

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2009-2106

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

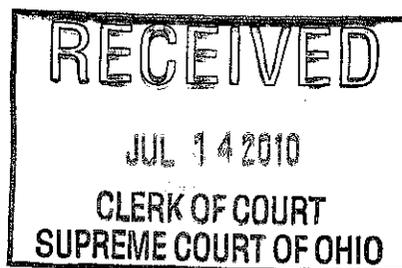
LEOLA SUMMERVILLE,
Plaintiff-Appellee,

vs.

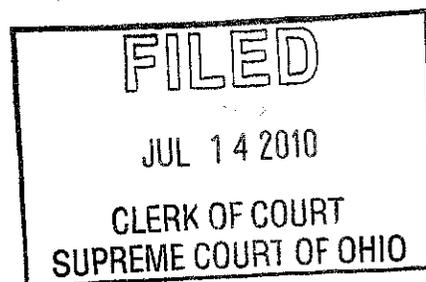
CITY OF FOREST PARK, et al.,
Defendants-Appellants.

**REPLY BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CIVIL TRIAL
ATTORNEYS URGING REVERSAL ON BEHALF OF DEFENDANTS-APPELLANTS**

Lynnette Dinkler (0065455)
Lynnette@dinklerpregon.com
Jamey T. Pregon (0075262)
Jamey@dinklerpregon.com
DINKLER PREGON, LLC
2625 Commons Boulevard, Suite A
Dayton, OH 45431
(937) 426-4200
(866) 831-0904 (fax)
*Attorneys for Amicus Curiae,
Ohio Association of Civil Trial Attorneys*



Lawrence E. Barbieri (0027106)
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
5300 Socialville Foster Road, Suite 200
Mason, OH 45040
(513) 583-4210
(513) 583-4203 (fax)
Counsel for Appellants, City of Forest Park, Adam Pape, and Corey Hall



Marc D. Mezibov (0019316)
Susan M. Lawrence (0082811)
THE LAW OFFICE OF MARC MEZIBOV
401 E. Court Street, Suite 600
Cincinnati, OH 45202
(513) 621-8800
(513) 621-8833 (fax)

Counsel for Appellee, Leola Summerville, Administrator of the Estate of Roosevelt Summerville, Deceased, and Leola Summerville

Stephen L. Byron (0055657)
Rebecca K. Schaltenbrand (0064817)
SCHOTTENSTEIN, ZOX & DUNN CO., LPA
Interstate Square Building I
4230 State Route 306, Suite 240
Willoughby, OH 44094
(216) 621-5107
(216) 621-5341 (fax)

Counsel for Amicus Curiae, The Ohio Municipal League

John Gotherman (0000504)
Ohio Municipal League
175 S. Third Street, Suite 510
Columbus, OH 43215-7100
(614) 221-4349
(614) 221-4390 (fax)

Counsel for Amicus Curiae, The Ohio Municipal League

Stephen J. Smith (0001344)
SCHOTTENSTEIN, ZOX & DUNN CO., LPA
250 West Street
Columbus, OH 43215
(614) 462-2700
(614) 462-5135 (fax)

Counsel for Amicus Curiae, The Ohio Municipal League

TABLE OF CONTENTS

Table of Authorities..... iv

I. THE PLAIN LANGUAGE OF R.C. 2744.02(C) PROVIDES OHIO’S
POLITICAL SUBDIVISIONS AND EMPLOYEES A STATUTORY RIGHT TO
AN IMMEDIATE APPEAL FROM AN ORDER DENYING THE BENEFIT
OF QUALIFIED IMMUNITY.....1

II. IF AN ORDER DENYING THE BENEFIT OF QUALIFIED IMMUNITY IS
NOT A FINAL APPEALABLE ORDER PURSUANT TO R.C. 2744.02(C),
PUBLIC POLICY SUPPORTS THIS COURT’S ADOPTION OF THE
COLLATERAL ORDER DOCTRINE.2

III. CONCLUSION.....3

TABLE OF AUTHORITIES

Cases

<i>Hubbell v. Xenia</i> , 115 Ohio St.3d 77, 2007-Ohio-4839	3
<i>Johnson v. Fankell</i> (1997), 520 U.S. 911	2
<i>Marcum v. Rice</i> (Nov. 3, 1998), Franklin App. Nos. 98AP-717, 98AP-718, 98AP-179, 98AP-721, 1998 Ohio App. LEXIS 5385	1
<i>Mitchell v. Forysth</i> (1985), 472 U.S. 511.....	2, 3
<i>Wilson v. Stark Cty. Dept. of Human Services</i> (1994), 70 Ohio St.3d 450.....	3

Statutes

42 U.S.C. 1983.....	2
Chapter 2744.....	1, 2, 3
R.C. 2744.01(D).....	1
R.C. 2744.02(C).....	1, 2, 3
R.C. 2744.03(A)(7).....	1
R.C. 2744.09(E).....	2

I. THE PLAIN LANGUAGE OF R.C. 2744.02(C) PROVIDES OHIO'S POLITICAL SUBDIVISIONS AND EMPLOYEES A STATUTORY RIGHT TO AN IMMEDIATE APPEAL FROM AN ORDER DENYING THE BENEFIT OF QUALIFIED IMMUNITY.

The language of R.C. 2744.02(C) is clear. It plainly provides that an order denying a political subdivision or its employee of "the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." Pursuant to R.C. 2744.01(D), the term "law" is defined as "any provision of the constitution, statutes, or the rules of the United States or of this state * * *." Therefore, an entry denying a political subdivision or its employee immunity from liability as provided in a statute "of the United States" is a final appealable order.

Furthermore, in amending Chapter 2744 in 2003 to include R.C. 2744.02(C), the General Assembly made its intent clear. Had the legislature intended to limit the statute's application only to state laws, it would have written the provision to reflect that intention, as it did in other provisions of Chapter 2744. For instance, the General Assembly clearly provided in R.C. 2744.03(A)(7) that the defense of immunity to which the particular political subdivisions were entitled was only available "at common law or established by the Revised Code." See, also, *Marcum v. Rice* (Nov. 3, 1998), Franklin App. Nos. 98AP-717, 98AP-718, 98AP-179, 98AP-721, 1998 Ohio App. LEXIS 5385 (concluding that the General Assembly intended specific meanings for its various references to laws in R.C. Chapter 2744, and R.C. 2744.02(C) encompasses "all federal and state rules, both judicial and legislated"). Although Plaintiff argues that the clause "any other provision of the law" in R.C. 2744.02(C) could "refer to a multitude of other Ohio statutes that may confer immunity upon political subdivisions," Plaintiff ignores the precise language contained in Chapter 2744, which provides that the term "law" includes federal law. When the General Assembly added R.C. 2744.02(C), it was well aware of the other provisions in

the chapter and unambiguously intended to confer appellate jurisdiction over orders denying a political subdivision or its employee the benefit under an alleged immunity contained in both state and federal law.

Plaintiff cites to R.C. 2744.09(E) for the proposition that Chapter 2744 does not apply to civil claims based upon violations of the statutes of the United States. Plaintiff also cites to various cases interpreting that statute, which essentially all conclude that the immunities set forth in Chapter 2744 do not apply to federal claims. Defendants are not asking this Court to substantively apply the immunities set forth in Chapter 2744 to claims arising under 42 U.S.C. 1983. Rather, Defendants are simply asking this Court to apply R.C. 2744.02(C) as it is written and confer jurisdiction on state appellate courts to review final orders denying immunity to a political subdivision or its employee.

II. IF AN ORDER DENYING THE BENEFIT OF QUALIFIED IMMUNITY IS NOT A FINAL APPEALABLE ORDER PURSUANT TO R.C. 2744.02(C), PUBLIC POLICY SUPPORTS THIS COURT'S ADOPTION OF THE COLLATERAL ORDER DOCTRINE.

Should this Court determine that R.C. 2744.02(C) does not apply to claims brought pursuant to federal law, this Court should adopt and apply the "collateral order doctrine" set forth in *Mitchell v. Forysth* (1985), 472 U.S. 511.

Although Plaintiff cites to *Johnson v. Fankell* (1997), 520 U.S. 911, and argues that "state courts need not adopt the federal definition of 'final decision' in construing the meaning of that term under their own rules" and that "state appellate rules are not pre-empted by §1983 to the extent they do not permit interlocutory appeals," Plaintiff ignores that states are free to adopt and apply the "collateral order doctrine" in "construing their jurisdictional statutes[.]" *Johnson*, at 916-917. In fact, public policy recognized by this Court supports the adoption and application of the "collateral order doctrine" to orders denying the benefit of immunity asserted under federal

law.

This court has already recognized that judicial economy is better served by the immediate appeal of orders denying immunity set forth in R.C. Chapter 2744. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶24. Such policy is equally applicable to the denial of qualified immunity, as early determination of a political subdivision's immunity from liability is necessary to prevent the unnecessary expenditure of public resources in litigating trial matters where immunity should bar suit, to prevent the unnecessary expense of public funds to settle cases despite a viable immunity defense, and to preserve judicial resources in resolving a pivotal issue that often determines the outcome of a lawsuit. See, generally, *Hubbell*, ¶25, *Wilson v. Stark Cty. Dept. of Human Services* (1994), 70 Ohio St.3d 450, 543, *Mitchell*, at 526.

III. CONCLUSION

As stated by this Court, “[j]udicial economy is actually better served by a plain reading of R.C. 2744.02(C).” *Hubbell*, at ¶24. A plain reading of the statute reveals that an entry denying a political subdivision or its employee the benefit of immunity from liability as provided in a federal statute is a final appealable order. Accordingly, this Court should reverse the First District's dismissal of Defendants' appeal.

Respectfully submitted,



Lynnette Dinkler (0065455)

Lynnette@dinklerpregon.com

Jamey Pregon (0075262)

Jamey@dinklerpregon.com

DINKLER PREGON, LLC

2625 Commons Boulevard, Suite A

Dayton, OH 45431

(937) 426-4200

(866) 831-0904 (fax)

Attorneys for Amicus Curiae,

Ohio Association of Civil Trial Attorneys

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to the following by U. S. Mail this 13th day of July, 2010:

Lawrence E. Barbieri, Esq.

Schroeder, Maundrell, Barbieri & Powers

5300 Socialville Foster Road, Suite 200

Mason, OH 45040

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

Marc D. Mezibov, Esq.

Susan M. Lawrence, Esq.

The Law Office of Marc Mezibov

401 E. Court Street, Suite 600

Cincinnati, OH 45202

Counsel for Appellee, Leola Summerville, Administrator of the Estate of Roosevelt Summerville, Deceased, and Leola Summerville

Stephen L. Byron, Esq.

Rebecca K. Schaltenbrand, Esq.

Schottenstein, Zox & Dunn Co., LPA

Interstate Square Building I

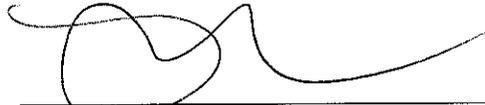
4230 State Route 306, Suite 240

Willoughby, OH 44094

Counsel for Amicus Curiae, The Ohio Municipal League

John Gotherman, Esq.
Ohio Municipal League
175 S. Third Street, Suite 510
Columbus, OH 43215-7100
Counsel for Amicus Curiae, The Ohio Municipal League

Stephen J. Smith, Esq.
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215
Counsel for Amicus Curiae, The Ohio Municipal League



Lynnette Dinkler (0065455)

o:\^cases - active\general\oacta\summersville v. forest park\p\dgs\reply brief.doc