

IN THE SUPREME COURT OF OHIO

CASE NO. 12-0790

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

-vs-

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

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

**PLAINTIFF-APPELLEE'S BRIEF MEMORANDUM IN OPPOSITION OF
JURISDICTION OF DEFENDANT-APPELLANT, ELECTRONIC CLASSROOM
OF TOMORROW**

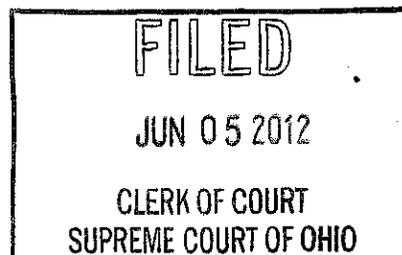
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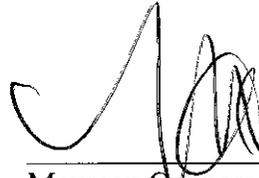


CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief in Opposition has been sent by e-mail and regular U.S. Mail, on this 5th day of June, 2012 to:

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STATEMENT OF ISSUES PUBLIC AND GREAT GENERAL IMPORTANCE

Bolstered by their previous appearance before this Court in *State ex rel. Electronic Classroom of Tomorrow vs. Cuyahoga County Court of Common Pleas, et al.*, case number 2010-1401, which vacated portions of the trial verdict and which determined that Defendant-Appellant Electronic Classroom of Tomorrow (“ECOT”) is a political subdivision for the purposes of posting a supersedeas bond, ECOT now comes before this Court to succor favor in establishing new law and entitlements for political subdivisions such as themselves.

The Eighth District’s dismissal order of March 22, 2012 resolved issues regarding denial of leave to file an amended answer to assert the affirmative defense of political subdivision immunity. The matters before this Court are not as complicated, urgent, or in need of review as ECOT would have this Court believe. Quite simply, and in line with years of case precedent on this very subject, the Eighth District determined that denial of leave to file an amended answer to assert the affirmative defense of political subdivision immunity does not fall under the broad heading of *Hubbell v. Xenia*. 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878. Defendant-Appellant ECOT now comes before this Court under the guise of this issue being of public and great general importance in order to establish new precedent that will undo years of clearly established case law and upend the Civil Rules of Procedure, both of which make clear that an affirmative defense can be waived if it is not timely asserted, including the defense of immunity. As the Eighth District itself states in its decision which is the subject of this appeal, “We find our interpretation of *Hubbell* consistent with the waiver provisions of the Ohio Rules of Civil Procedure. . . 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.” ECOT comes

before this Court asking for an exception to be made for them by using the *Hubbell* decision as the basis for exception. This issue was addressed by the Eighth District in its decision: “To expand *Hubbell* to include orders such as denial 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.” No matter of public and great general importance exists in reality or before this Court. This issue has long been decided.

The second alleged issue of public and great general importance in the eyes of ECOT involves the trial court’s denial of their motion for summary judgment. The Eighth District’s reasoning behind this issue too is sound and need not be revisited by this Court. The Eighth District states 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.” (See Court of Appeals opinion dated March 22, 2012 page 12 or ECOT Appendix Pg 14). ECOT raised for the first time its immunity defense in its summary judgment motion, rather than early on as is expected and as is established. A long line of judicial authorities has been established that clearly indicates that affirmative defenses cannot be asserted for the first time in a motion for summary judgment. *Mossa v. W. Credit Union, Inc.*, 84 Ohio App.3d 177, 181, 616 N.E.2d 571 (10th 1992); *Carmen v. Link* (1997), 119 Ohio App.3d 244, 695 N.E.2d 28. Afterwards, ECOT moved to amend their answer to include the immunity defense; however, the immunity argument was not properly before the Court at the time of the denial of partial summary judgment on this specific ground. The immunity defense never having been established prior to ECOT’s Motion for Partial Summary Judgment was not before the trial court not decided by the

trial court and was therefore not a basis for summary judgment denial. As with the issue involving denial of leave to file an amended answer, this particular issue regarding denial of motion for summary judgment has been before this Court. It is hardly new nor is it of public and great general importance other than to establish new entitlements for Goliath political subdivisions such as Defendant-Appellant ECOT.

ARGUMENT

PROPOSITION OF LAW I:

PROPOSITION OF LAW I: DENIAL OF LEAVE TO FILE AN AMENDED ANSWER TO AO ASSERT THE AFFIRMATIVE DEFENSE OF POLITICAL SUBDIVISION IMMUNITY DOES NOT FALL UNDER THE BROAD HOLDING OF *HUBBELL*. *Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007-Ohio-4839, 873 N.E. 2d 878.

ECOT relies on *Hubbell* to the extent that this 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).” *Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007-Ohio-4839, 873 N.E. 2d 878. The Eighth District’s reasoning behind determining that the broad interpretation of the *Hubbell* court does not encompass motions for leave to file amended responsive pleading is sound and well-established in a long line of judicial authorities. To expand and broaden *Hubbell*, as ECOT is inclined to have this Court do, would be to open the door “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.” (See Court of Appeals opinion dated March 22, 2012 page 10 or ECOT Appendix Pg 12). This Court

should reward the vigilant and not those who sleep on their rights. This is particularly so for those who then later attempt to assert the rights under faulty reasoning and on the basis of entitlement.

Even the abuse of discretion standard has been contemplated and decided by this Court as seen in the decision from *Turner vs. Central Local School District*, 85 Ohio St.3d 95, 1999-Ohio-207, 706 N.E.2d 1261. Political subdivision immunity is not a right which is automatic. It must be asserted in the form of an affirmative defense. Much to ECOT's detriment and chagrin, it waived its ability to raise as an affirmative defense that it is a political subdivision. 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* (1994), 68 Ohio St.3d 590, 594, 629 N.E.2d 446, 450; see also *Krieger v. Cleveland Indians Baseball Co.*, 2008-Ohio-2183, 892 N.E.2d 461 (Ohio Ct. App. 8th Dist. Cuyahoga County 2008); Civ.R. 8(C); Civ.R. 12(H). ECOT's introduction of political subdivision status less than three months before trial is hardly considered a "timely" assertion of the affirmative defense. Asking for leave to Amend its Answer to include the newly discovered affirmative defense less than two months before trial is most definitely an untimely filing.

The situation that is most analogous to ECOT's plight is again aptly found in *Turner v. Cent. Local School Dist.*

Central, a school district and thus a political subdivision, clearly had the right to rely upon the immunity provisions found in the *Political Subdivision Tort Liability Act*, R.C. Chapter 2744. See R.C. 2744.01(F). In fact, as a matter of course, a properly pleaded answer should have included the statutory-immunity defense. This is so because, in most cases, the Act could provide a complete defense to a negligence cause of action. However, Central failed to include this defense. If it intended to rely on statutory immunity, it had the responsibility to assert it in a timely fashion. It was perfectly reasonable for appellants to

assume that in the absence of Central's failure to assert this defense, and its failure to argue this issue in its first motion for summary judgment, it intended to waive the defense.

Further, Justice Pfeifer in his concurring opinion stated: "While the school district in this case did waive its immunity defense, in my view it was a defense that never existed." *Id.*

As the Eighth District states, "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. *Hubbell* does not apply as there was no "denial" of the "benefit" of an "alleged immunity" by the trial court's decision to deny leave to file an amended answer.

PROPOSITION OF LAW II:

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.

ECOT alleges that they are a political subdivision and therefore had an immediate right of appeal when they were denied the right to argue that they were immune from the torts that were alleged against them. ORC 2744.02 First, Supportive Solutions denies that ECOT is a political subdivision ORC 2744.01E defines a political subdivision a "... school district responsible for governmental activities in a geographic area *smaller than that of the state.*" (Emphasis added.) Being an *electronic online* charter school, ECOT

admission is open to students in the *entire state*, not a geographic area smaller than that of the state.

Furthermore, the immunity ECOT seeks stems from their affirmative defense of being a political subdivision. Because ECOT did not plead such a defense, it was improperly before the court in its summary judgment motion. The proper place to even ask for permission to be able to argue that the immunity exists, is in a Motion for Leave to File an Amended Answer, the denial of which is reviewed on an abuse of discretion standard and something that the Supreme Court should not even be reviewing. Supportive Solutions never had the opportunity to brief whether ECOT is or is not a political subdivision and therefore entitled to argue that they are immune because it was never pled. Because it was never pled, it was never before the trial court, never decided by the appellate court, and has nothing to do with the denial of summary judgment.

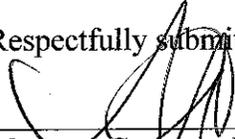
Denial of summary judgment has nothing to do with the immediate right of appeal that ECOT sought under 2744.02. The denial of the Motion to Amend the Answer (so that ECOT could properly plead that it is a political subdivision and its immunity defense) arguably may have been a denial subject to immediate review under 2744.02, but that right does not extend to other judgment entries or orders that have no weight or bearing on ECOTs immunity. To attempt to add the denial of summary judgment to the appeal is without merit because based on this court's prior decision, the court of appeals had no jurisdiction to consider an interlocutory order. ORC 2505.02 *Dawson v. Cleveland*, 8th Dist. No. 94510, 2010-Ohio-5142. The court of appeals stated that an amended appeal ought to have been filed so as to argue that the Motion for Summary Judgment would also be before the court.

ECOT is misstating what the actual underlying issue is. The 8th District Court of Appeals did not create a new standard with judicial precedents governing App. R.3. The cases that ECOT relies on *Maritime Mftrs., Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 436 N.E.2d 1034; *Barksdale v. Van's Auto Sales, Inc.* (1988), 38 Ohio St. 3d 127, 527 N.E. 2d 284; and *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 649 N.E.2d 1229 are all misapplied here. The court gave these appellants leniency because of the errors made by the appellants: the assignment of error was listed improperly, the wrong order was designated, and et al was used improperly. These cases are cited merely to blur the issues. ECOT did not include the summary judgment issue in the appeal when it was filed because 2744.02 does not give a political subdivision an immediate right to appeal a summary judgment decision that was decided on issues other than 2744.02. What ECOT is doing now is creating facad for this Court so that it appears the the 8th District has created some new policy or procedure opening the door to make the application of 2744.02 more difficult. When in fact what has happened is ECOT is trying to find a backdoor to sneak through so as to be allowed to start from scratch and properly plead its immunity defense that it waived when it failed to plead it before.

CONCLUSION

For the foregoing reasons, this Court should deny jurisdiction to review the issues.

Respectfully submitted,



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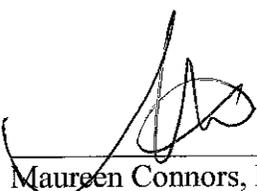
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