

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-0790

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 NOS. 95022 & 95287

MERIT BRIEF OF DEFENDANT-APPELLANT,  
ELECTRONIC CLASSROOM OF TOMORROW

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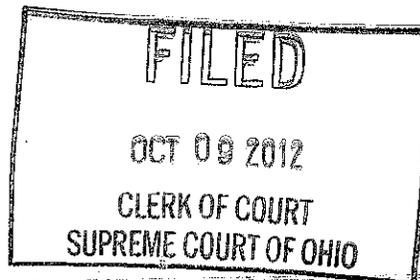
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## INTRODUCTION

This appeal poses the question of whether the right to immediate review afforded to political subdivisions by R.C. 2744.02(C) must be artificially confined to “dispositional-type” motions, such as orders denying motions to dismiss and for summary judgment. In this instance, the trial judge had summarily overruled a request to amend the Answer to specifically raise the defense of political subdivision immunity. *Apx. 00023*. The defense had been argued at length in a Motion for Summary Judgment that had been timely filed, roughly three months prior to trial. Plaintiff-Appellee, Supportive Solutions Training Academy, L.L.C., never established that it would suffer any prejudice by the amendment, other than the termination of several claims on the grounds of immunity. Although the puzzling denial of leave completely precluded the indisputably valid defense from being pursued, the Eighth District held that the benefit of the alleged immunity had not been sufficiently denied within the meaning of R.C. 2744.02(C). *Apx. 00012-17*.

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 to be immediately appealable, but must do so in the context of “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 unprecedented “dispositional-type” motion test, this Court should reverse the Eighth District and hold that any order that precludes an immunity defense from being pursued falls within the scope of R.C. 2744.02(C). In the interest of judicial economy and expediency, the trial court’s untenable denial of leave to amend should also be overturned and partial summary judgment should be entered in favor of Defendant-Appellant, Electronic Classroom of Tomorrow, on the basis of political subdivision

immunity.

### 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* (emphasis original). 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 Supportive Solutions proceeded to file on March 4, 2008 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). *Case No. 652873*. 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.” *Complaint*, p. 23. Although unclear, the Complaint suggested that no more than 200 students had been receiving these educational services from Supportive Solutions. *Id.*, 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.

Defendants ECOT, Alex Kadenyi (“Kadenyi”), and Bradley S. Martensen (“Martensen”), submitted their timely Answer on June 25, 2008, denying that anything further was owed under the Service Agreements. The pleading also included a Counterclaim seeking a refund of the amounts that had been overpaid. Inadvertently, the affirmative defenses had been deleted from the document prior to filing, including one asserting statutory immunity.

An Amended Complaint followed on December 18, 2009, that joined Lucas

County Education Service Center ("LCESC") as a New Party Defendant. A Ninth Cause of Action was added for "Tortious Interference with Business Relations" against this governmental agency. *Id.*, pp. 25-28. Notably, Supportive Solutions specifically alleged that "Lucas County is also a political subdivision." *Id.*, p. 26, ¶143.

Defendants ECOT, Kadenyi, and Martensen submitted their Answer on January 16, 2009, which adopted their prior Answer by reference.<sup>1</sup> Defendant LCESC moved for a dismissal on immunity grounds on January 29, 2009, which Supportive Solutions opposed. The Motion was granted on February 10, 2009.

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 imaginative 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 correct this oversight, 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 include the missing affirmative defense. 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

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<sup>1</sup> The pleading was titled "Answer of Defendants to Plaintiff's Second Amended Complaint."

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 defense counsel 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.

The Motion for Leave to Amend Answer remained pending for over six weeks. 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. 00023.*

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. 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.

Citing R.C. 2744.02(C), ECOT and the individual Defendants appealed the denial of political subdivision immunity later that afternoon. *8<sup>th</sup> 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
Breach of Express Contract	\$86,400.00

*See Journal Entry dated May 11, 2010.* Defense verdicts were entered in favor of Kadenyi and Martensen. *Id.* Following post-trial proceedings, pre-judgment interest was also awarded. *See Journal Entry dated June 14, 2010.* The only remaining Defendant, ECOT, filed a second Notice of Appeal on June 17, 2010. *8<sup>th</sup> Dist. Case No. 95287.*

Civ. R. 62(C) allows political subdivisions to secure a stay of execution without bond, which Defendant ECOT invoked in a Motion dated May 14, 2010. 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. *Case No. 2010-1401.* A decision was released on February 16, 2011, granting the writs. The majority 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.*, 00010-21. Jurisdiction was accepted by this Court on July 25, 2012. *Supportive Solutions Training Acad., L.L.C. v. Electronic Classroom of Tomorrow*, 132 Ohio St. 3d 1481, 2012-Ohio-3334, 971 N.E. 2d 960.

### ARGUMENT

**PROPOSITION OF LAW: 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.**

#### **A. ECOT'S RIGHT TO IMMEDIATE REVIEW**

##### **1. The Benefit of an Alleged Immunity Test**

Defendant ECOT does not disagree with the Eighth District's determination that the ruling in *Electronic Classroom of Tomorrow*, 129 Ohio St. 3d 30, renders the jury trial a "nullity" and returns this action to the *status quo ante* that existed when the first Notice of Appeal was filed on April 26, 2010. *Apx.*, 00010-12, ¶5-7. Appellate jurisdiction still remained, however, to review the order that had been issued seven days earlier, denying leave to amend the Answer to include the immunity defense. *Id.*, 00023. To this limited extent, the appellate court erred by declining to reverse the unjustifiable ruling and hold that Defendant ECOT is entitled to protection under R.C. 2744.02 with regard to all claims, except for breach of express contract.

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 legislature’s decidedly broad language, 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 finding 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.

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 when the prospect for later

establishing the defense remains available. *Laurie v. City of Cleveland*, 8<sup>th</sup> Dist. No. 91665, 2009-Ohio-869, 2009 W.L. 483175, p. \*2, ¶14 (Feb. 26, 2009); *Fogle v. Village of Bentleyville*, 8<sup>th</sup> Dist. No. 88375, 2008-Ohio-3660, 2008 W.L. 2837123, p. \*1, ¶2-6 (July 24, 2008). 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.

As even the Eighth District observed, Defendant ECOT will be deemed to have lost the immunity defense if an amendment is not permitted to the Answer. *Apx. 00016-17, ¶18-17*. Logically then, the trial court’s order was as “final” with regard to immunity defense as one can ever 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 challenge to the trial court’s unexplained denial of leave must now wait until after a second trial is conducted upon Supportive Solutions’ far-fetched tort and *quasi-contract* claims. All of the benefits flowing from an early resolution of the dispute that had been identified in both the *Burger* dissent and the *Hubbell* majority opinion will be lost, which is particularly troubling given 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 opinion had adopted a "broad interpretation" of R.C. 2744.02(C). *Apx.*, 00015, ¶15. Moreover, the holding cannot be confined just to motions for summary judgment. *Id.*, 00014, ¶13. Defendant ECOT does not disagree.

But even though the *Hubbell* syllabus offers no exceptions to the sensible standard that was approved by this Court, the appellate court 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." *Apx.* 00015, ¶16 (citations omitted). No attempt was made to explain why such rulings – which do not necessarily preclude an immunity defense from being successfully established later in the proceedings – are somehow more "final" than an order that prohibits the defense from being raised at all. *Id.*

The Eighth District further maintained 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. \*\*\*

*Apx.* 00017, ¶20. With all due respect, this is just sophistry. In *Hubbell*, 115 Ohio St. 3d at 77-78, the trial judge had not rendered any "determination about immunity." The Court merely held that a genuine issue of fact existed on the defense, and refused to grant summary judgment. *Id.* at 78, ¶4. The Second District then reasoned in the ensuing appeal:

\*\*\* When the trial court denies a motion for summary judgment because it finds that there are genuine issues of material fact as to the government's immunity, the trial court has not yet adjudicated the issues of whether the political subdivision or its employee is entitled to the benefit of the alleged immunity. In other words, the trial court has concluded that the state of the record does not permit an adjudication of that issue due to the question of fact. In our view, a governmental entity or its employee is not denied the benefit of immunity until the issue of whether the government or its employee is entitled to immunity has been fully resolved. [emphasis added].

*Hubbell v. City of Xenia*, 167 Ohio App. 3d 294, 298, 2006-Ohio-3369, 854 N.E. 2d 1133, 1136, ¶13. That argument is indistinguishable from the Eighth District's own interpretation of the term "denial." *Apx. 00017*, ¶20. But this Court reversed the Second District and held, in no uncertain terms, that a "denial" encompasses more than just an adjudication on the merits. *Hubbell*, 115 Ohio St. 3d at 78-81. By refusing to allow ECOT to avoid the waiver by amending the Answer, the trial judge plainly and unmistakably "denied the benefit of an alleged immunity" under any sensible understanding of the phrase.

The line that has been drawn is purely artificial. In the proceedings below, for example, Judge Suster did not have to adjudicate the immunity issue solely in response to the Motion for Leave to Amend Answer. In overruling Defendants' Motion for Partial Summary Judgment in part, he could have explicitly held that the defense had been waived in the pleadings. The Eighth District would presumably agree in that instance that an immediate review was permitted because immunity had been denied in a "dispositional-type" motion. *Apx. 00015*, ¶16. Appellate jurisdiction would then turn solely upon how the trial judge elected to characterize his ruling, which has no support in the text of R.C. 2744.02(C).

The appellate court also predicated the restrictive interpretation of the statute upon the belief "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." *Apx. 00015*, ¶17. This "deterrent theory" suffers from a number of fundamental flaws, one of which is that claims and defenses are rarely (if ever) left out of the pleadings as a result of a careful analysis of the pros and cons of the omission. And any litigant who is denied leave to amend will still retain the right to appellate review of the ruling. The General Assembly has simply allowed political subdivisions to appeal immediately when the benefit of an alleged immunity has been

denied, rather than have to wait until all claims have been adjudicated at the trial court level. *R.C. 2744.02(C)*. The notion that a restrictive interpretation of the statute will encourage error-free pleading is simply too attenuated to be afforded any credence.

It is also troubling that the appellate court had been peering into the merits of the appeal while determining that appellate jurisdiction was lacking. *Apx. 00015-17, ¶17-20*. In finding that denials of leave to amend an answer are not worthy of the same status as “dispositional-type” motions, the panel was plainly intimating that Defendant ECOT lacked a valid justification for first raising the immunity defense only three months prior to trial. *Id., 00016, ¶18* (“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.”) The readily apparent problem with such reasoning is that jurisdiction must be resolved before the merits are broached. *Hitt v. Tressler*, 4 Ohio St. 3d 174, 175, 447 N.E. 2d 1299, 1301 (1983); *Burns v. Daily*, 114 Ohio App. 3d 693, 700, 683 N.E. 2d 1164, 1168 (11<sup>th</sup> Dist. 1996). By all appearances, Supportive Solution’s waiver argument was accepted by the appellate court and then used as a justification for dismissing the appeal for lack of a final order. *Apx. 00014-17, ¶16-20*.

## **2. The Purported Threat of “Abuse”**

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. 00015-16, ¶17*. Such a bizarre gamble makes no sense. A defendant that deliberately withheld the affirmative defense would lose the opportunity to assert immunity in either a Rule 12(B)(6) motion to dismiss or a Rule 12(C) motion for judgment on the pleadings. If the assertion of the defense was postponed long enough, the right to seek summary judgment under Rule 56 could also be forfeited. Each of those mechanisms already offers a substantially more certain opportunity to prolong the

proceedings with an interlocutory appeal. The undeniable verity is that a political subdivision that intends to “abuse” the judicial process can already do so at multiple points in the litigation under *Hubbell*, 115 Ohio St. 3d 77.

There has never been any serious suggestion in these proceedings that Defendant ECOT had made a calculated decision to eliminate all the affirmative defenses from the Answers that were filed. Leave to amend the pleadings had been sought less than two weeks after Supportive Solutions had first asserted that immunity had been waived. Deliberately withholding an affirmative defense would make sense only if a political subdivision’s attorney was confident that it had no chance of succeeding. Sufficient mechanisms already exist to redress such misconduct. *App. R. 23; Civ. R. 11; R.C. 2323.51.*

There is no legitimate reason to fear that the appellate system will soon be overwhelmed if political subdivisions are allowed to seek immediate review in appropriate instances of orders denying leave to include an immunity defense in an answer. Such rulings are uncommon, as this Court has squarely held that revisions to an answer should be allowed unless the plaintiff will be “seriously” prejudiced. *Hoover v. Sumlin*, 12 Ohio St. 3d 1, 5, 465 N.E. 2d 377, 380 (1984), quoting *Bobbitt v. Victorian House, Inc.*, 532 F. Supp. 734, 736 (N.D. Ill. 1982). Indeed, the Eighth District specifically observed that the instant appeal presented a question of “first impression[.]” *Apx. 00013, ¶11.* Given that immediate appeals have been allowed under R.C. 2744.02(C) for over nine years, this issue surely would have surfaced some time ago if political subdivisions are indeed scrounging for new opportunities to abuse the justice system.

### **3. The Plain and Ordinary Meaning of the State**

The effort to rework R.C. 2744.02(C) out of unsubstantiated concerns for potential abuse cannot be reconciled with R.C. 1.42, which requires statutes to be

construed “according to the rules of grammar and common usage.” “In construing a statute, it is the duty of the court to give effect to the words used in [the] statute, not to insert words not used.” *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 331, 2010-Ohio-1829, 928 N.E.2d 421, 425, ¶22, quoting *State of Ohio v. S.R.*, 63 Ohio St.3d 590, 595, 589 N.E.2d 1319 (1992). 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.*, 81 Ohio App. 3d 263, 268, 610 N.E.2d 1061, 1064-1065 (9<sup>th</sup> Dist. 1992). Since the Eighth District has significantly curtailed the scope of R.C. 2744.02(C) in a manner that the General Assembly never authorized, or this Court ever countenanced, a reversal is in order.

## **B. ECOT’S ENTITLEMENT TO IMMUNITY**

### **1. Scope of Supreme Court Review**

In the event that this Court concludes that the trial court’s order of April 19, 2010 (*Apx. 00023*), was properly and timely appealed, then an abuse of discretion should be found with respect to the denial of leave to amend the Answer and partial summary judgment should be granted upon the immunity defense. This protracted lawsuit has now been pending for over four and half years, and remanding this pivotal issue for further consideration will produce even more delay. In the interest of judicial economy and expediency, this Court is fully entitled to adjudicate issues that the appellate court left unresolved. *Apel v. Katz*, 83 Ohio St. 3d 11, 18, 1998-Ohio-420, 697 N.E. 2d 600, 606-607; *Painter & Pollis*, *OHIO APPELLATE PRAC.* (2011-12 Ed.) 248, Section 8:51. The parties have fully briefed the issue of whether the revisions are justified, as well as the appropriateness of summary judgment, and the Eighth District is in no better position to adjudicate these issues than this Court.

### **2. Liberal Allowance of Pleading Revisions**

The Ohio Rules of Civil Procedure advocate a permissive approach to revising the

pleadings when necessary, as Rule 15(A) specifically directs that: "Leave of court shall be freely given when justice so requires." Consequently, new defenses are traditionally permitted prior to trial so long as there is no demonstration of bad faith, undue delay, or unfair prejudice. *U.S. Bank, N.A. v. Wilkens*, 8<sup>th</sup> Dist. No. 93088, 2010-Ohio-262, 2010 W.L. 323432, p. \*5 (Jan. 28, 2010). This Court has confirmed 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*, 12 Ohio St. 3d 1, 5, 465 N.E. 2d 377, 380, quoting *Bobbitt v. Victorian House, Inc.*, 532 F. Supp. at 736. Consistent with *Hoover*, 12 Ohio St. 3d 1, the Eighth District had recognized in an earlier appeal that an abuse of discretion will be found when leave to amend is denied with no apparent or stated reason. *Pfizenmayer v. Nair*, 8<sup>th</sup> Dist. No. 71218, 1997 W.L. 298074, p. \*5 (June 5, 1997). The same sound principle applies when a plaintiff seeks to amend his/her pleadings. *Birmingham Fire Ins. Co. v. River Downs Race Track*, 26 Ohio App. 3d 139, 140-141, 499 N.E. 2d 18, 20 (1<sup>st</sup> Dist. 1985).

In justifying special treatment for orders denying leave to amend, the Eighth District had discussed *Turner v. Central Loc. Sch. Dist.*, 85 Ohio St. 3d 95, 1999-Ohio-207, 706 N.E. 2d 1261, at length. *Apx. 00016-17, ¶19*. In that instance, summary judgment had been granted in favor of a school district upon a wrongful death claim, which was successfully appealed and reversed. *Id.*, 85 Ohio St. 3d at 96. After the action was remanded, the school district sought leave to amend the answer to include the immunity defense. *Id.* at 96. The request was granted that same day. *Id.* The trial judge then proceeded to enter summary judgment a second time, notwithstanding the reversal that had been ordered in the earlier appeal. *Id.* at 96-97. Not surprisingly, this Court concluded that an abuse of discretion had been committed. *Id.* at 99. The

majority was “particularly troubled by the fact that [the district’s] motion did not give a rationale for its failure to properly assert this affirmative defense in its answer to its original complaint or its failure to do so in the ensuing two years and ten months.” *Id.* at 99.

The Eighth District concluded below that *Turner* “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.’” *Apx. 00016-17, ¶19* (citation omitted). Defendant ECOT has never suggested anything to the contrary, and certainly does not expect royal treatment. But to the extent the Court intended to imply that *Turner* justifies the denial of the charter school’s motion for leave to amend, ECOT strenuously disagrees. The Motion for Leave to Amend Answer that had been filed on March 1, 2001 fully detailed the justifications for permitting the revision, and was not granted on the day of filing (or at all). The request had been made less than two weeks after Supportive Solutions raised the waiver argument, which was the first notice that there was a deficiency in the Answer. The circumstances that were at issue in *Turner*, 85 Ohio St. 3d 95, are thus distinguishable.

### **3. The Unexplained Denial of Leave**

In contravention of these precedents, Judge Suster never offered any explanation for why he summarily denied ECOT’s request to amend their Answer. *Apx. 00023*. An abuse of discretion has thus been established. *McGregor v. Armeni*, 10<sup>th</sup> Dist. No. 89AP-1500, 1990 W.L. 179981, p. \*2 (Nov. 20, 1990) (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*, 8<sup>th</sup> Dist. No. 90499, 2008-Ohio-4223, 2008 W.L. 3870623, pp. \*2-3 (Aug. 21, 2008) (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); *Keiber v. Spicer Constr. Co.*, 2<sup>nd</sup> Dist. No. 94-CA-95, 1995 W.L. 655946, pp. \*2-3 (Nov. 8, 1995) (trial court did not abuse its discretion in granting leave for defendant to file amended answer asserting a statute of limitations defense); *Parks v. Teledyne Ohiocast*, 2<sup>nd</sup> Dist. No. 2471, 1988 W.L. 101978, p. \*2 (Sept. 29, 1988) (trial court erred in denying leave to file amended answer withdrawing a statute of limitations defense); *Hoskinson v. Lambert*, 5<sup>th</sup> Dist. No. 06 CA 037, 2006-Ohio-6940, 2006 W.L. 3804514, p. \*5 (Dec. 26, 2006) (trial court abused its discretion in denying leave to file amended answer to respond to counterclaim). These compelling decisions further the laudable maxim that, whenever reasonably possible, courts should avoid resolving disputes on the basis of procedural technicalities. *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 431 N.E.2d 644, 647 (1982); *National Mut. Ins. Co. v. Papenhagen*, 30 Ohio St.3d 14, 15, 505 N.E.2d 980, 981 (1987).

Notably, Supportive Solutions had been allowed to revise their own pleading earlier in the proceedings. *See Journal Entry dated December 23, 2008*. They were later permitted to “correct the record” by changing their company name as erroneously listed in its numerous pleadings and other filings. *See Journal Entry dated January 14, 2010*. That generous ruling – which was granted only weeks before ECOT sought to amend its own pleading – effectively saved the lawsuit from being dismissed for lack of a real party in interest. *See Defendants’ Memorandum in Opposition/Motion to Dismiss Second Amended Complaint dated November 19, 2009*. Far from being just a technical error, the plaintiff had originally been identified as an entirely separate corporation that could not have possibly possessed standing to recover damages. *Deposition of Yvette Ford taken October 28, 2009, pp. 29-32*.

#### **4. The Absence of Actual Prejudice**

It is inconceivable in this instance that Plaintiff Supportive Solutions would have been prejudiced at all, let alone “seriously,” by the inclusion of the immunity defense

that had been inadvertently omitted. The fact that immunity was being sought should have hardly been a surprise to anyone. By the undersigned counsel's count, the phrase "political subdivision" actually appeared no less than four times in Supportive Solutions own Amended Complaint of December 18, 2009 (paragraphs 141, 143, 155). Earlier in the litigation, they had openly conceded that ECOT "is a charter school funded by the State of Ohio[.]" *Complaint*, ¶2, p. 2. The General Assembly has specifically provided that the phrase "political subdivision" includes a "community school established under Chapter 3314 of the Revised Code[.]" *R.C. 2744.01(F)*. Charter schools like ECOT are considered to be political subdivisions under Ohio law precisely because they are sponsored by approved educational agencies and funded with state revenues. See generally *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St. 3d 568, 569, 2006-Ohio-5512, 857 N.E. 2d 1148; *Greater Hts. Acad. v. Zelman*, 522 F. 3d 678, 680-681 (6<sup>th</sup> Cir. 2008).

A more sensible approach had been followed in *Goad v. Cuyahoga Cty. Bd. of Commrs.*, 79 Ohio App. 3d 521, 607 N.E. 2d 878 (8<sup>th</sup> Dist. 1992). The county attorneys had neglected to include the defense of sovereign immunity in their answer, which asserted only that the plaintiffs had failed to state a potentially viable claim for relief. *Id.*, 79 App. 3d at 522. Just as in the case *sub judice*, the plaintiffs argued that the defense had been waived in response to the motion for summary judgment that was filed. *Id.* at 522-523. The Eighth District unanimously held that the pleadings were sufficient to raise sovereign immunity, despite the county attorneys' omission of the specific affirmative defense. *Id.* at 523-524. The entry of summary judgment was then affirmed. *Id.* at 525. Since the circumstances are largely indistinguishable, the same sound result is warranted in the instant case.

Supportive Solutions seemed to be suggesting below that granting leave to amend would have been prejudicial because the immunity defense will eliminate the far-fetched

claims of defamation, implied contract, and negligent misrepresentation that were alleged. *Plaintiff's Court of Appeals Brief*, pp. 14-18. Such specious arguments can be asserted every time that an attempt is made by a defendant to interject a new denial or defense through Civ. R. 15(A), as the objective of such revisions is always to undermine or defeat an existing claim.

As this Court has recognized, however, the proper question is whether the opposing party faces any "obstacles by the amendment which they would not have faced had the original pleading raised the defense." *Hoover*, 12 Ohio St. 3d at 6. Accordingly, it is not enough to assert merely that leave to amend should be denied so that theories of recovery can be pursued that otherwise would be unavailable. *Rossetti v. OM Financial Life Ins. Co.*, 5<sup>th</sup> Dist. No. 2008CA00083, 2008-Ohio-5889, 2008 W.L. 4885672, p. \*2, ¶14 (Nov. 10, 2008) (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); *Radio Parts Co. v. Invacare Corp.*, 178 Ohio App. 3d 198, 205, 2008-Ohio-4777, 897 N.E. 2d 228, 233, ¶12-14 (9<sup>th</sup> Dist. 2008) (rejecting the plaintiffs' arguments that a statute of limitations defense had been waived and an amendment to the answer should not have been permitted, after observing that they did not appear to face "any obstacles from the amendment that they would not have faced had [the defendant] originally pleaded the defense."); *Charles v. Conrad*, 10<sup>th</sup> Dist. No. 05AP-410, 2005-Ohio-6106, 2005 W.L. 3073358, ¶14-15 (Nov. 17, 2005) (holding that the absence of any new obstacles justified an amendment to the answer to include a statute of limitations defense).

As Supportive Solution's argumentation silently concedes, the answer here is a resounding "no." If leave had been granted the trial court would have been required to consider the immunity arguments that had been raised in ECOT's Motion for Summary

Judgment of January 29, 2010, which also would have been the case if the affirmative defense had been sufficiently raised in the original Answer. No new obstacles would have been created by the revision. *Hoover*, 12 Ohio St. 3d at 6.

### 5. The Purported Delay

Instead of attempting to demonstrate serious prejudice, Supportive Solutions has sought to justify the denial of leave upon defense counsel's purported failure to seek the amendment to the Answer at the earliest available opportunity. *Plaintiff's Court of Appeals Brief*, pp. 11-18. Such arguments can, of course, be asserted in response to every attempt, whether by a plaintiff or defendant, to utilize Rule 15(A). The purpose of the amendment is almost always to include a new claim or defense that, in theory, could have been raised in the original pleading. Elsewhere, Supportive Solutions has acknowledged that "delay, by itself, should not preclude leave to amend." *Plaintiff's Court of Appeals Brief*, p. 14 (citation omitted). That has, of course, long been the rule in Ohio. *CommuniCare, Inc. v. Wood Cty. Bd. of Commrs.*, 161 Ohio App. 3d 84, 89-90, 2005-Ohio-2348, 829 N.E. 2d 706, 710, ¶17 (6<sup>th</sup> Dist. 2005); *Ondak v. Moore*, 8<sup>th</sup> Dist. No. 66794, 1994 W.L. 723725, p. \*2 (Dec. 29, 1994).

Much of the so-called "delay" can be attributed to defense counsel's decision to seek a ruling upon the immunity defense for the first time at the summary judgment stage of the proceedings. Because the standards that are imposed by Civ. R. 12(B)(6) and 12(C) are extremely favorable to the plaintiff, securing a dismissal on the pleadings is typically a difficult endeavor. *See e.g., Vinicky v. Pristas*, 163 Ohio App. 3d 508, 2005-Ohio-5196, 839 N.E. 2d 88 (8<sup>th</sup> Dist. 2005); *Moss v. Lorain Cty. Bd. of Mental Retardation*, 185 Ohio App. 3d 395, 2009-Ohio-6931, 924 N.E. 2d 401 (9<sup>th</sup> Dist. 2009). Unlike Defendant LCESC, ECOT was never going to be able to justify a complete termination of the action because the claim for breach of express contract is not subject to immunity. Given that discovery was unavoidable, establishing the defense through

the Motion for Partial Summary Judgment was the most sensible approach.

## 6. The Assertions of Bad Faith

Recognizing that delay alone is not enough, Plaintiff has proclaimed over-and-over that ECOT has acted in "**bad faith.**" *Plaintiff's Court of Appeals Brief*, pp. 14-16 (emphasis original). The use of bold lettering hardly makes this unsubstantiated representation true. In numerous contexts, it has been explained that:

The "term 'bad faith' generally implies something more than bad judgment or negligence. 'It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud.'" *State v. Wolf*, 154 Ohio App. 3d 2693, 2003-Ohio-4885, 797 N.E. 2d 109, at ¶14, quoting *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272, 6 OBR 337, 452 N.E. 2d 1315 (1983).

*State of Ohio v. Pawloski*, 188 Ohio App. 3d 267, 276, 2010-Ohio-3504, 935 N.E. 2d 111, 118, ¶133 (8<sup>th</sup> Dist. 2010); see also *State of Ohio v. Brown*, 170 Ohio App. 3d 235, 239, 2007-Ohio-179, 866 N.E. 2d 584, 586, ¶12 (2<sup>nd</sup> Dist. 2007); *Schoenfield v. Navarre*, 164 Ohio App. 3d 571, 577, 2005-Ohio-6407, 843 N.E. 2d 234, 239, ¶22 (6<sup>th</sup> Dist. 2005); *State of Ohio v. Ritze*, 154 Ohio App. 3d 133, 139, 2003-Ohio-4580, 796 N.E. 2d 566, 570, ¶17 (1<sup>st</sup> Dist. 2003); *Nations Title Ins. of New York, Inc. v. Bertram*, 140 Ohio App. 3d 157, 164, 746 N.E. 2d 1145, 1151 (2<sup>nd</sup> Dist. 2000). Absolutely no evidence exists in the record that would support a finding of willful misconduct, intentional wrongdoing, or bad faith on the part of ECOT and its counsel.

The affirmative defenses were not included in ECOT's pleadings as a result of simple oversight, nothing more and nothing less. When summary judgment was sought on the basis of immunity on January 29, 2010, the trial was nearly three months away. As a result of the liberal standards that have been ascribed to Civ. R. 15(A), Ohio courts have routinely permitted amendments to the pleadings under similar circumstances. *Presley v. The Diocese of Cleveland*, 8<sup>th</sup> Dist. No. 40681, 1980 W.L. 354661, p. \*6 (Apr. 24, 1980) (finding that trial judge would have committed an abuse of discretion by

refusing to grant leave to amend an answer after defense counsel discovered his mistake in identifying the proper owner of the school at issue after the complaint had been pending for over a year); *Jefferson v. Eboh*, 3<sup>rd</sup> Dist. No. 9-95-58, 1996 W.L. 355037, p. \*2-3 (June 21, 1996) (finding that an abuse of discretion was committed when the plaintiff was denied leave to amend the complaint after summary judgment was filed, to clarify a new theory of recovery that was being raised). The Eighth District has previously recognized that:

Where the amended pleading is tendered in a timely fashion and in good faith, and no reason is apparent or disclosed for denying leave, failure to grant leave is an abuse of discretion. [emphasis added].

*Board of Educ. of Cleveland City Sch. Dist. v. URS Co., Inc.*, 8<sup>th</sup> Dist. No. 56260, 1989 W.L. 147663, p. \*1 (Dec. 7, 1989), citing *Hoover*, 12 Ohio St. 3d at 5. The same sensible standard is equally applicable in this instance, and requires a reversal.

#### **7. Appropriateness of Partial Summary Judgment**

The reality is that the parties and the judicial system would have realized a substantial savings of time and effort if the seemingly unobjectionable amendment had been permitted. Supportive Solutions is now conceding that, if properly raised in the pleadings, political subdivision immunity would have barred every claim, except for breach of express contract. *Plaintiff's Court of Appeals Brief*, pp. 19-26. This admission is understandable, as no exceptions have been provided in R.C. 2744.02(B) for the claims of fraud, defamation, fraud in the inducement, tortious interference with business relations, breach of implied contract, promissory estoppel, and negligent misrepresentation that had been alleged. *See generally, Rucker v. Village of Newburgh Hts.*, 8<sup>th</sup> Dist. No. 89487, 2008-Ohio-910, 2008 W.L. 597603 (Mar. 6, 2008); *Griffits v. Village of Newburgh Hts.*, 8<sup>th</sup> Dist. No. 91428, 2009-Ohio-493, 2009 W.L. 280376 (Feb. 5, 2009). There thus would have been no need to prepare for trial upon these dubious theories of liability and the proceedings that eventually commenced on May 3,

2010 would have been confined to a discrete and easily understood claim of breach of express contract. No interlocutory appeals would have been filed and no writs would have been requested in the Supreme Court of Ohio. Given the undisputable circumstances that had been established in the record, this Court should therefore hold that an abuse of discretion was committed when leave to amend was denied and Defendant ECOT is entitled to immunity upon all claims except for breach of express contract.

### CONCLUSION

Because the order of April 19, 2010 (*Apx. 00023*) was immediately appealable by authority of R.C. 2744.02(C), this Court should reverse the Eighth District's dismissal order and hold that the denial of leave to amend the answer to include the immunity defense was an abuse of discretion and summary judgment was warranted as a matter of law upon all claims except for breach of express contract. In the alternative, Defendant ECOT's interlocutory appeal should be reinstated and remanded to the intermediate appellate court for further proceedings.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Merit Brief** has been sent by e-mail on this

9<sup>th</sup> day of October, 2012 to:

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ORIGINAL

12-0790

IN THE SUPREME COURT OF OHIO

CASE NO. \_\_\_\_\_

**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 NOS. 95022 & 95287**

**NOTICE OF APPEAL OF**  
**DEFENDANT-APPELLANT, ELECTRONIC CLASSROOM OF TOMORROW**

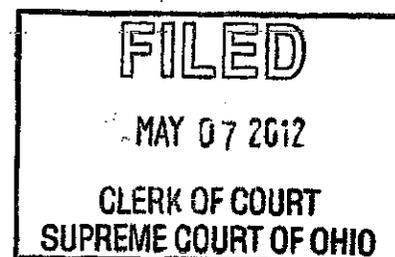
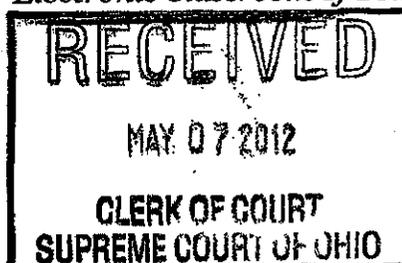
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**NOTICE**

Notice is hereby served that Defendant-Appellant, Electronic Classroom of Tomorrow, is seeking further review of the Eighth District Court of Appeal's final order of March 22, 2012. The appellate court's ruling presents issues of public and great general importance.

Respectfully Submitted,

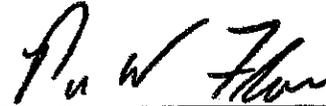
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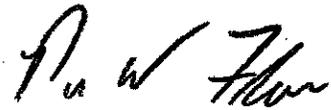
**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Notice** has been sent by e-mail and regular

U.S. Mail, on this 7<sup>th</sup> day of May, 2012 to:

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---

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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
Nos. 95022 and 95287

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

PLAINTIFF-APPELLEE

vs.

**ELECTRONIC CLASSROOM OF TOMORROW**

DEFENDANT-APPELLANT

---

**JUDGMENT:  
DISMISSED**

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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

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

**MAR 22 2012**

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

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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 I*");

[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.<sup>1</sup>

{¶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

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<sup>1</sup>ECOT 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

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By: CLPAL  
GERALD E. FUERST, CLERK

Page 1 of 1

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Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)

→→ **2744.02 Political subdivision not liable for injury, death, or loss; exceptions**

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

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

#### CREDIT(S)

(2007 H 119, eff. 9-29-07; 2002 S 106, eff. 4-9-03; 2001 S 108, § 2.01, eff. 7-6-01; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 (*State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999)); 1994 S 221, eff. 9-28-94; 1989 R 381, eff. 7-1-89; 1985 H 176)

## CONSTITUTIONALITY

“Ohio Revised Code § 2744” was held on 12-16-2003 to violate the right to trial by jury, under Ohio Constitution Article 1, § 5, and the right to a remedy, under Ohio Constitution Article 1, § 16. The ruling was by the U.S. District Court for the Southern District of Ohio, deciding as it believes the Supreme Court of Ohio would have, in the case of *Kammeyer v City of Sharonville*, 311 F.Supp.2d 653 (SD Ohio 2003). The Court also observed that the state is sovereign but political subdivisions are not.

Current through all 2011 laws and statewide issues and 2012 Files 70 through 143 of the 129th GA (2011-2012).

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