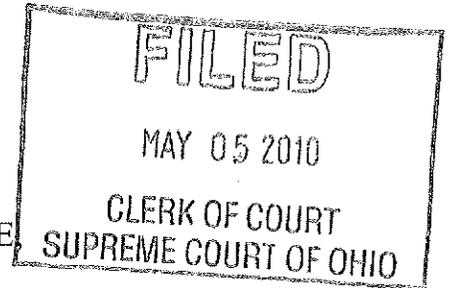

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO
CASE No. C0900708

LEOLA SUMMERVILLE, ADMINISTRATOR
OF THE ESTATE OF ROOSEVELT
SUMMERVILLE, DECEASED, and
LEOLA SUMMERVILLE
Plaintiff-Appellee

v.

CITY OF FOREST PARK, ADAM PAPE,
and COREY HALL
Defendants-Appellants



**MERIT BRIEF OF DEFENDANTS-APPELLANTS
CITY OF FOREST PARK, ADAM PAPE, and COREY HALL**

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STATEMENT OF THE CASE AND FACTS

I. Introduction

Plaintiff-Appellant Leola Summerville (“Plaintiff”) brought this action against Defendants-Appellees City of Forest Park, Adam Pape, and Corey Hall (“Defendants”) as a result of an incident which occurred September 15, 2005. Plaintiff Leola Summerville returned home from her job in the early afternoon and found blood at the bottom of the stairwell between the first and second floors of her home. She called to her husband upstairs, but he didn’t answer. She then called 911 and Forest Park Police Officers Adam Pape and Corey Hall responded to the scene. The Forest Park Life Squad also responded.

Mr. Summerville was shot and killed by the responding officers when he lunged at Officer Pape with a knife held in his hand over his head. The Hamilton County Sheriff’s Office conducted an investigation of this incident and absolved Officers Hall and Pape of any wrongdoing.

Plaintiff’s Complaint asserts causes of action against Defendants for (1) excessive use of force under 42 U.S.C. §1983 (Complaint, Count One); (2) deliberate indifference in failing to provide adequate medical care under 42 U.S.C. §1983 (Complaint, Count Two); (3) deliberate indifference in failing to train under 42 U.S.C. §1983 (Complaint, Count Three); (4) wrongful death under state law (Complaint, Count Four); (5) negligent infliction of emotional distress under state law (Complaint, Count Five); and (6) loss of consortium under state law (Complaint, Count Six).

Defendants moved for summary judgment on all claims. The trial court granted summary judgment in favor of Defendants on the §1983 claim for deliberate indifference in failure to

provide adequate medical care. The trial court also granted summary judgment in favor of Defendants on all of the state law claims based on Revised Code Chapter 2744 immunity.

The trial court, however, denied summary judgment to Officers Pape and 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 trial court denied Officers Pape and Hall qualified immunity. The trial court further 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 appealed the decision of the trial court to the First District Court of Appeals to the extent it denied them summary judgment. The Notice of Appeal stated that it was filed pursuant to the authority of R.C. 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 court of appeals exercise pendent appellate jurisdiction over the claims against it based upon the authority of *Mattox v. City of Forest Park*, 183 F.3d 515 (6th Cir. 1999). Both Ohio law and Federal law support the right of these Defendants to file an immediate appeal to the extent the Court denied them summary judgment.

Plaintiff moved to dismiss the appeal and argued, among other things, that R.C. Chapter 2744 did not apply to claims brought pursuant to 42 U.S.C. §1983. Appellants filed a memorandum opposing the motion to dismiss, but the appellate court granted the motion and dismissed the appeal without opinion on October 28, 2009.

Defendants filed their Notice of Appeal in this Court on November 19, 2009. The Court accepted the appeal on February 10, 2010.

II. Facts

On September 15, 2005, Plaintiff, Leola Summerville, arrived home from work and observed blood on the steps leading to an upstairs bedroom. At 1:19 p.m. she called 911. (L. Summerville dep., p. 55). Officers Adam Pape and Corey Hall were dispatched to the scene as was the Forest Park Life Squad. Mrs. Summerville was still on the phone when Detective Pape arrived. (L. Summerville dep., p. 62;). Detective Pape arrived on the scene first, exited his vehicle and walked toward the house. When he arrived at the house, he was met by Mrs. Summerville who was on the front steps crying. She stated that her husband was upstairs in the bedroom and Detective Pape walked up the stairs and turned right to go toward the bedroom. (Pape dep., p. 85, 86).

When Detective Pape reached the bedroom, he saw Roosevelt Summerville lying on the bedroom floor at the end of the hallway. His feet were closest to the door to the bedroom and his head was farthest away. As Detective Pape approached Mr. Summerville he saw what appeared to be knife stuck in the left side of Summerville's chest. Summerville's right hand was on the knife. Detective Pape then radioed the County and asked them to have the Life Squad expedite. He then told Mr. Summerville not to move and that the squad would be there soon to help him. (Pape dep., p. 87-89).

At that point, Mr. Summerville looked at Detective Pape, pulled the knife from his chest and began plunging it into his chest over and over. (Pape dep., p. 91; L. Summerville dep., p. 67). As he did that, Mr. Summerville did not show any sign that he was feeling pain. Detective Pape yelled repeatedly for Mr. Summerville to "stop doing that", but Mr. Summerville continued to stab himself in the chest. (L. Summerville dep., p. 67-68). At that point, Detective Pape pulled out his taser and continued to command Mr. Summerville to stop stabbing himself. (Pape

dep., p. 94).¹ Detective Pape heard Officer Hall call to him from downstairs and Detective Pape answered that he was upstairs in the bedroom.

In spite of Detective Pape's repeated commands to stop stabbing himself, Mr. Summerville continued to stab himself in the chest. Detective Pape then deployed his taser in order to stop Mr. Summerville. The prongs did not immobilize Mr. Summerville who pulled one prong out of his chest and then looked at Detective Pape in an angry fashion. Mr. Summerville began to stand up and Detective Pape threw his taser to the floor. Officer Hall and Detective Pape both withdrew their duty weapons at that time and both commanded Mr. Summerville to drop the knife. Mr. Summerville continued to get up onto his feet and Detective Pape left the bedroom and closed the door in order to establish a barrier. However, Mr. Summerville opened the door and stood in the doorway with the knife held in his right hand over his shoulder in a stabbing position. Both Officer Hall and Detective Pape continued to yell for Mr. Summerville to drop the knife. However, Mr. Summerville raised the knife higher over his head and lunged toward Detective Pape who was 3 to 5 feet away. Mrs. Summerville was also in the close vicinity. Officer Hall and Detective Pape shot simultaneously and Mr. Summerville fell to the floor. (Pape dep., p. 98-122; Hall dep., p. 27-40). Mrs. Summerville was in the bathroom and did not see the officers shoot her husband. (L. Summerville dep., p. 91). Both officers radioed the County and asked that all units respond to the location. Detective Pape again asked the squad to expedite and indicated the scene was secure. Officer Hall then put pressure on the wounds in order to stop the bleeding. After a few seconds, the Forest Park Life Squad arrived and took Mr. Summerville to the hospital where he was pronounced dead. The incident happened very

¹ The Butler County Autopsy report, filed separately, also states Mr. Summerville had 11 knife wounds in his chest.

quickly, and the officers were forced to make split second decisions. Both Chief Hughes and Sgt. Ward, their training officer, testified Detective Pape and Officer Hall acted properly, in accordance with their training and with Forest Park policies and procedures. The Hamilton County Prosecutor agreed. (See, Letter from Joseph T. Deters attached to Defendant's Motion for Summary Judgment as Exhibit "A").

The depositions of Detective Pape and Officer Hall clearly reflect that each officer had adequate if not superior training. They each received 12 weeks of training with a field training officer and an additional two weeks in which officers followed them while they did their jobs. In addition, they received frequent roll call training and annual in-service training with each of their weapons and in response to aggression procedures. Both officers completed situational training in which they had to make split second decisions regarding which weapon to use and how to react in various situations including those dealing with people attempting to commit suicide. They watched videotapes describing how to deal with many different situations including situations involving emotionally disturbed people. In addition, they received annual training in the use of force, the Forest Park policy regarding the continuum of force, and received training and were in fact certified in the use of each weapon which they were provided. (Pape dep., p. 17-41; Ward dep., p. 35-52).

ARGUMENT

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)

I. The Plain Language of R.C. 2744.02(C) Provides For This Appeal

Article IV, Section 3(B)(2) of the Ohio Constitution gives the district courts of appeal “such jurisdiction as may be provided by law” Effective April 9, 2003, the General Assembly enacted R.C. 2744.02(C), which provides “[a]n 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 the present case, the court of appeals 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 immunities set forth in Chapter 2744, but also to the denial of an alleged immunity based upon **“any other provision of the law.”**

In fact, R.C. 2744.01(D) defines the term “law” for purposes of Chapter 2744. It provides “law” means “any provision of the constitution, statutes, or rules of the United States or of this state[.]” In fact, Ohio courts interpreting the term “law” in R.C. 2744.02(C), in conjunction with its definition in R.C. 2744.01(D), have concluded that it encompasses “all federal and state rules, both judicial and legislated.” *Marcum v. Rice* (Nov. 3, 1998), Franklin App. Nos. 98AP-717,

98AP-718, 98AP-179, 98AP-721, 1998 WL 887051. In this case, the trial court denied Defendants Pape and Hall's qualified immunity pursuant to federal law and that denial of immunity clearly falls within R.C. 2744.02(C). The trial court's Entry was therefore final and appealable.

In *Hubbell v. City of Xenia* (2007), 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, this Court ruled that a trial court's decision denying R.C. Chapter 2744 immunity based upon the existence of a genuine issue of material fact is a final appealable order. That decision resolved a split in the district courts of appeal. In making its ruling, this Court noted the language of R.C. 2744.02(C) was unambiguous and should be applied consistently with its plain meaning.

Since *Hubbell*, the Supreme Court has further strengthened the right of a political subdivision to an immediate appeal from the denial of immunity. In *Sullivan v. Anderson Township* (2009), 122 Ohio St.3d 83, 909 N.E.2d 88, 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, this 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 the immediate appeal.

If the General Assembly had intended that R.C. 2744.02(C) only apply to the denial of immunity pursuant to Chapter 2744, it would not have added the language "**or any other provision of the law**" to that section. By adding that language, the legislature clearly intended to broaden the right to an immediate appeal to the denial of any immunity. Allowing an immediate

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.

There is no conflict between the final appealable order provision of R.C. 2744.02(C) and the provision of R.C. 2744.09(E). The cases cited by Plaintiff in support of her R.C. 2744.09(E) argument hold only that the *immunities* set forth in R.C. Chapter 2744 do not apply to federal claims. See, *W.P. v. City of Dayton*, 2nd Dist No. 22549, 2009-Ohio-52, ¶12 (stating only that the immunity under R.C. Chapter 2744 does not apply to §1983 claims); *Campbell v. City of Youngstown*, 7th Dist. No. 006MA184, 2007-Ohio-7219 (considering only whether R.C. Chapter 2744 provides immunity for federal claims); *Patton v. Wood County Humane Soc.* (2003), 154 Ohio App.3d 670, 2003-Ohio-5200, 33 (holding, simply, that "the immunities found within R.C. Chapter 2744 do not apply to Section 1983 actions"). None of these cases contradict the plain language of R.C. 2744.02(C), which provides orders denying immunities pursuant to Chapter 2744 "or any other provision of the law" are final appealable orders.

It should be noted that R.C. 2744.02(C) was enacted long after R.C. 2744.09(E)². The General Assembly was well aware of R.C. 2744.09(E) when it enacted R.C. 2744.02(C). Ohio law provides that in case of conflict, a later enacted statute controls over an earlier enacted statute. R.C. 1.52.

Further, under Ohio law, in the case of a conflict, a more specific provision like R.C. 2744.02(C) controls over a more general provision such as R.C. 2744.09(E). See, *Comer v. Calim* (Ohio App. 1st Dist. 1998), 128 Ohio App.3d 599, 604, 716 N.E.2d 245, 248-49; R.C.

² R.C. 2744.09(E) was enacted in 1985.

1.51. Thus, even if there were a conflict between the two statutes, R.C. 2744.02(C) would control, because it is the latter enacted and more specific provision. Consequently, an order denying a political subdivision or its employees the benefit of qualified immunity is a final order that is immediately appealable pursuant to R.C. 2744.02(C).

As a result, the order of the First District Court of Appeals dismissing the appeal for lack of a final appealable order must be reversed, and this case must be remanded to the Court of Appeals for its consideration of the merits of the appeal.

II. The Policy Rationale Cited By This Court in *Hubbell* Applies With Equal Force to Claims of Qualified Immunity In Section 1983 Cases

In reaching its decision in *Hubbell*, this Court identified the strong policy considerations for allowing Ohio political subdivisions and their employees to file an immediate appeal from the denial of immunity. *Hubbell*, 2007-Ohio-4839, ¶¶24-26. The Court noted it is beneficial to both parties to reach an early resolution of the issue:

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.

Id. at ¶26 (citing, *Burger v. Cleveland Hts.* (1999), 87 Ohio St.3d 188, 199-200, 1999-Ohio-319 (Lundberg Stratton, J., dissenting)). The Court also determined “[j]udicial economy is actually better served by a plain reading of R.C. 2744.02(C).” *Id.* at ¶24.

“The primary purpose of governmental immunity is to conserve the fiscal integrity of political subdivisions.” *Wilson v. Stark Cty. Dept. of Human Services* (1994), 70 Ohio St.3d 450, 543. Qualified immunity “is an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth* (1985), 472 U.S. 511, 526.

Qualified immunity provides immunity not only from liability, but from the “consequences” of suit, such as:

the general costs of subjecting officials to the risks of trial—
distraction of officials from their governmental duties, inhibition of
discretionary action, and deterrence of able people from public
service.

Id. at 526; see also, *Doe v. Exxon Mobile Corp.* (D.C. Cir. 2006), 473 F.3d 345, 350.

Pretrial denials of qualified immunity cannot, therefore, be effectively reviewed after trial because “the court’s denial * * * finally and conclusively determines the defendant’s claim of right not to stand trial on the plaintiff’s allegations, and because “[t]here are simply no further steps that can be taken in the [trial] court to avoid the trial the defendant maintains is barred[.]” *Id.*, (internal citations omitted); see, also, *Brannum v. Overton County School Bd.* (6th Cir. 2008), 516 F.3d 489, 493 (holding that should “a public official [be] unable to appeal the denial of qualified immunity immediately, he would be forced to endure the cost, expense, and inconvenience of defending an action to which he may be immune”).

Failure to give effect to the plain language of R.C. 2744.02(C) by allowing immediate appeals of denials of qualified immunity would defeat the very purpose for which immunity provisions exist. See, *Brannum*, 516 F.3d at 493.

In light of the strong policy reasons supporting immediate appeals of qualified immunity denials, R.C. 2744.02(C) should be construed consistently with its plain language and this Court should hold that orders denying public officials the benefit of alleged qualified immunity in section 1983 cases are final appealable orders.

III. In the Alternative, This Court Should Adopt the Collateral Order Doctrine to Allow Immediate Appeals of Denials of Qualified Immunity in Section 1983 Cases

The same policy considerations which caused the Ohio General Assembly to amend R.C. 2744.02(C), and which were cited by this Court in *Hubbell*, were long ago adopted by federal courts to allow immediate appeals from denials of qualified immunity. The United States Supreme 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* (1985), 472 U.S. 511, 105 S.Ct. 2806. The right to an immediate appeal from the denial of qualified immunity was recently reaffirmed by the Supreme Court in *Ashcroft v. Iqbal* (2009), ___ U.S. ___, 129 S.Ct. 1937.

In the event this Court determines orders denying the benefit of alleged qualified immunity in Section 1983 cases are not final and appealable under R.C. 2744.02(C), it should adopt the “collateral order doctrine” that has been employed by the federal courts and allow immediate appeals of those orders for the policy reasons expressed in *Hubbell*.³

IV. Additionally, this Court Should Adopt the Pendent Appellate Jurisdiction Doctrine to Allow Immediate Appeals of *Monnell* Claims Against Municipal Defendants Where They Are Closely Intertwined with the Claims to Which Qualified Immunity Applies.

When Section 1983 claims are filed against government officials, they are usually accompanied by Section 1983 claims against the employing political subdivision under *Monnell v. Department of Social Services of City of New York* (1978), 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611.

³ Several other states have adopted versions of the collateral order doctrine. (See Brief filed by *Amicus Curiae* Ohio Association of Civil Trial Attorneys, pages 11-12).

When an appeal is taken from the denial of qualified immunity to government officials, the initial inquiry is whether the officials have violated a constitutional right of the plaintiff. *Mattox v. City of Forest Park*, 183 F.3d 515 (6th Cir. 1999). That is the same inquiry used in determining the liability the government entity with which they are employed. The evaluations of the claims of qualified immunity raised by the government official defendants and the viability of the *Monnell* claims against the government entity defendants are closely intertwined. For that reason, in cases where both a government employee and a political subdivision are sued under Section 1983, federal courts have allowed the immediate appeal of denials of summary judgment with respect to both claims, even though, strictly speaking, there is no entitlement to qualified immunity on behalf of the entity. The courts of appeal have pendent appellate jurisdiction to review the *Monnell* claims against the government entity defendants, such as the City of Forest Park. *Id.*; See also, *Brennan v. Township of Northville*, 78 F.3d 1152 (6th Cir. 1996). Therefore, pursuant to the doctrine of pendent appellate jurisdiction, Defendants Pape, Hall, and the City of Forest Park would all be entitled to an immediate appeal to the extent the trial court's decision denied them summary judgment.

Accordingly, this Court should hold that in cases where immediate appeals are available to government officials under R.C. 2744.02(C) or the collateral order doctrine, the denial of summary judgment on any Section 1983 claims asserted against their political subdivision employers should also be immediately appealable by the political subdivision under the doctrine of pendant appellate jurisdiction.

CONCLUSION

For the reasons set forth above, the court of appeals' entry granting Plaintiff's motion to dismiss the appeal should be reversed.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was served by regular U.S.

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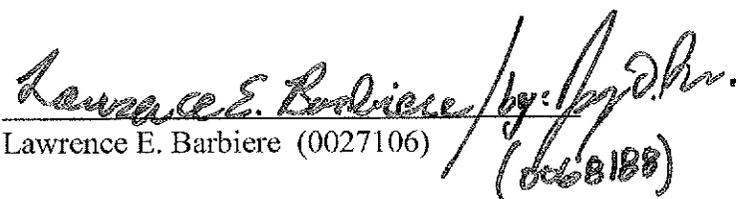
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APPENDIX

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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

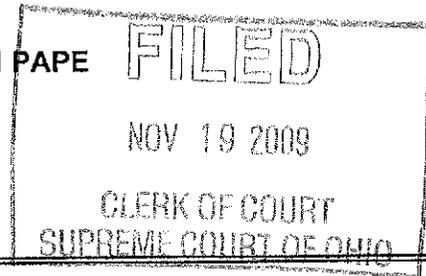
LEOLA SUMMERVILLE ADMINISTRATOR
OF THE ESTATE OF ROOSEVELT
SUMMERVILLE, DECEASED, and
LEOLA SUMMERVILLE

Plaintiff-Appellee,

vs.

CITY OF FOREST PARK, ADAM PAPE
and COREY HALL

Defendants-Appellants



NOTICE OF APPEAL OF APPELLANTS, CITY OF FOREST
PARK, ADAM PAPE AND COREY HALL

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City of Forest Park, Corey Hall and
Adam Pape*

**NOTICE OF APPEAL OF APPELLANTS,
CITY OF FOREST PARK, ADAM PAPE AND COREY HALL**

Appellants, City of Forest Park, Adam Pape and Corey Hall, give notice of appeal to the Supreme Court of Ohio from the Entry Granting Appellee's Motion to Dismiss Appeal of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals No. C-09-0708 on October 28, 2009.

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



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Ohio Bar Number: 0027106

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CERTIFICATE OF SERVICE

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



Lawrence E. Barbieri

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,

Appellees,

vs.

APPEAL NO. C-090708

A0707973

ENTERED

OCT 28 2009

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.



D85644284

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)

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

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

Plaintiffs, **JUDICIAL ENTRY** Judge Luebbers
vs. **SEP 28 2009**
CITY OF FOREST PARK, et al. : COURT OF COMMON PLEAS
Defendants : ENTER
HON. JODY M. LUEBBERS
THE CLERK SHALL SERVE NOTICE
TO PARTIES PURSUANT TO CIVIL
RULE 58 WHICH SHALL BE TAXED
AS COSTS HEREIN

**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

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ARTICLE IV: JUDICIAL

ARTICLE IV: JUDICIAL

JUDICIAL POWER VESTED IN COURT.

§1 The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.

(1851, am. 1883, 1912, 1968, 1973)

ORGANIZATION AND JURISDICTION OF SUPREME COURT.

§2 (A) The Supreme Court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the Supreme Court in the place and stead of the absent judge. A majority of the Supreme Court shall be necessary to constitute a quorum or to render a judgment.

(B)(1) The Supreme Court shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;
- (f) In any cause on review as may be necessary to its complete determination;
- (g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The Supreme Court shall have appellate jurisdiction as follows:

- (a) In appeals from the courts of appeals as a matter of right in the following:
 - (i) Cases originating in the courts of appeals;
 - (ii) Cases in which the death penalty has been affirmed;
 - (iii) Cases involving questions arising under the constitution of the United States or of this state.
- (b) In appeals from the courts of appeals in cases of

felony on leave first obtained.

- (c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed.
- (d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;
- (e) In cases of public or great general interest, the Supreme Court may direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify, or reverse the judgment of the court of appeals;
- (f) The Supreme Court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court.

(C) The decisions in all cases in the Supreme Court shall be reported together with the reasons therefor.

(1851, am. 1883, 1912, 1944, 1968, 1994)

ORGANIZATION AND JURISDICTION OF COURT OF APPEALS.

§3 (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;
- (f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify,

ARTICLE IV: JUDICIAL

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 actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of the article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(1968, am. 1994)

ORGANIZATION AND JURISDICTION OF COMMON PLEAS COURT.

§4 (A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas court of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise

such powers as are prescribed by rule of the Supreme Court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(1968, am. 1973)

POWERS AND DUTIES OF SUPREME COURT; RULES.

§5 (A)(1) In addition to all other powers vested by this article in the Supreme Court, the Supreme Court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the Supreme Court

(2) The Supreme Court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with

1.51 Special or local provision prevails as exception to general provision.

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Effective Date: 01-03-1972

1.52 Irreconcilable statutes or amendments - harmonization.

(A) If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.

(B) If amendments to the same statute are enacted at the same or different sessions of the legislature, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are substantively irreconcilable, the latest in date of enactment prevails. The fact that a later amendment restates language deleted by an earlier amendment, or fails to include language inserted by an earlier amendment, does not of itself make the amendments irreconcilable. Amendments are irreconcilable only when changes made by each cannot reasonably be put into simultaneous operation.

Effective Date: 01-03-1972

2744.01 Political subdivision tort liability definitions.

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "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 independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to,

office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including,

but not limited to, any of the following:

- (i) A park, playground, or playfield;
- (ii) An indoor recreational facility;
- (iii) A zoo or zoological park;
- (iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;
- (v) A golf course;
- (vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;
- (vii) A rope course or climbing walls;
- (viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.
- (v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;
- (w)(i) At any time before regulations prescribed pursuant to 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;
- (ii) On and after the effective date of regulations prescribed pursuant to 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.
- (x) A function that the general assembly mandates a political subdivision to perform.
- (D) "Law" means 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. When used in connection with the "common law," this definition does not apply.
- (E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.
- (F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council

created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

Effective Date: 04-09-2003; 04-27-2005; 10-12-2006

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

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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