

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. _____ 12-0790

**SUPPORTIVE SOLUTIONS TRAINING ACADEMY, L.L.C.,
Plaintiff-Appellee,**

-vs-

**ELECTRONIC CLASSROOM OF TOMORROW,
Defendant-Appellant.**

**ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY, OHIO, CASE NO. 95022 & 95287**

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT, ELECTRONIC CLASSROOM OF TOMORROW**

John A. Demer, Esq. (#0003104)
James A. Marniella, Esq. (#0073499)
DEMER & MARNIELLA, LLC
2 Berea Commons, Suite 200
Berea, Ohio 44017
(440) 891-1644
FAX: (440) 891-1684

Maureen Connors, Esq.
CONNORS & VAUGHN
5005 Rockside Road, Ste 100
Independence, Ohio 44131

*Attorney for Plaintiff-Appellee,
Supportive Solutions Training
Academy, LLC*

Paul W. Flowers, Esq. (#0046625)
[COUNSEL OF RECORD]
PAUL W. FLOWERS Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
FAX: (216) 344-9395

*Attorneys for Defendant-Appellant,
Electronic Classroom of Tomorrow*

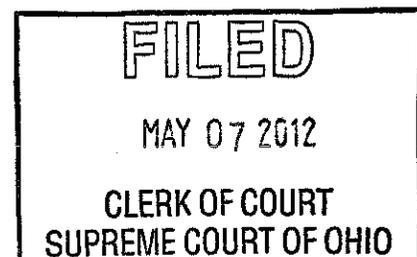
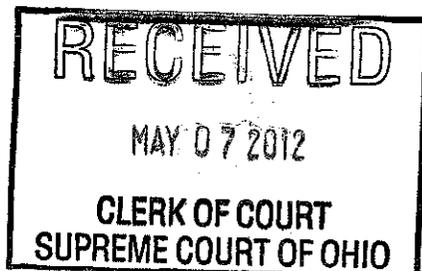


TABLE OF CONTENTS

TABLE OF CONTENTSii

STATEMENT OF ISSUES OF PUBLIC AND GREAT GENERAL IMPORTANCE..... 1

STATEMENT OF THE CASE AND FACTS3

ARGUMENT 8

PROPOSITION OF LAW I: ANY ORDER THAT DENIES THE BENEFIT OF AN ALLEGED IMMUNITY TO A POLITICAL SUBDIVISION IS IMMEDIATELY APPEALABLE PURSUANT TO R.C. §2744.02(C), INCLUDING THE DENIAL OF A MOTION TO AMEND THE ANSWER TO INCLUDE THE DEFENSE. *Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007-Ohio-4839, 873 N.E. 2d 878, approved and extended..... 8

PROPOSITION OF LAW II: A NOTICE OF APPEAL DOES NOT NEED TO SPECIFY EVERY ORDER THAT IS BEING CHALLENGED AND SHOULD BE CONSTRUED IN A MANNER THAT PERMITS APPELLATE REVIEW..... 12

CONCLUSION 15

CERTIFICATE OF SERVICE..... 16

APPENDIX

Court of Appeals Opinion dated March 22, 2012..... 0001

Common Pleas Journal Entry dated April 19, 2010.....00020

Common Pleas Journal Entry dated April 26, 2010 00021

Common Pleas Entry Upon Jury Verdict dated May 11, 2010..... 00022

STATEMENT OF ISSUES PUBLIC AND GREAT GENERAL IMPORTANCE

The Eighth District's dismissal order of March 22, 2012 implicates two issues of public and great general importance. At stake is the General Assembly's determination that disputes over political subdivision immunity should be resolved early in civil lawsuits in order to promote judicial efficiency and encourage prompt settlements and adjudications. Effective April 9, 2003, subsection (C) was added to R.C. § 2744.02 to permit immediate appeals of any "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[.]" Consistent with the decidedly broad language that was adopted by the legislature, this Court held in the syllabus of *Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007-Ohio-4839, 873 N.E. 2d 878, that:

When a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C).

The public policy objectives behind this legislation had been explained by Justice Lundberg Stratton in an earlier dissenting opinion:

From a practical perspective, determination 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 an 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. Alternately, if the appellate court holds that immunity does *not* apply, that early findings 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. [emphasis added, italics original].

Burger v. City of Cleveland Hts., 87 Ohio St. 3d 188, 199-200, 1999-Ohio-319, 718 N.E. 2d 912, 920 (Lundberg Stratton, J., dissenting). This unerring analysis was adopted by a majority of this Court in *Hubbell*, 115 Ohio St. 3d at 82.

But now the plain and ordinary meaning of R.C. §2744.02(C), as well as the seemingly unambiguous dictates of *Hubbell*, are under assault. Citing competing policy considerations, the Eighth District has refused to permit immediate review of an order denying a political subdivision leave to amend an answer to include the statutory immunity defense. *Apx. 0001*. Even though the General Assembly has specifically provided that such governmental entities cannot be held liable for the fraud, negligent misrepresentation, defamation, promissory estoppel, and implied contract theories that were asserted in the Second Amended Complaint, the trial court's order now allows Plaintiff-Appellee, Supportive Solutions Training Academy L.L.C., to argue that the affirmative defense has been waived. There is no meaningful difference between denying the benefit of an alleged immunity by refusing to permit the amendment or by refusing summary judgment upon the defense. If anything, there is more finality to denying an amendment, since immunity can still be argued at trial even after a motion for summary judgment has been overruled. Yet, only the latter are "final orders" according to the Eighth District's holding.

The second issue of public and great general importance arises from the appellate court's refusal to review the trial judge's denial of Defendant's motion for summary judgment, which had been announced just seven days after the trial court refused to permit the amendment to the answer. This Court had previously established that such rulings are immediately appealable in accordance with R.C. §2744.02(C). *Hubbell*, 115 Ohio St. 3d at 78-82. The Eighth District nevertheless concluded that the trial court's order had not been sufficiently specified in the Notice of Appeal. *Apx. 00014-15*. As will be developed in this Memorandum, this holding is contrary to a long line of judicial

authorities that have refused to elevate form over substance.

The *Hubbell* syllabus had not been confined to just certain types of rulings and certainly did not require any “magic language” in the Notice of Appeal. The determinative factor is whether the effect of the order was to deny the benefit of an alleged immunity. *Id.*, 115 Ohio St. 3d 77, syllabus. Both the denial of leave to amend and the denial of summary judgment had satisfied this simple standard, as Plaintiff was allowed to proceed with tort and *quasi*-contract theories against a political subdivision that was allegedly entitled to immunity.

The Eighth District’s opinion creates a murky new world where an order does not just have to deny the benefit of an alleged immunity, but it must do so in the context of certain “dispositional-type” motions. This amorphous new standard has not been derived from the actual terms of the statute and will exist, for all practical purposes, only in the eye of the beholder. In order to avoid the confusion that is sure to follow for years to come from the appellate court’s precedent, this Court should accept jurisdiction over these issues of great general and public importance.

STATEMENT OF THE CASE AND FACTS

Although Plaintiff’s claims for fraud, defamation, fraud in the inducement, tortious interference with business relations, breach of implied contract, promissory estoppel, and negligent misrepresentation have proceeded along a torturous course, the background of this contractual dispute may be succinctly stated for purposes of this appeal.

Defendant-Appellant, Electronic Classroom of Tomorrow (ECOT), was established as a non-profit corporation under Ohio law on February 11, 2000. *Trial Tr. Vol. III, pp. 426-429*. For roughly the last ten years, ECOT has operated an on-line or “virtual” school system. *Id.* Approximately 462 teachers, all of whom are licensed by the Ohio Department of Education (ODE), furnish instruction and assistance to

students who are enrolled in grades K-12. *Id.* All of these instructors are deemed “highly qualified” under the No Child Left Behind Act of 2001 (NCLB). *Id.* During the 2009-10 school year, ECOT’s enrollment exceeded 10,000 students. *Id.*

As part of Ohio’s system of public education, ECOT’s program is furnished tuition free. *Trial Tr. Vol. III, p. 427.* The school’s operating revenue is derived almost exclusively from State foundational funds and federal assistance. *Id.*

Plaintiff-Appellee, Supportive Solutions Training Academy, L.L.C. (“Supportive Solutions”), furnished education-related services, primarily in Cuyahoga County, Ohio. *Trial Tr. Vol. II, p. 89.* During the 2007-08 school year, the parties had entered into 119 “Service Agreements,” providing that Supportive Solutions would be supplying math and reading tutoring Supplemental Education Services (“SES”). *Id., Vol. III, pp. 442-443; Vol. IV, p. 494.* Each of the contracts specifically directed that the charges were “not to exceed \$1,360.91 per pupil per year.” *Trial Tr. Vol. II, p. 190; Vol. IV, pp. 490-491.* By early January 2008, Supportive Solutions’ operations discontinued and no further services were provided to ECOT. *Id., Vol. II, pp. 137-139.*

The Complaint that Plaintiff proceeded to file in the Cuyahoga County Court of Common Pleas raised claims for Breach of Implied Contract (First Cause of Action), Misrepresentation (Second Cause of Action), Negligent Misrepresentation (Third Cause of Action), Promissory Estoppel (Fourth Cause of Action), Unjust Enrichment (Fifth Cause of Action), Fraud and Fraud in the Inducement (Sixth Cause of Action), Respondeat Superior (Seventh Cause of Action), Defamation (Eighth Cause of Action), and Tortious Interference with Business Relations (Ninth Cause of Action). Supportive Solutions demanded damages “on all counts in excess of \$400,000.00, with pre-judgment interest at a rate of 10%, punitive damages, reasonable attorneys’ fees, and any other remedy this Court deems fit.” *Id., p. 29.*

Although unclear, the Amended Complaint suggested that no more than 200

students had been receiving these educational services from Supportive Solutions. *Amended Complaint*, p. 7, ¶27. It has been asserted that “the total amount of both supplemental and related services provided by [Supportive Solutions] to ECOT students is \$492,040.00 of which \$384,930.00 is outstanding.” *Id.*, p. 9, ¶38. ECOT had thus been charged an average of \$2,460.20 per student only three months into the school year, which was well in excess of the written agreements’ cap of \$1,360.91 per pupil per year.

On January 29, 2010, ECOT and the individual Defendants submitted their Motion for Partial Summary Judgment. They maintained that each of Supportive Solutions’ theories of recovery, except for breach of express contract, was barred by R.C. Chapter 2744 (Political Subdivision Immunity). Citing affidavit testimony, the Memorandum established that ECOT was a community school that had been organized under Chapter 3314 of the Revised Code and thus qualified as a “political subdivision” within the meaning of R.C. §2744.01(F). None of the exceptions to immunity set forth in R.C. §2744.02(B) could have possibly applied to the tort, implied/verbal contract, and estoppel theories of recovery that had been asserted.

Supportive Solutions submitted its Motion to Strike Defendants’ Motion for Summary Judgment upon purely technical grounds on February 16, 2010. One of the arguments asserted was that the doctrine of political subdivision immunity had not been sufficiently raised in the pleadings. In order to eliminate any uncertainty in this regard, ECOT tendered its Motion for Leave to Amend Answer on March 1, 2010. In accordance with Civ. R. 15(C), the charter school proposed simply to confirm beyond all dispute that immunity was being invoked. At the same time, they opposed the Motion to Strike. Supportive Solutions’ Brief in Opposition to Defendants’ Motion for Leave to File Amended Answer followed the next day. No suggestion was made that any additional discovery would have to be conducted or the jury trial would have to be

postponed if ECOT was allowed to amend its Answer. Instead, the opposition was devoted entirely to berating ECOT for not establishing its political subdivision status earlier in the proceedings.

Three days after that, on March 5, 2010, Supportive Solutions submitted its Brief in Opposition to Defendants' Motion for Summary Judgment. Sovereign immunity was opposed strictly on the grounds that (1) ECOT was a "school" but "not a school district or a system of public education" and (2) the affirmative defense had not been timely raised. *Id.* (emphasis original). ECOT tendered a Reply on March 12, 2010, disputing those contentions.

In a Journal Entry dated April 19, 2010, Judge Ronald Suster denied the Motion to Strike. At the same time, the court denied – without explanation – ECOT's Motion for Leave to Amend Answer. *Apx. 00020.*

Shortly before the trial was set to commence, Judge Suster issued his Order on April 26, 2010, granting ECOT's Motion for Partial Summary Judgment only with regard to the claims of fraud and intentional misrepresentation. *Apx. 00021.* ECOT's request for summary judgment upon the defense of statutory immunity was thus denied with regard to the remaining tort and *quasi-contract* theories. *Id.*

Citing R.C. §2744.02(C), ECOT and the individual Defendants appealed the denial of political subdivision immunity later that afternoon. *8th Dist. Case No. 95022.* Nevertheless, the jury trial still proceeded on May 3, 2010 upon all claims before retired Judge James D. Sweeney. Following a week of testimony, Supportive Solutions' counsel requested in her closing argument \$378,330.00 in compensatory damages "plus attorneys' fees and punitive damages for the defamation claim." *Trial Tr. Vol. IV, p. 619.* Inexplicably, the jurors returned a verdict in favor of Supportive Solutions and against ECOT as follows:

Breach of Implied Contract	\$1,000,000.00
Negligent Misrepresentation	\$120,000.00

Apx. 00022. ECOT filed a second Notice of Appeal on June 17, 2010. *8th Dist. Case No. 95287.*

The Eighth District issued a series of rulings on July 30, 2010. Initially, ECOT's request for Stay of Execution was granted only in part. A second entry indicated that a supersedeas bond was being required in the amount of \$1,210,000.00, notwithstanding the terms of Civ. R. 62(C). In the third order, the first immunity appeal was "dismissed per R.C. 2505.02."

ECOT proceeded to file a Complaint in Prohibition and Mandamus in this Court on August 10, 2010. *Sup. Ct. Case No. 2010-1401.* A decision was released on February 16, 2011, granting the writs. The high court concluded that the trial judge had lost jurisdiction over "any claims that might be subject to ECOT's immunity defense" once the interlocutory appeal was filed. *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Ct. of Com. Pls.*, 129 Ohio St.3d 30, 33, 2011-Ohio-626, 950 N.E.2d 149, 153, ¶14. In the second part of the opinion dealing with the requirement of a *supersedeas* bond, this Court determined that ECOT qualified as a "political subdivision" and was therefore entitled to a stay of execution without bond pursuant to Civ.R. 62(C). *Id.*, 129 Ohio St.3d at 35, ¶¶25-30.

The dispute was then remanded to the Eighth District. Following oral argument, an opinion was issued on March 22, 2012, dismissing the appeal for lack of a final appealable order. *Apx. 0001.* The Eighth District held that (1) the denial of leave to amend to include the immunity defense in the answer was not immediately appealable under R.C. §2744.02(C), and (2) the order denying summary judgment had not been sufficiently specified in the Notice of Appeal. *Id.*, 0007-18. Defendant ECOT now seeks further review of the issues of public and great general importance that were raised in this ruling.

ARGUMENT

The two Propositions of Law that have been identified by Defendant ECOT will be separately addressed in the remainder of this Memorandum.

PROPOSITION OF LAW I: ANY ORDER THAT DENIES THE BENEFIT OF AN ALLEGED IMMUNITY TO A POLITICAL SUBDIVISION IS IMMEDIATELY APPEALABLE PURSUANT TO R.C. §2744.02(C), INCLUDING THE DENIAL OF A MOTION TO AMEND THE ANSWER TO INCLUDE THE DEFENSE. *Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007-Ohio-4839, 873 N.E. 2d 878, approved and extended.

The Eighth District's opinion has sowed the seeds of confusion by disrupting the straightforward "benefit of an alleged immunity" test that had been established in the syllabus of *Hubbell*. It is now well-settled that immediate review may be sought by a political subdivision when immunity is denied, even if the prospect for later establishing the defense remains available. *Laurie v. City of Cleveland* (Feb. 26, 2009), 8th Dist. No. 91665, 2009-Ohio-869, 2009 W.L. 483175, p. *2, ¶14; *Fogle v. Village of Bentleyville* (July 24, 2008), 8th Dist. No. 88375, 2008-Ohio-3660, 2008 W.L. 2837123, p. *1, ¶¶2-6. A trial court needs only to preclude the "benefit" of an "alleged immunity" to implicate the statute. *Hubbell*, 115 Ohio St. 3d 77, 79, ¶12. The procedure that must be followed by the appellate court has been established as follows:

A court of appeals must exercise jurisdiction over an appeal of a trial court's decision overruling a Civ. R. 56(C) motion for summary judgment in which a political subdivision or its employee seeks immunity. Absent some other procedural obstacle, a court of appeals must conduct a de novo review of the law and facts. If, after that review, only questions of law remain, the court of appeals may resolve the appeal. If a genuine issue of material fact remains, the court of appeals can remand the case to the trial court for further development of the facts necessary to resolve the immunity issue. [emphasis added].

Hubbell, 115 Ohio St. 3d at 81, ¶21.

According to Plaintiff Supportive Solutions, the trial court's denial of leave to

amend has conclusively precluded the immunity defense from being raised at any stage in this civil action. The trial court's order is as "final" with regard to immunity defense as one can be. But apparently for the first time in Ohio, the Eighth District has concluded that the order was not quite "final" enough to be immediately appealable under R.C. §2744.02(C).

ECOT's well-founded contention that the trial court's unexplained denial of leave was an abuse of discretion must now wait until after a second trial is conducted upon Supportive Solutions' far-fetched tort and *quasi*-contract claims and a direct appeal can be commenced. All of the benefits of an early resolution the issue that had been identified in both the *Burger* dissent and the *Hubbell* opinion will be lost, which is particularly troubling in that no exception to immunity has ever been identified that would permit a recovery upon any theory except breach of express contract.

In carving out a new exception to the *Hubbell* rule, the Eighth District observed that the jurisdictional question presented was "one of first impression[.]" *Apx. 00010*, ¶11. The court further noted that the Supreme Court decision had adopted a "broad interpretation" of R.C. §2744.02(C). *Id.*, 00012, ¶15. Defendant ECOT does not disagree. But, even though the *Hubbell* syllabus had not been constrained in any manner, the panel proceeded to limit the holding to "dispositional-type motions, *i.e.*, Civ. R. 12(B)(6) motions to dismiss, Civ. R. 12(C) motions for judgment on the pleadings, and Civ. R. 56 motions for summary judgment." *Id.*, ¶16 (citations omitted). No attempt was made to explain why such rulings – which do not necessarily preclude an immunity defense from being successfully pressed later in the proceedings – are somehow more "final" than an order that prohibits the defense from being raised at all. *Id.* The line that has been drawn is purely artificial.

The appellate court theorized that a broad application of *Hubbell*, "could lead to potential abuse by political subdivisions by sitting on its rights and responsibilities to

assert a timely immunity defense, knowing that any denial would be immediately appealable.” *Apx. 00012-13, ¶17*. Such a bizarre gamble makes no sense. A defendant that deliberately withheld the affirmative defense would do so at considerable peril, since it is extremely unlikely that the appellate court would find that an abuse of discretion was committed when leave to amend was denied. Taking such a risk would only make sense if the defense was frivolous, and sufficient mechanisms already exist to redress such misconduct. *App. R. 23; Civ. R. 11; R.C. §2323.51*.

By prohibiting any immediate appeals of a denial of motion for leave to amend because it is theoretically possible for the process to be abused, the Eighth District has plainly thrown the baby out with the bathwater. Such appeals are often successful in cases, such as this, when immunity is raised several months prior to trial and the motion is denied without either an explanation or a demonstration of actual prejudice. The Supreme Court of Ohio has explained that:

*** In the real world, however, failure to plead an affirmative defense will rarely result in waiver. Affirmative defenses – like complaints – are protected by the direction of Rule 15(a) that courts are to grant leave to amend pleadings freely *** when justice so requires. Accordingly, failure to advance a defense initially should prevent its later assertion only if that will seriously prejudice the opposing party. [emphasis added].

Hoover v. Sumlin (1984), 12 Ohio St. 3d 1, 5, 465 N.E. 2d 377, 380, quoting *Bobbitt v. Victorian House, Inc.* (N.D. Ill. 1982), 532 F. Supp. 734, 736. The overwhelming consensus of authority recognizes that an amendment to the pleadings is justified under circumstances such as these. *McGregor v. Armeni* (Nov. 20, 1990), 10th Dist. No. 89AP-1500, 1990 W.L. 179981, p. *2 (trial court committed abuse of discretion in failing to allow amendment of answer, which was made in good faith and not for purposes of delay or prejudice); *ABN Amro Mortgage Grp., Inc. v. Evans* (Aug. 21, 2008), 8th Dist. No. 90499, 2008-Ohio-4223, 2008 W.L. 3870623, pp. *2-3 (trial court abused its discretion in denying motion to amend answer where there was no evidence that the

defendants were seeking to unduly delay the proceedings or that the amendment would prejudice the plaintiff); *Rossetti v. OM Financial Life Ins. Co.* (Nov. 10, 2008), 5th Dist. No. 2008CA00083, 2008-Ohio-5889, 2008 W.L. 4885672, p. *2, ¶14 (finding that insurer should have been granted leave to amend answer since only a short period of time had elapsed, no “unforeseen obstacles would have been presented that could not have been presented via the insurance contract” and no “undue prejudice” would have been suffered).

As *Hoover* and its progeny attest, denials of leave to amend are relatively uncommon. Most courts abide by the laudable maxim that disputes should be resolved upon their merits and not procedural grounds. *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 431 N.E.2d 644, 647; *National Mut. Ins. Co. v. Papenhagen* (1987), 30 Ohio St.3d 14, 15, 505 N.E.2d 980, 981. Consequently, there is no reason to fear that appellate courts will soon be overwhelmed with frivolous interlocutory appeals unless R.C. §2744.02(C) is confined to just “dispositional-type motions.” *Apx. 00012*.

But when a trial court refuses to permit the immunity defense to be raised in a pleading, the strongest possible case can be made that an immediate appeal is essential. Unlike the denial of a motion to dismiss or motion for summary judgment, the affirmative defense is deemed to be conclusively “waived” for the remainder of the proceedings. There is no chance that the issue can be raised, and correctly decided, at trial. The unprecedented determination that only “dispositional-type motions” are entitled to immediate review is simply contrary to both the statute’s plain language and the dictates of *Hubbell*.

The effort to rewrite R.C. §2744.02(C) cannot be reconciled with R.C. §1.42, which requires statutes to be construed “according to the rules of grammar and common usage.” Courts may not judicially rewrite legislation under the guise of “statutory construction.” *State ex rel. Myers v. Chiaramonte* (1976), 46 Ohio St.2d 230, 238, 348

N.E.2d 323. Regardless of the policy implications, plain and unambiguous language may not be ignored. *Board of Edn. of Pikedelta-York Loc. Sch. Dist. v. Fulton Cty. Budget Commn.* (1975), 41 Ohio St.2d 147, 156, 324 N.E.2d 566; *Guear v. Stechschulte* (1928), 119 Ohio St. 1, 7, 162 N.E. 46. Unless a constitutional due process argument is raised, the judiciary may not speculate as to the wisdom of a legislative enactment. *Lorain Cty. Bd. of Commrs. v. United States Fire Ins. Co.* (9th Dist. 1992), 81 Ohio App. 3d 263, 268, 610 N.E.2d 1061, 1064-1065. Since the Eighth District has significantly curtailed the scope of R.C. §2744.02(C) in a manner that the General Assembly never intended, or this Court ever countenanced, jurisdiction should be accepted over this appeal.

PROPOSITION OF LAW II: A NOTICE OF APPEAL DOES NOT NEED TO SPECIFY EVERY ORDER THAT IS BEING CHALLENGED AND SHOULD BE CONSTRUED IN A MANNER THAT PERMITS APPELLATE REVIEW.

Legislative intent was further undermined when the Eighth District established a new requirement of specificity for purposes of R.C. §2744.02(C). ECOT's Notice of Appeal had not included a precise reference to the order denying summary judgment, because the ruling had not yet been received by Plaintiff's counsel. The entry denying leave to amend seven days earlier had been specifically referenced in the Notice. Furthermore, the Notice provided that immediate appellate review was being sought over "all other adverse and appealable orders in this action." Sufficient warning was thus afforded that the appeal would include every order that had denied ECOT the benefit of an alleged immunity defense as permitted by R.C. §2744.02(C).

Citing no judicial authorities, the appellate court found "that ECOT had a duty to file an amended notice of appeal pursuant to App. R. 3 and include the additional journal entry denying partial summary judgment, if it was ECOT's intention to challenge this ruling and attempt to create a final, appealable order." *Apx. 00015, ¶22*. With all

due respect, such a submission would have been pointless. If it had not been clear enough that all appealable orders were being challenged in the notice, there could have been no misunderstandings once briefing was underway. Entire sections of ECOT's analysis had been devoted to both the denial of leave to amend and the denial of partial summary judgment. Plaintiff was thus afforded a full and fair opportunity to respond to both aspects of the appeal. It is simply inconceivable that the language of the Notice could have prejudiced anyone or had some deleterious impact upon the proceedings.

The Eighth District's new standard also cannot be reconciled with the controlling judicial precedents governing App. R. 3. In *Maritime Mftrs., Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 436 N.E.2d 1034, an appellant timely filed a notice of appeal. The appellate court *sua sponte* dismissed the proceedings on the basis that the notice mistakenly identified the error as denial of the motion for new trial, rather than an appeal from a final judgment on the merits. *Id.*, 70 Ohio St.2d at 258. This Court unanimously rejected the appellate court's strict construction of the appellate rules. The *Maritime* court observed that the "strict construction . . . is, however, inconsistent with the general attitude taken by this court toward the construction of procedural rules, case law of Ohio, the purpose underlying the notice of appeal requirement, as well as with the position of the United States Supreme Court." *Id.* "This court has long recognized that, in construing the Rules of Appellate Procedure, the law favors and protects the right of appeal and . . . a liberal construction of the rules . . . to promote the objects of the Appellate Procedure Act and to assist the parties in obtaining justice." *Id.*

The *Maritime* court summarized numerous Ohio cases and concluded that it "has consistently adhered to the policy of exercising all proper means to prevent the loss of valuable rights when the validity of a notice of appeal is challenged solely on technical, procedural grounds." *Id.* at 258-259 (collecting cases). From a practical standpoint, the Court observed that neither the court of appeals nor the appellee could pretend that it

was not fully apprised of the basis of the appellant's appeal. *Id.* at 259-260. *See also Bobko v. Sagen* (8th Dist. 1989), 61 Ohio App. 3d 397, 412, 572 N.E. 2d 823, 833 (court refuses to limit appeal to only those orders that were listed in the notice).

Several years later, an appellant's designation of the wrong final order in a notice of appeal was at issue in *Barksdale v. Van's Auto Sales, Inc.* (1988), 38 Ohio St. 3d 127, 527 N.E. 2d 284. In accordance with *Maritime*, 70 Ohio St. 2d 257, this Court unanimously held that the appellate court was still obligated to consider the validity of the ruling that the appellant had meant to challenge.

More recently, in *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 649 N.E.2d 1229, the appellant timely filed the notice of appeal, but the appealing parties were designated as "Dennis Wallace et al." Following *Papenhagen*, 30 Ohio St.3d 14, 505 N.E.2d 980, the *Transamerica* court reasoned that a court of appeals abuses its discretion by dismissing an appeal where a defect in the notice of appeal was made in good faith, with no resulting prejudice to the opposing party. Though the Court did not endorse the use of the "et al." designation in the notice, it held that the dismissal was a disproportionate sanction where the parties were fully aware of their respective interests. *See also* 4 Ohio Jur.3d Appellate Review §225.

As is the case with Ohio jurisprudence in general, the pivotal question should have been whether any prejudice has been sustained. In *Interstate Gas Supply, Inc. v. Callex Corp.* (Feb. 14, 2006), 10th Dist. No. 04AP-980, 2006-Ohio-638, 2006 W.L. 328679, the appellant timely filed a notice of appeal, but neglected to include a portion of the trial court's judgment relating to the employee at issue. The court observed that, pursuant to *Transamerica*, the only jurisdictional requirement for an appeal was a timely filed notice of appeal. The appellate court possessed discretion to determine the appropriate remedy for any defects contained in the notice. *Id.* at p. *3. The Tenth District concluded that the notice of appeal was sufficient and that, absent a showing of

prejudice by the appellees, dismissal was not appropriate.

After criticizing ECOT for not amending the notice of appeal, the appellate court's opinion spins into circular reasoning. *Apx. 00015-18*. The court concluded that "immunity was not properly raised in the motion for partial summary judgment" because the defense had been waived in the purportedly defective Answer. *Id.*, ¶23-25. Of course, if the appeal had proceeded, ECOT would have argued that the trial judge had abused his discretion by denying the timely motion for leave without explanation. *Hoover*, 12 Ohio St. 3d 1, 5. In effect, the appellate court was pre-judging the merits of the appeal as a basis for concluding that appellate jurisdiction was lacking.

There is no valid justification for imposing special rules for appeals that have been brought under the authority of R.C. §2744.02(C). Such appeals should be governed by the same time-tested standards as in any other review proceeding. Unless this Court intercedes, a new pitfall will lurk for political subdivisions seeking to exercise the rights that have been afforded to them by the General Assembly. Strong justifications exist for this Court to therefore accept jurisdiction over this action.

CONCLUSION

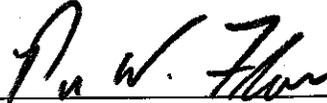
For the foregoing reasons, this Court should grant jurisdiction to review the issues of public and great general importance raised in the two Propositions of Law.

Respectfully Submitted,

John A. Demer (per authority)
John Demer, Esq. (#0003104)
James A. Marniella, Esq. (#0073499)
DEMER & MARNIELLA, LLC

*Attorneys for Defendant-Appellant,
Electronic Classroom of Tomorrow*

Deena M. Giordano (per authority)
Deena M. Giordano, Esq. (#0073408)
3700 High Street
Columbus, Ohio 43207



Paul W. Flowers, Esq. (#0046625)
[COUNSEL OF RECORD]
PAUL W. FLOWERS CO., L.P.A.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Memorandum** has been sent by e-mail and regular U.S. Mail, on this 7th day of May, 2012 to:

Maureen Connors, Esq.
CONNORS & VAUGHN
5005 Rockside Road, Ste 100
Independence, Ohio 44131

*Attorney for Plaintiff-Appellee,
Supportive Solutions Training
Academy, LLC*



Paul W. Flowers, Esq., (#0046625)
PAUL W. FLOWERS Co., L.P.A.

*Attorney for Defendant-Appellant
Electronic Classroom of Tomorrow*

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 95022 and 95287

**SUPPORTIVE SOLUTIONS TRAINING
ACADEMY L.L.C.**

PLAINTIFF-APPELLEE

vs.

ELECTRONIC CLASSROOM OF TOMORROW

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-652873

BEFORE: Keough, J., Jones, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 22, 2012

ATTORNEYS FOR APPELLANT

Paul W. Flowers
Paul W. Flowers Co., LPA
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113

John A. Demer
James A. Marniella
Demer & Marniella, LLC
2 Berea Commons, Suite 200
Berea, OH 44017

Deena M. Giordano
3700 High Street
Columbus, OH 43207

FILED AND JOURNALIZED
PER APP.R. 22(C)

MAR 22 2012

GERALD E. FURST
CLERK OF THE COURT OF APPEALS
BY  DEP.

ATTORNEYS FOR APPELLEE

Maureen Connors
Ann S. Vaughn
Connors & Vaughn
6000 Freedom Square Drive
Suite 165
Independence, OH 44131

KATHLEEN ANN KEOUGH, J.:

{¶1} In this consolidated appeal, defendant-appellant, Electronic Classroom of Tomorrow ("ECOT"), appeals various rulings by the trial court and the jury's award for monetary damages in favor of plaintiff-appellee, Supportive Solutions Training Academy, L.L.C. ("Supportive Solutions"). ECOT raises the following assignments of error:

Appeal No. 95022

I. The trial judge erred, as a matter of law, in failing to grant summary judgment upon [Supportive Solutions'] claims of implied contract [because the merits of the case warranted summary judgment or breach of implied contracts do not apply to political subdivisions].

II. Summary judgment was improperly denied, as a matter of law, upon [Supportive Solutions'] unsubstantiated claim of defamation [because the merits of the case warranted summary judgment or the claim of defamation is barred by political subdivision immunity].

III. Summary judgment was warranted, as a matter of law, on the claims of negligent misrepresentation [because the merits of the case warranted summary judgment or political subdivisions are immune from claims of negligent misrepresentation].

IV. The trial judge abused his discretion in denying [ECOT's] motion for leave to amend [its] answer [to assert the affirmative defense of political subdivision immunity].

Appeal No. 95287

I. The trial judge abused his discretion in denying [ECOT's] motion for leave to amend [its] answer [to assert the affirmative defense of political subdivision immunity].

II. The trial judge erred, as a matter of law, in failing to grant summary judgment upon [Supportive Solutions'] claims of implied contract [because the merits of the case warranted summary judgment or breach of implied contracts do not apply to political subdivisions].

III. Summary judgment was improperly denied, as a matter of law, upon [Supportive Solutions'] claim of defamation [because the merits of the case warranted summary judgment or the claim of defamation is barred by political subdivision immunity].

IV. Summary judgment was warranted, as a matter of law, on the claims of negligent misrepresentation [because the merits of the case warranted summary judgment or political subdivisions are immune from claims of negligent misrepresentation].

V. [ECOT] was entitled to either a directed verdict or a new trial upon the claim of breach of express contract.

VI. The trial judge abused his discretion by granting pre-judgment interest in favor of [Supportive Solutions] under R.C. 1343.03.

I. Facts and Procedural History

{¶2} The jurisdictional complexity and procedural history in this case are convoluted, confusing, and mimic a tortuous law school civil procedure final exam.

{¶3} The facts and case history were set forth in *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149 ("*ECOT P*");

[ECOT] is a community school established pursuant to R.C. Chapter 3314. ECOT was the first Internet-based community school in Ohio and is currently the state's largest community school. Its operating

revenues are derived almost exclusively from state and federal funds.

ECOT entered into a series of service agreements with respondent Supportive Solutions Training Academy, L.L.C. ("Supportive Solutions") to take effect beginning in the 2007-2008 school year. ECOT paid Supportive Solutions \$107,110, which ECOT believed was all that was due under the agreements, but Supportive Solutions claimed that it was entitled to more. Supportive Solutions went out of business and provided no further services to ECOT after December 2009.

In March 2008, Supportive Solutions filed a suit for damages against ECOT and others in the Cuyahoga County Court of Common Pleas. The case, which was designated *Supportive Solutions Training Academy, L.L.C. v. Electronic Classroom of Tomorrow*, Cuyahoga Cty. C.P. [C]ase No. CV 08 652873, included claims of breach of implied contract, misrepresentation, negligent misrepresentation, promissory estoppel, unjust enrichment, fraud, fraud in the inducement, respondeat superior, and defamation. The case was originally assigned to Judge Ronald Suster. ECOT and the other defendants filed an answer in which they did not raise the affirmative defense of political-subdivision immunity. In December 2008, Supportive Solutions filed an amended complaint to raise a claim of tortious interference with business relations against a new defendant, Lucas County Educational Service Center ("Service Center"). In ECOT's answer to the amended complaint, it again did not raise political-subdivision immunity as an affirmative defense.

In January 2009, Service Center moved to dismiss Supportive Solutions' claim against it based on, among other things, political-subdivision immunity. Shortly thereafter, Service Center was dismissed from the case. Nearly a year later, in January 2010, ECOT raised for the first time the defense of political-subdivision immunity in its motion for partial summary judgment. After Supportive Solutions claimed that ECOT had waived this affirmative defense by failing to raise it in the answer, ECOT filed a motion for leave to file an amended answer. Judge Suster denied ECOT's motion in an entry journalized in April 2010. Judge Suster also granted ECOT and the other defendants' motion for partial

summary judgment on the claims of fraud and intentional misrepresentation and ordered that the remaining claims be resolved at the scheduled trial.

ECOT and the other defendants appealed from the court's decision denying their motion for leave to amend their answer to include the affirmative defense of political-subdivision immunity. Supportive Solutions moved to stay the trial court case pending resolution of ECOT's appeal. In its motion, Supportive Solutions conceded that of the remaining causes of action against ECOT, the motion for leave to amend the answer "would have an impact on seven" of them. The trial proceeded before Judge James D. Sweeney, who denied ECOT's motion to limit the evidence to Supportive Solutions' express-contract claims and any other matters that were not currently under the jurisdiction of the court of appeals.

On May 7, 2010, the jury returned a verdict for Supportive Solutions and against ECOT and the other defendants for \$1,000,000 for breach of implied contract, \$120,000 for negligent misrepresentation, and \$86,400 for breach of express contract. Judge Sweeney entered a judgment reflecting the jury verdict, granted Supportive Solutions prejudgment interest in the amount of \$104,973.32, and denied ECOT's motion for judgment notwithstanding the verdict or for a new trial. ECOT appealed from the judgment, and ECOT's motion for stay of execution of the judgment was denied.

ECOT then filed a motion in the court of appeals for a stay of execution of the common pleas court's judgment pending appeal, and Supportive Solutions filed a motion for a supersedeas bond. On July 30, 2010, the court of appeals granted the stay but conditioned it on ECOT's posting of a supersedeas bond in the amount of \$1,210,000. On the same day, the court of appeals dismissed ECOT's earlier appeal from the common pleas court's denial of its motion for leave to file an amended answer for lack of a final, appealable order.

On August 10, 2010, ECOT filed this action for extraordinary relief. ECOT requests a writ of prohibition to prevent respondents, Cuyahoga County Court of Common Pleas, Judge Suster, and Judge

Sweeney, from enforcing the allegedly invalid portion of its judgment in the underlying case, a writ of mandamus requiring the common pleas court and judges to vacate that portion of the judgment, and, insofar as any money judgment against ECOT remains, a writ of mandamus to compel the common pleas court and judges to issue a stay of execution without bond pursuant to Civ.R. 62(C). ECOT also named Supportive Solutions as a respondent but did not request any relief against it. A few days later, ECOT filed a motion for an emergency stay of execution of the judgment. On August 17, we granted ECOT's motion and an alternative writ. 126 Ohio St.3d 1536, 2010-Ohio-3840, 931 N.E.2d 1099. On August 20, the court of appeals stayed its consideration of ECOT's appeal and related appeals pending our disposition of this writ case. The parties have submitted evidence and briefs in this case. *Id.* at ¶ 2-9.

{¶4} In *ECOT I*, the Ohio Supreme Court concluded:

Based on the foregoing, ECOT has established its entitlement to a writ of prohibition to prevent the common pleas court, Judge Suster, and Judge Sweeney from enforcing the portions of the judgment in the underlying civil case that were subject to an appeal filed by ECOT from the denial of its motion for leave to amend its answer and a writ of mandamus ordering the common pleas court and judges to vacate those portions of the judgment. ECOT is also entitled to a writ of mandamus to compel the common pleas court, Judge Suster, and Judge Sweeney to stay the portion of the judgment relating to the breach of express contract without requiring the posting of bond pending ECOT's appeal of the judgment. *Id.* at ¶ 31.

II. Effect of *ECOT I* and this Court's Jurisdiction

{¶5} The Ohio Supreme Court's judgment entry and opinion in *ECOT I*, effectively divested this court of jurisdiction to consider the appeals filed by ECOT. By vacating the judgments rendered on the counts of implied contract and negligence, we now lack a final appealable order to consider the merits of

the appeals filed because all claims raised in the complaint and counterclaim have not been disposed.

{¶6} “When there are multiple claims and/or multiple parties to an action, an order of a court is a final, appealable order only if the requirements of both R.C. 2505.02 and Civ.R. 54(B) are met.” *Qualchoice Health Plan, Inc. v. Progressive Quality Care, Inc.*, 8th Dist. No. 95046, 2011-Ohio-483, ¶ 13, citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989), syllabus. Under Civ.R 54(B), when more than one claim for relief is presented in an action, a court may enter final judgment as to fewer than all the claims “only upon an express determination that there is no just reason for delay.” In the absence of such a determination, “any order * * * which adjudicates fewer than all the claims * * * shall not terminate the action as to any of the claims or parties.” *Id.*

{¶7} In essence, the Ohio Supreme Court’s decision reverts this case back and prior to trial, as if the trial were a nullity on the claims that were affected by the first appeal, i.e., all claims except the breach of express contract. Accordingly, pursuant to R.C. 2505.02 and Civ.R. 54(B), we lack a final, appealable order because all claims raised by Supportive Solutions and ECOT’s counterclaims have not been disposed of, which are interdependent on another. Furthermore, because the requisite Civ.R. 54(B) language is not included in the

trial court's judgment entries, ECOT's appeal relating to the judgment rendered on Supportive Solutions' breach of express contract claim (its fifth and sixth assignments of error) is not final and appealable, but interlocutory. Because no final, appealable order exists, all interlocutory orders are not ripe for review, including the denial of ECOT's motion for partial summary judgment and motion for leave to file an amended answer, which will be further discussed below.

III. Motion for Leave to File an Amended Answer

{¶8} ECOT contends in its fourth assignment of error in App. No. 95022, and its first assigned error in App. No. 95287, that the trial court abused its discretion in denying its motion for leave to file an amended answer to assert the affirmative defense of political subdivision immunity.

{¶9} Prior to reaching the merits of any appeal, an appellate court must ensure it has jurisdiction. "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *Digiorgio v. City of Cleveland*, 8th Dist. No. 95945, 2011-Ohio-5824, ¶ 4, quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). Generally, a motion for leave to file

an amended answer is not a final, appealable order. However, ECOT contends that R.C. 2744.02(C) provides an exception to this rule.¹

{¶10} Under R.C. 2744.02(C), “[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.”

{¶11} Therefore, the issue before this court is whether a motion for leave to file an amended answer to assert the affirmative defense of political subdivision immunity is a final, appealable order. After reviewing the case law, we find this issue is one of first impression but one that Justice Pfeifer contemplated in his dissent in *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878.

{¶12} In *Hubbell*, the Ohio Supreme Court held that “when a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C).” *Id.* at syllabus

¹ECOT raised this argument in its motion to reinstate appeal of immunity issues filed on June 30, 2011.

{¶13} As this court recognized in the en banc decision in *Digiorgio v. City of Cleveland*, 8th Dist. No. 95945, 2011-Ohio-5824, “although decided in the context of a motion for summary judgment, the *Hubbell* court made clear that its holding was not limited to only motions for summary judgment.” *Digiorgio* at ¶ 5. The Ohio Supreme Court held,

We conclude that the use of the words “benefit” and “alleged” illustrates that the scope of this provision is not limited to orders delineating a “final” denial of immunity. R.C. 2744.02(C) defines as final a denial of the “benefit” of an “alleged” immunity, not merely a denial of immunity. Therefore, 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.

* * *

Accordingly, we hold that when a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C). *Hubbell* at ¶ 12, 27.

{¶14} The *Hubbell* court explained the policy reasons for its broad interpretation of R.C. 2744.02(C) as follows: “As the General Assembly envisioned, the determination of immunity [should] be made prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses * * *.” *Id.* at ¶ 26, quoting *Burger v. Cleveland Hts.*, 87 Ohio St.3d 188, 199-200, 718 N.E.2d 912 (1999).

{¶15} However, the question before this court is whether this broad interpretation encompasses motions for leave to file amended responsive pleadings. We find that it does not.

{¶16} We find most significant the cases wherein *Hubbell* and its progeny are cited and relied on for authority involve dispositional-type motions, i.e., Civ.R. 12(B)(6) motions to dismiss, Civ.R. 12(C) motions for judgment on the pleadings, and Civ.R. 56 motions for summary judgment. *See, e.g., Digiorgio; Rucker v. Newburg Hts.*, 8th Dist. No. 89487, 2008-Ohio-910; *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522. To expand *Hubbell* to include orders such as denial of leave to file amended pleadings or motions would open the door for political subdivisions to challenge all adverse rulings potentially affecting its immunity defense with an immediate appeal. We do not believe *Hubbell* was intended to be read this broadly.

{¶17} Although the policy reasons behind *Hubbell* are to determine the immunity issues prior to a determination of the merits, there should also be a competing policy that a political subdivision should timely assert its immunity defense so that the other litigant does not devote its time and resources in litigating a lawsuit that could be barred by immunity. Interpreting *Hubbell* this broadly could lead to potential abuse by political subdivisions by sitting on its

rights and responsibilities to assert a timely immunity defense, knowing that any denial would be immediately appealable.

{¶18} We find our interpretation of *Hubbell* consistent with the waiver provisions of the Ohio Rules of Civil Procedure. An affirmative defense can be waived if it is not timely asserted, including the defense of immunity. We find that no caveat or niche has yet been carved out giving a political subdivision an exception to the waiver provision of the Civil Rules.

{¶19} In *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 1999-Ohio-207, 706 N.E.2d 1261, the Ohio Supreme Court considered whether granting a motion for leave to amend an answer was an abuse of discretion. The Ohio Supreme Court held that a political subdivision waived its right to assert the statutory immunity defense by failing to timely assert it in its answer. *Id.* at 99-100. In *Turner*, Central waited until after the trial date was scheduled, which was almost three years after the complaint was filed, to amend its answer to assert the affirmative defense of political subdivision immunity. The Ohio Supreme Court ruled that the trial court abuse its discretion in granting Central leave to amend its answer. *Id.* This holding demonstrates that the waiver provisions of the Civil Rules apply to political subdivisions, political immunity can be waived if not timely asserted, and political subdivisions are not always

“king.” *Hubbell*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, at ¶ 41, Pfeifer, J., dissenting.

{¶20} In this case, denying a motion for leave to amend an answer to assert the affirmative defense does not “deny” the “benefit” of an “alleged immunity.” The denial of leave made no determination about immunity. Although the Supreme Court in *ECOT I* determined that ECOT is a political subdivision for purposes of posting a supersedeas bond, no determination was made whether the classification extends to the merits of the case or whether ECOT will be immune from liability. Therefore, there was no “denial” of the “benefit” of an “alleged immunity” by failing to grant ECOT leave to file an amended answer; *Hubbell* does not apply.

IV. Denial of Summary Judgment on the Basis of Immunity

{¶21} Insofar as ECOT raises three assignments of error in both appeals contending that the trial court erred in denying its motion for partial summary judgment because it is immune from those causes of action, we find that this court lacks jurisdiction to consider these assignments of error at this time.

{¶22} First, ECOT’s notice of appeal in App. No. 95022 only specifies that it is appealing the trial court’s April 19, 2010 denial of ECOT’s motion for leave to amend its answer. Attached to the notice of appeal was the sole journal entry denying ECOT leave. Although ECOT has artfully crafted an argument in its

appellate brief that the language in the notice of appeal “and all other adverse and appealable rulings in this matter” includes the trial court’s denial of ECOT’s motion for partial summary judgment, we find that ECOT had a duty to file an amended notice of appeal pursuant to App.R. 3 and include the additional journal entry denying partial summary judgment, if it was ECOT’s intention to challenge this ruling and attempt to create a final, appealable order. Because ECOT did not file an amended notice of appeal, the denial of partial summary judgment is not included in App. No. 95022.

{¶23} Moreover, we find that immunity was not properly raised in the motion for partial summary judgment and thus was not a basis for the trial court’s denial of summary judgment, which would fall under the *Hubbell* final, appealable order exception.

{¶24} Under Civ.R. 8(C), a defendant is required to affirmatively set forth matters that will effectively preclude a finding of liability on the part of the defendant. Failure to raise such defenses in a responsive pleading or motion will constitute a waiver of those defenses. Statutory immunity is an affirmative defense, and if it is not raised in a timely fashion, it is waived. *State ex rel. Koren v. Grogan*, 68 Ohio St.3d 590, 594, 629 N.E.2d 446 (1994), Civ.R. 8(C); Civ.R. 12(H). Further, even if immunity is asserted as an affirmative defense in a defendant’s answer, it still must be asserted in the motion for summary

judgment. *Leibson v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, 84 Ohio App.3d 751, 761, 618 N.E.2d 232 (8th Dist.1992). However, a summary judgment motion is not the proper format in which to raise an affirmative defense for the first time in a case. *Mossa v. W. Credit Union, Inc.*, 84 Ohio App.3d 177, 181, 616 N.E.2d 571 (10th Dist.1992). Affirmative defenses cannot be asserted for the first time in a motion for summary judgment. *Carmen v. Link* (1997), 119 Ohio App.3d 244, 695 N.E.2d 28.

{¶25} As previously discussed, a denial of summary judgment when immunity is asserted and claimed is a final, appealable order under *Hubbell*. However, that is not the case before this court. ECOT's motion for summary judgment asserted for the first time the affirmative defense of immunity. Supportive Solutions argued that ECOT waived the immunity defense by failing to raise it in its second amended answer. To cure this defect, ECOT moved for leave to file an amended answer to assert the defense, which was denied. Because leave was denied, immunity was not properly asserted; thus, immunity could not be and was not the basis for the trial court's denial of ECOT's motion for partial summary judgment. Therefore, the denial of ECOT's motion for partial summary judgment falls under the general rule that a denial of summary judgment is not a final, appealable order.

{¶26} In *Dawson v. Cleveland*, 8th Dist. No. 94510, 2010-Ohio-5142, this court considered a similar case. In *Dawson*, the City raised the immunity defense in its answer, but failed to assert the defense in its motion for summary judgment; rather, the City asserted the defense for the first time in its reply brief in support of its motion for summary judgment. The trial court struck the City's reply brief and then denied the City's motion for summary judgment. The City immediately filed an appeal under the guise of *Hubbell*. This court held that because the trial court struck the reply brief, which raised the immunity defense, "the immunity argument was neither before, nor decided by, the trial court." *Id.* at ¶11. Therefore, the denial of the City's motion for summary judgment did not deny the City the benefit of an alleged immunity. *Id.* Therefore, R.C. 2744.02 did not apply, but rather R.C. 2505.02 applied and an order denying summary judgment is not a final, appealable order. *Id.* at ¶ 12, citing *State ex rel. Overmeyer v. Walinski*, 8 Ohio St.2d 23, 222 N.E.2d 312 (1966).

{¶27} Much like the case before us, the trial court's decision denying ECOT leave to amend its answer rendered the immunity argument raised in its motion for summary judgment to have no legal effect. Therefore, the immunity argument was neither before the trial court, decided by the trial court, nor the basis for summary judgment denial; as such, the order denying partial summary

judgment became an interlocutory order. As previously concluded, the *ECOT I* holding and order divested this court of jurisdiction to consider the interlocutory orders on appeal. Accordingly, we lack jurisdiction to consider ECOT's second, third, and fourth assignments of error raised in App. No. 95287.

IV. Conclusion

{¶28} The decision in *ECOT I* vacated portions of the final judgment, which was the basis for the final, appealable order filed with this court. Accordingly, because we now lack a final, appealable order, this court lacks jurisdiction to consider the issues raised on appeal. Moreover, we hold that the denial of leave to file an amended answer to assert the affirmative defense of political subdivision immunity does not fall under the broad holding of *Hubbell*, and thus, is not in and of itself a final, appealable order.

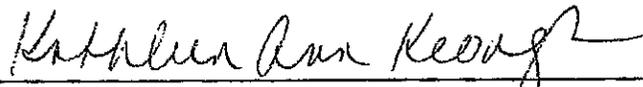
{¶29} Dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KATHLEEN ANN KEOUGH, JUDGE

LARRY A. JONES, SR., P.J., and
SEAN C. GALLAGHER, J., CONCUR



62728393

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

SUPPORTIVE SOLUTIONS, LLC
Plaintiff

ELECTRONIC CLASSROOM OF TOMORROW ETAL
Defendant

Case No: CV-08-652873

Judge: RONALD SUSTER

JOURNAL ENTRY

D1 ELECTRONIC CLASSROOM OF TOMORROW MOTION FOR LEAVE TO AMEND ANSWER PAUL W FLOWERS
0046625, FILED 03/01/2010, IS DENIED.

Judge Signature

04/19/2010

04/16/2010

RECEIVED FOR FILING
04/19/2010 10:13:37
By: CLPAL
GERALD E. FUERST, CLERK



62846036

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

SUPPORTIVE SOLUTIONS, LLC
Plaintiff

ELECTRONIC CLASSROOM OF TOMORROW ETAL
Defendant

Case No: CV-08-652873

Judge: RONALD SUSTER

JOURNAL ENTRY

DEFENDANT(S) ELECTRONIC CLASSROOM OF TOMORROW(D1), ALEX KADENYI(D2) and BRADLEY S MARTENSEN(D3) MOTION FOR PARTIAL SUMMARY JUDGMENT PAUL W FLOWERS 0046625, FILED 01/29/2010, IS GRANTED IN PART.

MOTION OF DEFENDANTS' (FILED 01/29/2010) FOR PARTIAL SUMMARY JUDGMENT IS GRANTED IN PART. THE COURT, HAVING CONSIDERED ALL THE EVIDENCE AND HAVING CONSTRUED THE EVIDENCE MOST STRONGLY IN FAVOR OF THE NON-MOVING PARTY, DETERMINES THAT REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION, THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AS TO PLAINTIFF'S CLAIMS FOR FRAUD AND INTENTIONAL MISREPRESENTATION, AND THAT DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

ALL OTHER CLAIMS REMAIN PENDING AND SHALL BE RESOLVED AT THE SCHEDULED TRIAL.

Judge Signature

04/23/2010

04/23/2010

RECEIVED FOR FILING
04/26/2010 08:54:02
By: CLPAL
GERALD E. FUERST, CLERK

CASE NO. CV 08 - 652873

ASSIGNED JUDGE JAMES D. SWEENEY

SUPPORTIVE SOLUTIONS, LLC ET AL

VS

ELECTRONIC CLASSROOM OF TOMORROW ET AL

<input type="checkbox"/> 02 REASSIGNED	D I S P O S I T I O N	<input checked="" type="checkbox"/> 81 JURY TRIAL	<input type="checkbox"/> 81 DIS. W/PREJ
<input type="checkbox"/> 03 REINSTATED (C/A)		<input type="checkbox"/> 82 ARBITRATION DECREE	<input type="checkbox"/> 91 COGNOVITS
<input type="checkbox"/> 04 REINSTATED		<input type="checkbox"/> 83 COURT TRIAL	<input type="checkbox"/> 92 DEFAULT
<input type="checkbox"/> 20 MAGISTRATE		<input type="checkbox"/> 85 PRETRIAL	<input type="checkbox"/> 93 TRANS TO COURT
<input type="checkbox"/> 40 ARBITRATION		<input type="checkbox"/> 86 FOREIGN JUDGMENT	<input type="checkbox"/> 95 TRANS TO JUDGE
<input type="checkbox"/> 65 STAY		<input type="checkbox"/> 87 DIS. W/O PREJ	<input type="checkbox"/> 96 OTHER
<input type="checkbox"/> 69 SUBMITTED		<input type="checkbox"/> 88 BANKRUPTCY/APPEAL STAY	



STATUS FORM

NO. JURORS 9

START DATE 06 / 03 / 2010

END DATE 05 / 07 / 2010

COURT REPORTER DIANE CIEPLY

START DATE 05 / 03 / 2010

END DATE 05 / 07 / 2010

PARTIAL

FINAL

POST CARD

DATE 05 / 07 / 2010 (NUNC PRO TUNC ENTRY AS OF & FOR ___ / ___ / ___)

CLERK OF COURT

ON TRIAL. ALTERNATE JUROR IS EXCUSED. JURY RETIRES TO DELIBERATE.

JURY RETURNS VERDICT FOR PLAINTIFF, SUPPORTIVE SOLUTIONS AGAINST DEFENDANT ELECTRONIC CLASSROOM OF TOMORROW, ET AL FOR \$1,000,000.00 (ONE-MILLION DOLLARS) FOR DAMAGES ON PLAINTIFFS CLAIM FOR BREACH OF IMPLIED CONTRACT.

JURY RETURNS VERDICT FOR PLAINTIFF SUPPORTIVE SOLUTIONS AGAINST DEFENDANT, ELECTRONIC CLASSROOM OF TOMORROW, ET AL FOR \$120,000.00, (ONE-HUNDRED, TWENTY-THOUSAND DOLLARS) FOR NEGLIGENT MISREPRESENTATION.

JURY RETURNS VERDICT FOR PLAINTIFF, SUPPORTIVE SOLUTIONS AGAINST DEFENDANT, ELECTRONIC CLASSROOM OF TOMMOROW, ET AL FOR \$86,400.00. (EIGHT-SIX THOUSAND, FOUR-HUNDRED DOLLARS) FOR BREACH OF EXPRESS CONTRACT.

COURT COSTS CHARGED TO DEFENDANT.

JOURNAL

RECEIVED FOR FILING

MAY 11 2010

GERALD E. FUERST, CLERK
BY [Signature] DER

James D. Sweeney
JUDGE

CPC 43-2