court to reverse the decision of the First District Court of Appeals, Hamilton County, which dismissed the appeal of the City of Forest Park. The City had sought to appeal the trial court’s denial of qualified immunity, which is an immunity provided by federal law in claims brought pursuant to 42 U.S.C. §1983.

The First District’s decision is contrary to the procedure established by the General Assembly, and the plain language of R.C. 2744.02(C), which provides that the denial of an alleged immunity from liability under any provision of law, is a final order.

This court is respectfully requested to remand this case to the Hamilton County Court of Appeals with a mandate to consider the merits of the appeal of the City of Forest Park.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of more than 750 Ohio cities and villages, all of which have an interest in the proper interpretation of R.C. 2744.02(C).

The League and its members have an interest in ensuring that an order denying the benefits of an alleged immunity from liability is determined to be an immediately appealable order, as intended by the Ohio General Assembly, even when the immunity is provided by federal law.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the Statement of the Case and the Statement of Facts contained within the Brief of the City of Forest Park.

ARGUMENT

PROPOSITION OF LAW #1: 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, therefore, is a final and appealable order under R.C. 2744.02(C).

R.C. 2744.02(C): “A Final Order”

R.C. 2744.02(C) provides: “An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.”

In *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, this Court noted that while the denial of summary judgment is not ordinarily a final, appealable order, R.C. 2744.02(C) is unambiguous and definite: “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, supra*, at ¶ 12. Accordingly, “[a] court of appeals **must** exercise jurisdiction over an appeal of a trial court’s decision overruling a *** motion for summary judgment in which a political subdivision or its employee seeks immunity.” *Id.*, at ¶ 21. (Emphasis added.)

In *Sullivan v. Anderson Township*, 122 Ohio St.3d 83, 2009-Ohio-1971, this Court concluded that R.C. 2744.02(C) permits a political subdivision to appeal a trial court order that denies an alleged immunity from liability even when the order does not include a Civil Rule 54(B) certification. In the decision, this Court again noted the plain language of R.C. 2744.02(C): “the General Assembly has expressly made that determination with the enactment of R.C. 2744.02(C), which makes final an order denying a political subdivision the benefit of an alleged immunity from liability.” *Sullivan, supra*, at ¶ 12.

In this case, the City sought a determination that its employees were entitled to qualified immunity. Qualified immunity, which is raised as an affirmative defense, protects government officials from “liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Humphrey v. Mabry* (C.A.6, 2007), 482 F.3d 840, 846, quoting *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396. Qualified immunity affords government officials “ample room for mistaken judgments by protecting ‘all but the plainly incompetent or those who knowingly violate the law.’” *Scott v. Clay Cty., Tenn* (C.A.6, 2000), 205 F.3d 867, 873, n. 9, quoting *Sova v. City of Mt. Pleasant*, (C.A.6, 1998), 142 F.3d 898, 902. An order denying such an immunity is a final order, pursuant to R.C. 2744.02(C).

This court has consistently upheld the procedure established by the General Assembly in R.C. 2744.02(C) enabling a political subdivision to immediately appeal a denial of immunity from liability. It should do so in this case as well.

R.C. 2744.09(E)

R.C. 2744.09(E) provides that Chapter 2744 “does not apply to, and shall not be construed to apply to, the following: *** (E) Civil claims based upon alleged violations of the constitution or statutes of the United States ***.” Such language would seem to preclude the application of R.C. 2744.02(C) to cases brought under 42 U.S.C. §1983. This is not so, given the substance/procedure established in *Erie Railroad v. Thompkins* (1938), 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

In deciding the substantive issue of qualified immunity, Ohio courts are required to apply federal law as federal law, will be dispositive in evaluating a 42 U.S.C. §1983 claim. The General Assembly recognized this requirement by enacting R.C. 2744.09(E). Pursuant to Ohio

statutory law and federal common law, the merits of a qualified immunity case will be reviewed under federal law.

R.C. 2744.02(C) Establishes Jurisdiction of Ohio Courts

R.C. 2744.02(C), however, establishes the jurisdiction of the Ohio appellate court; there can be no role for federal law in this arena. “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.” (Emphasis added.) Pursuant to this section, the source of the alleged immunity that is denied is immaterial to the appellate court’s jurisdiction.

This argument is bolstered by additional statutory authority. The phrase in R.C. 2744.02(C) “any other provision of law” includes federal claims of qualified immunity because the term “law,” as used in Chapter 2744, is defined as “any provision of the **constitution, statutes, or rules of the United States** or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. ***.” R.C. 2744.01(D). (Emphasis added.)

The General Assembly’s enactment of R.C. 2744.02(C), therefore, means that an order denying an alleged immunity from liability as provided in any provision of the **constitution, statutes, or rules of the United States** is a final order. If the intent of the General Assembly was to exclude immunity based on federal law, it would have included such an exclusion in R.C. 2744.02(C) or revised the definition of law set forth in R.C. 2744.01(D). It did neither.

R.C. 2744.02(C) provides that a final order denying a political subdivision or an employee of a political subdivision the benefit of an alleged immunity granted by federal law is a final order and subject to immediate appeal. There is no ambiguity in the statute that establishes

the appellate courts' jurisdiction to review orders denying a political subdivision or an employee of a political subdivision the benefit of an alleged immunity.

Legislative Intent

The General Assembly enacted Chapter 2744, in 1985, and stated: “[t]he reason for such necessity is that the protections afforded to political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health and safety services for their residents.” Am.Sub.H.B. No. 176, Section 8.

This court has recognized that the General Assembly’s purpose in enacting Chapter 2744 “is the preservation of the fiscal integrity of political subdivisions.” *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 453, 639 N.E.2d 105. A court’s refusal to consider a denial of qualified immunity as a final order defeats the General Assembly’s purpose in preserving the tax dollars of political subdivisions, as it delays an immunity determination resulting in the expenditure of additional public resources. Furthermore, such denial is contrary to this Court’s conclusion that judicial economy is best served by a plain reading of R.C. 2744.02(C):

“[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 any 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.” *Hubbell, supra*, at 883.

Constitutional Authority

Article IV, Section 3 (B)(2), of the Ohio Constitution provides: “**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, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or action of administrative officers or agencies.” (Emphasis added.) In reviewing an earlier version of this constitutional provision, this Court held that the purpose of the provision “is to accomplish the simple result of empowering the General Assembly to change the appellate jurisdiction of the Courts of Appeals if it should desire so to do; and unless and until there is such legislative action, the appellate jurisdiction of the Courts of Appeals remains as it was” *Youngstown Municipal Ry. Co. v. City of Youngstown* (1946), 147 Ohio St. 221, 223, 70 N.E.2d 649, 34 O.O. 122. The enactment of R.C. 2744.02(C) by the Ohio General Assembly changed the jurisdiction of the Court of Appeals by providing for the immediate review of an order denying a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability. A court cannot change jurisdiction mandated by the General Assembly by refusing to recognize the jurisdiction established by the General Assembly.

CONCLUSION

Based upon the foregoing, the League respectfully requests this court to reverse the judgment of the Hamilton County Court of Appeals and remand this case for a determination of the merits of the case: whether the City was denied the benefit of immunity provided by law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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