

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2013-0261

HENRY JONTONY, PATRICIA JONTONY, KARA JONTONY,
AND DOMINIC JONTONY,
Plaintiffs/Appellees

v.

LEE J. COLEGROVE AND THE CITY OF STRONGSVILLE
Defendants/Appellants

ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY, OHIO, CASE NO.: 12 098295

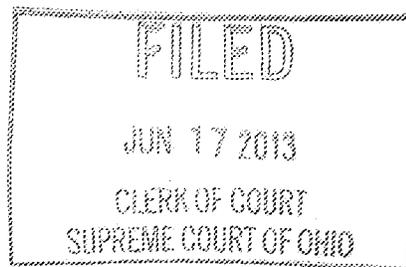
MOTION FOR RECONSIDERATION OF APPELLANT/CROSS-APPELLEE, CITY OF
STRONGSVILLE

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I. INTRODUCTION

The issues raised by the City of Strongsville (“City”) in its Memorandum in Support of Jurisdiction have struck a chord with members of the Court. Pursuant to S.Ct.Prac.R. 18.02(B)(1), the City respectfully urges this Court to reconsider its decision of June 5, 2013, narrowly declining jurisdiction of the City’s appeal. Three dissenting Justices, touching on all four propositions of law, would accept jurisdiction. Although the City is requesting reconsideration of all propositions of law submitted for review, this Motion will focus particular attention on the City’s Propositions of Law I and IV which drew multiple dissenting votes from members of this Court. This Motion for Reconsideration is timely filed pursuant to S.Ct.Prac.R. 18.02(A) and 3.03.

II. **Proposition of Law I should be reconsidered because a litigant’s right to have cases decided upon the merits is an issue of public and great general importance.**

It is difficult to identify an issue of greater importance for this Court to consider than a litigant’s right to have his or her case heard on the merits. Historically, this Court has spoken in strong, broad terms about the importance applying the Civil Rules and the discretion of lower courts in such a way as to protect litigants from errors of counsel in pleading. See, e.g., *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161; see also, *Bentz v. Carter* (1988), 55 Ohio App. 3d 120, 121-122 (“Decisions on the merits should not be avoided on the basis of mere technicalities; pleading is not ‘a game of skill in which one misstep by counsel may be decisive to the outcome * * * [rather] the purpose of pleading is to facilitate a proper decision on the merits,’” citing, *Conley v. Gibson*, 355 U.S. 41, 48, quoting, *Foman v. Davis* (1962), 371 U.S. 178, 181-182). By refusing to accept jurisdiction of this case, this Court is turning its back on one of its most

fundamental tenets of law. Due to a mistake of counsel, the City has been denied an opportunity to present a viable defense despite invoking the allegedly liberal protections of Civ. R. 15.¹

Civ. R. 15 is **the only protection a civil defendant has** from its counsel's failure to plead a legal theory of defense in an answer. Meanwhile, a civil plaintiff is afforded the protection not only of Civ. R. 15, but also Civ. R. 41(A). If a civil plaintiff fails to plead a legal theory of recovery, and is (rightly or wrongly) denied a motion to amend his complaint, the plaintiff can in many cases simply dismiss the entire case unilaterally and without prejudice. No consideration is given to the prejudice such a dismissal and subsequent re-filing may have on the civil defendant. A civil defendant has no additional safety net. Accordingly, it is imperative that this Court keep a keen and steady eye on the application of Civ. R. 15, and ensure that the rule is properly applied to permit parties to advance legal theories based upon known facts unless there is evidence of bad faith or **serious** prejudice to the opposing party.

This Court has been silent on this essential issue since issuing its opinion in *Turner v. Cent. Local School Dist.* (1999), 85 Ohio St.3d 95. *Turner* required this Court to review the granting of a motion to amend an answer after three years of litigation and two trips through the appellate system. This Court has not reviewed the **denial of a motion to amend an answer** in the common pleas courts in almost thirty years. See, *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1

¹ As noted in the record, former counsel for the City of Strongsville did not recognize that the known facts warranted a claim for immunity on behalf of the City. Former counsel for the City actually wrote a letter to counsel for Jontony stating as much. Ironically, it is this letter documenting former counsel's mistake that has been erroneously construed as a "stipulation" by the Eighth District to preclude the City from amending its Answer. See, City of Strongsville's Proposition of Law II. The letter was no different (and could not have caused any more "prejudice") than the City's Answer – both demonstrate that the City had not asserted an immunity defense at a particular point in time. The trial court Order denying the City's Motion to Amend erroneously failed to state how the letter was prejudicial, much less seriously prejudicial.

(limiting the discretion of a trial court to deny motions to amend pleadings to situations involving bad faith, undue delay, or serious prejudice).

It is time for this Court to speak and provide additional guidance to the lower courts consistent with the long standing policy favoring cases decided **on their merits**. This Court should not permit precedent to stand unchecked which prevents a defendant from amending an answer in good faith before trial based upon mistake of counsel when discovery is open and active. Because the right to have cases decided on their merits is so fundamental, such an unprecedented departure from the principles set forth in *Peterson* and *Hoover* should occur **only** with the approval of this Court.

In addition, this case is important because the defendant municipality is attempting to assert its only viable defense and was wrongfully denied its statutory right to immediately appeal the Order denying it immunity before trial.² This is a case where both the trial court and the appellate court agreed the defendant did not move to amend in bad faith or based upon facts unknown to the opposing party. It is important because the case was in active discovery when the motion was denied. Finally, it is important because the failure to plead the defense was caused solely by mistake of counsel.

² When the trial court denied the City's Motion to Amend its Answer on January 25, 2010, the City timely appealed to the Eighth District Court of Appeals because the trial court order denied the City the benefit of an immunity pursuant to R.C. 2744.02(C). The Eighth District improperly ruled it did not have jurisdiction because the order purportedly was not final and appealable. The City sought to appeal the issue to this Court, which declined jurisdiction on July 7, 2010. *Jontony v. Colegrove*, Supreme Court Case No. 2010-0500. This Court has now held with respect to this same issue that the denial of a political subdivision's motion to amend is final and appealable pursuant to R.C. 2744.02(C). *Supportive Solutions, LLC v. Electronic Classroom of Tomorrow*, Slip Opinion No. 2013-Ohio-2410. This Court's opinion reversing the Eighth District in *Supportive Solutions* demonstrates how appellate courts can improperly expand *Turner*, obstructing political subdivisions from asserting immunity by way of amendment.

There is no dispute about the relevant facts. This is an issue of law that hinges on the application of principles of fundamental fairness: “Leave of court shall be freely given when justice so requires.” Civ. R. 15(A). If the tests adopted by this Court in *Hoover* and *Turner* can reasonably be construed to prevent good faith amendment when discovery is open and the facts supporting the amendment are known to the parties, then the test has swallowed the rule itself. Accordingly it is precisely the situation that this Court must review to ensure that the lower courts are consistently protecting litigants’ ability to assert new legal theories based upon facts known to both parties absent bad faith or serious, articulable prejudice – even litigants without a Civ. R. 41(A) notice of dismissal safely tucked in their back pocket.

Therefore, the City respectfully requests that this Court reconsider its decision and accept jurisdiction of this appeal.

III. Proposition of Law IV raises a constitutional issue which falls squarely within the discretionary jurisdiction of this Court.

This Court should reconsider its 4-3 decision, declining jurisdiction of the City’s fourth proposition of law, because the issue of permitting set-offs otherwise mandated by R.C. 2744.05(B) is purely a question of constitutional law that has never before been decided by this Court. Political subdivisions have the statutory right to reduce “any award” of damages with benefits paid to a plaintiff from “any” source. This statutory right is limited only by the Constitution of the State of Ohio. See, *Buchman v. Wayne Trace Local Sch. Dist. Bd. Of Ed.* (1995), 73 Ohio St.3d 260. Therefore, to the extent the Eighth District has rejected the City’s request for set-off of Social Security and disability benefits from Jontony’s award of lost wages and services, the Eighth District **must** have found such a reduction to be unconstitutional.

The significance of this undeniable conclusion should not be lost on this Court. A District Court of Appeals has not only decided that such reductions are unconstitutional, but has

done so without a cogent explanation as to why or how the statutory, mandated reduction violates Ohio's constitution. With respect to deducting Social Security benefits, for example, from an award of lost services, the Eighth District held in this case:

In so far as the City maintains that "loss of services" are subject to setoff under R.C. 2744.05(B), this court has not been provided with, nor are we able to locate, any case law that supports the City's proposition that Social Security disability benefits are designed to compensate for loss of services. Accordingly, we find that the City is not entitled to setoff for "loss of services."

Putting aside the fact the City did argue and submit case law regarding the purpose of Social Security benefits,³ the Eighth District "punted" the issue to this Court by stating it could not find any case law **permitting deduction** of Social Security benefits from an award of lost services. There is certainly no precedent holding such deductions are constitutionally **impermissible**. The statute mandates the reduction and Ohio courts are obligated to apply the setoff **unless** application of the statute is unconstitutional. The Eighth District was not bound by precedent to deny the City's statutory reduction. The issue simply has not been analyzed by any court in this State, and it was not analyzed by the Eighth District in this case.

Put in its proper context, there is no case law finding a deduction of Social Security benefits from an award of lost services to be unconstitutional. "We cannot find any precedent" is merely an initial observation – not a substitute for constitutional analysis of an issue of first

³ Brief of Appellant City of Strongsville, filed in the Eighth District Court of Appeals, pp.27-28. "Based upon the federal law regarding the purpose of social security benefits, there is no basis to conclude that "lost services" fall outside the proper purpose of the benefits. The primary objective of the disability provisions of the social security system is to provide workers and their families with basic protection against hardships created by involuntary premature retirement. *Mathews v. DeCastro*, 429 U.S. 181, 185–86, 97 S.Ct. 431, 434–35, 50 L.Ed.2d 389 (1976). The disability insurance program, like the other insurance aspects of the Social Security Act, is contributory in nature, and is designed to prevent public dependency by protecting workers and their families against common economic hazards, wholly without regard to the need of the recipient. *Id.* at 186, 97 S.Ct. at 434–35, interpreting H.R.Rep. No. 615, 74th Cong., 1st Sess., 1 (1935)."

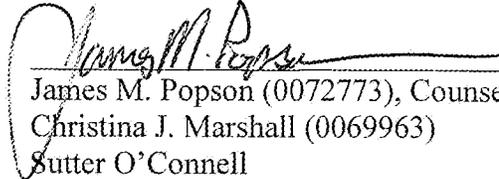
impression. It is a starting point, and not a final conclusion. Political subdivisions should not be required to demonstrate a mandated set-off is constitutional when no precedent exists finding the set-off unconstitutional. Rather, it is the burden of the party claiming unconstitutionality to demonstrate a particular application of the statute is unconstitutional, and it is the obligation of a court to apply the statute or set forth a basis as to why the particular application of the statute is unconstitutional.

In Ohio, this Court is the arbiter as to what is (or is not) permissible under Ohio's constitution. Almost every judgment in cases involving allegations of permanent disability will undoubtedly include an award for lost services. Litigants should know whether Social Security benefits (and disability benefits) are constitutionally deductible from an award for loss of services. By sidestepping the issue, the Eighth District has adopted the judicial version of the "pocket veto" of R.C. 2744.05(B) and created precedent declaring such deductions unconstitutional without a constitutional analysis of the issue. This Court should not condone the Eighth District's pocket veto by declining jurisdiction of this case.

This is an issue of first impression raising a substantial constitutional question that falls squarely within the jurisdiction of this Court.⁴ Accordingly, the City of Strongsville respectfully requests that this Court reconsider its decision of June 5, 2013, and accept jurisdiction of the City's appeal.

⁴ The same is true for the City's third proposition of law. This is the only known case where a political subdivision requested jury interrogatories in compliance with *Buchman* and was nevertheless denied reduction mandated by R.C. 2744.05(B) because the plaintiff convinced the trial court to accept allegedly deficient jury interrogatories over objection. An award was made and the benefits were received by the plaintiff pursuant to R.C. 2744.05(B). Accordingly, the only basis to deny the set-off is Ohio's constitution. Therefore, this is also an issue of first impression raising a substantial constitutional question.

Respectfully submitted,



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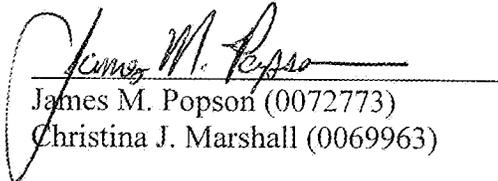
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CERTIFICATE OF SERVICE

A copy of the foregoing *Motion for Reconsideration of Appellant/Cross-Appellee* has been mailed via regular U.S. Mail, on this 17th day of June, 2013, to:

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