

IN THE SUPREME COURT OF OHIO
CASE NO. 2012-0790

SUPPORTIVE SOLUTIONS TRAINING ACADEMY, LLC,
Plaintiff-Appellee,

vs.

ELECTRONIC CLASSROOM OF TOMORROW,
Defendant-Appellant.

On Appeal From the Eighth Appellate District
Cuyahoga County, Ohio
Case Nos. 59022 and 95287

**MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF
CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANT
ELECTRONIC CLASSROOM OF TOMORROW**

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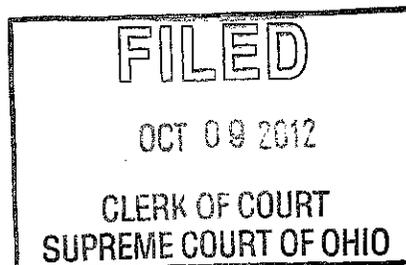
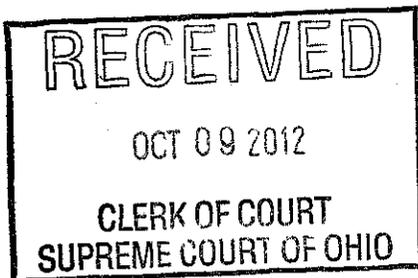
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TABLE OF CONTENTS

I. Interest of Amicus Curie 1

II. Statement of Facts 1

III. Legal Analysis 1

Proposition of Law No. 1: 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 vs. City of Xenia*, 115 O.S.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, approved and extended 1

A. The appealability of an order under R.C. 2744.02(C) depends upon its effect on the allegation of immunity, not its procedural context or rationale 2

B. R.C. 2744.02(C) does not distinguish between procedural and dispositive motions 4

C. Judicial preferences cannot override legislative policy 5

IV. Conclusion 7

Certificate of Service 8

TABLE OF AUTHORITIES

CASES

Hubbell v. City of Xenia,
115 O.S.3d 77, 2007-Ohio-4839, 873 N.E.2d 878. 1, 2, 3, 4, 5, 6

Mallozzi v. Nationwide Mut. Ins. Co.,
72 Conn. App. 620, 627-628, 806 A.2d 97 (Conn. App. Ct. 2002) 5

United States Fidelity & Guaranty Co. v. State Farm Mut. Auto Ins. Co.,
369 So.2d 410, 412, 1979 Fla. App. LEXIS 14706. 5

STATUTES

R.C. 2744.02(C) 1, 2, 3, 5, 6, 7

COURT RULES

Civ. R. 12(B)(6) 4

Civ. R. 12(C) 4

Civ. R. 56. 4

I. Interest of Amicus Curiae

The Ohio Association of Civil Trial Attorneys (“OACTA”) is a state-wide organization of more than 500 attorneys, corporate executives, and managers who devote a substantial portion of time to the defense of civil lawsuits. OACTA has long been a voice in both the Ohio General Assembly and this Court to ensure that the civil justice system is fair and efficient. A significant number of OACTA’s members are government and private practice lawyers and business executives who defend or manage tort claims against political subdivisions. OACTA therefore has interest in the fair and efficient resolution of claims against political subdivisions without unnecessary risk, delay, or taxpayer expense.

II. Statement of Facts

OACTA incorporates the Statement of Facts provided in the Merit Brief of Appellant Electronic Classroom of Tomorrow.

III. Legal Analysis

Proposition of Law No. 1: Any order that denies the benefit of an alleged immunity to a political subdivision, is immediately appealable pursuant to R.C. 2744.01(C), including the denial of a motion to amend the answer to include the defense. *Hubbell vs. City of Xenia*, 115 O.S.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, approved and extended.

The Eighth District held the trial court’s order denying ECOT’s motion to amend was not a final, appealable order under R.C. 2744.02(C), because:

- 1) the order was about the timeliness of ECOT’s motion for leave, not about immunity;
- 2) the order resolved a procedural motion, not a dispositive motion; and
- 3) the policy reasons underlying R.C. 2744.02(C) are counter-balanced by the court’s interest in timeliness.

These reasons confuse the *grounds* of an appealed order with the *appealability* of an order under R.C. 2744.02(C), overlooks both the purpose of ECOT’s motion for leave and the

practical effect of the trial court's order, misinterprets this Court's decision in *Hubbell*, and ignores the authority of the General Assembly to establish policy. Regardless of the procedural context of the motion being resolved, an order is appealable under R.C. 2744.02(C) when its effect is to deny the application or availability of an alleged immunity.

A. The appealability of an order under R.C. 2744.02(C) depends upon its effect on the allegation of immunity.

R.C. 2744.02(C) states:

An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

In *Hubbell*, this Court noted that the phrase "denies *the benefit of an alleged immunity*" necessarily includes non-final orders. (*Emphasis added*). In so doing, the Court implicitly acknowledged that the statute focuses on the *effect* of the order on the application or availability of an alleged immunity defense. The phrase "that denies" focuses the statute on what "an order" *does*, not its procedural context or rationale.

The Eighth District missed this point in finding that the trial court's order did not fall within R.C. 2744.02(C) because it was not "about" immunity. The Eighth District reasoned that:

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.

Supportive Solutions Training Acad. L.L.C. v. Elec. Classroom of Tomorrow, 8th Dist. Nos. 95022, 95287, 2012-Ohio-1185, ¶27 (*emphasis added*).

But R.C. 2744.02(C) is not limited to orders specifically “about” immunity in the sense that they determine “the *merits* of the case or whether [a political subdivision] *will be* immune.” (*emphasis added*). This was precisely the point in *Hubbell*, i.e., that the phrases “the *benefit* of” and “*alleged* immunity” extend the statute beyond final decisions on the merits of an immunity defense. The phrase “an order” is universally inclusive, without restricting either the nature of the order or the nature of the motion precipitating the order. The phrases “the benefit of” and “alleged defense” necessarily expand the scope of the statute beyond orders specifically addressing the merits of an immunity defense, to encompass any order which has the effect of depriving a political subdivision of the ability to even assert an immunity defense in the first place.

The Eighth District concluded that the trial court’s order was not “about” the merits of an immunity defense, but rather “about” the timeliness of the motion seeking leave to raise that defense. But by focusing on timeliness, the Eighth District confused the presumed *grounds* supporting the order with the *appealability* of that order. Regardless of whether ECOT’s motion was timely or whether the trial court abused its discretion in denying leave to amend, that question is wholly distinct from whether the *effect* of the trial court’s order was to deprive ECOT of an alleged immunity defense.

While perhaps based on considerations of timeliness, the trial court’s order foreclosed ECOT’s ability to assert an immunity defense. The policy considerations underlying R.C. 2744.02(C) require that ECOT be allowed to immediately appeal that order, in order to determine—prior to trial—whether it should be allowed to assert such a defense. Although

permission to assert the defense may have been denied on the grounds of timeliness, the timeliness of the motion should not be confused with the effect of its denial. ECOT's right of appeal derives from the *effect* of the order in denying ECOT the ability to assert an immunity defense. Concerns about timeliness are relevant only to the merits of the appeal.

B. R.C. 2744.02(C) does not distinguish between procedural and dispositive motions.

It appears that all prior cases in this Court and in the courts of appeals involving R.C. 2744.02(C) have addressed dispositive motions, i.e., motions to dismiss under Civ. R. 12(B)(6), motions for judgment on the pleadings under Civ. R. 12(C), or motions for summary judgment under Civ. R. 56. (See, e.g., *Hubbell vs. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶¶13-14 (discussing Court of Appeals' interpretations of R.C. 2744.02(C).) The Eighth District determined in this case that the statute should be confined to such motions, stating,

[T]o expand *Hubbell* to include orders such as denial of leave to file amended pleadings...would open the door for political subdivisions to challenge all adverse rulings potentially effecting its immunity defense. We do not believe *Hubbell* was intended to be read this broadly....

Supportive Solutions, 2012-Ohio-1185, ¶16.

This rationale ignores the plain language of the statute. As noted above, R.C. 2744.02(C) does not confine the scope of appealable orders to those that resolve dispositive motions, but rather uses the phrase "*an* order" without other qualification. (*emphasis* added). "An" is an indefinite article, signaling a general, broad, or unlimited application.

Dictionaries identify "a" and "an" as "indefinite" articles and define "indefinite" as "not defining or identifying," "not precise" or "having no fixed limit or amount." See, e.g., Merriam-Webster Dictionary (3d Ed. 1974); see also American Heritage Dictionary of the English Language (New College Ed. 1981) ("indefinite

article" is one "that does not fix or immediately fix the identity of the noun modified"); see also *Builders Service Corp. v. Planning & Zoning Commission*, 208 Conn. 267, 282, 545 A.2d 530 (1988) ("in statutory construction, unlike the definite article 'the,' which particularizes the words it precedes and is a word of limitation, the indefinite article 'a' has an 'indefinite or generalizing force'"). Thus, as stated by the trial court, "an" means "any"....

Mallozzi v. Nationwide Mut. Ins. Co., 72 Conn. App. 620, 627-628, 806 A.2d 97 (Conn. App. Ct. 2002); see also *United States Fidelity & Guaranty Co. v. State Farm Mut. Auto Ins. Co.*, 369 So.2d 410, 412, 1979 Fla. App. LEXIS 14706.

Thus, by its plain language, R.C. 2744.02(C) applies to "an order", i.e., "any order", which deprives a political subdivision of the benefit of an alleged immunity. There is no basis within the text of the statute to distinguish between procedural and dispositive orders. As this Court has repeatedly stated, including in *Hubbell* with regard to this very statute, "an unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language." *Hubbell*, at ¶11. Since the General Assembly broadly referred to "an order", i.e., "any order," this Court should not limit the phrase to mean only "a dispositive order." That this is the first known appeal of a procedural order does not disqualify it as "an order" under R.C. 2744.02(C). R.C. 2744.02 focuses on what an order *does*, not its procedural context.

C. Judicial preferences cannot override legislative policy.

The Eighth District further rationalized its decision as an appropriate balancing of policy considerations, stating,

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.

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.

Supportive Solutions, ¶¶16-17.

However, "judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy." *Hubbell*, at ¶22. A court may not favor its own "competing policy" considerations over policies expressly instituted by the General Assembly.

Moreover, as noted above, the scenario here is not an "expansion" or loosening of *Hubbell*'s interpretation of the statute. An order denying leave to amend is even more preclusive than an order denying summary judgment, as the immunity cannot be asserted at trial. As such, the scenario here fits within even the narrower interpretation of "denies" advocated by the dissent in *Hubbell*, in which Justice Pfeiffer argued that an order does not "deny" the benefit of an alleged immunity unless the defendant is precluded from asserting it at trial. That is the precisely the case here. If there is any "slippery slope" in the range of orders that could fall within R.C. 2744.02(C), the order here is much farther up the hill than even the order in *Hubbell*.

But the Eighth District's "slippery slope" concern is unrealistic anyway. The appealability of an order denying leave to amend will not cause complacency by political subdivisions, as the right of appeal does not assure that the order will be reversed. If the political subdivision was prejudicially complacent, the denial of leave may be upheld. Nor is it advantageous to lie in the weeds and wait to assert a defense that, if successful, would save the

fiscal resources of taxpayers by avoiding payment of unnecessary costs. Moreover, R.C. 2744.02(C) does not apply to orders which only tangentially or indirectly affect immunity. For example, an evidentiary ruling at trial may deprive a political subdivision of a particular piece of desired evidence, but that ruling does not deny the availability or application of the immunity defense as a whole. The political subdivision is still allowed to build the wall...it just can't use that particular brick. But where the order completely denies the political subdivision's ability to even begin building an immunity defense, it "denies the benefit of an alleged immunity" and is appealable under R.C. 2744.02(C).

Finally, it is far more consistent with the policy behind R.C. 2744.02(C) to permit immediate appeal of such an order. It ultimately benefits all parties if an appellate court can review an order precluding an immunity *prior* to the delay and expense of trial. The Eighth District's ruling means the parties would have to undergo a potentially meaningless trial before an appellate court can consider whether ECOT should actually have been allowed to assert its immunity. R.C. 2744.02(C) is intended to avoid precisely such wasted time and expense.

III. Conclusion

Although it was a procedural order based on timeliness, the effect of the trial court's order was to bar ECOT from asserting an alleged immunity. The plain language and policy reasons of R.C. 2744.02(C) apply to that order, since it had the effect of preventing the application or availability of an alleged immunity. Accordingly, OACTA respectfully submits that the Court should accept and adopt ECOT's proposition of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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