

ORIGINAL

IN THE SUPREME COURT OF OHIO

Henry Jontony, et al.	)	Supreme Court Case No. 2013-0261
	)	
Appellees/Cross-Appellants,	)	
	)	On Appeal from the Cuyahoga County
v.	)	Court of Appeals, Eighth Appellate District
	)	
Lee J. Colegrove, et al.	)	Court of Appeals
	)	Case No. CA 12 098295
Appellants/Cross-Appellees	)	
	)	

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APPELLEES' MEMORANDUM IN RESPONSE TO MOTION FOR RECONSIDERATION

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**I. Introduction:**

After over five years of costly and grueling litigation, the City of Strongsville attempts to take its final, of many, proverbial bites of the apple by filing its Motion for Reconsideration. The Justices of this Honorable Court correctly declined jurisdiction in this **extremely fact specific matter**. While Motions for Reconsideration are not to constitute a reargument of the case, the City does exactly this in its Motion, providing no changes, alterations, or new interpretations in the law which would now make the issues already declined by this Court suddenly issues of public and great general interest or a constitutional question.

Further, the City blatantly attempts to mislead this Court in stating that: “Three dissenting Justices, touching on all four propositions of law, would accept jurisdiction.” Such a statement is obviously designed to deceive the Court into believing that the entire appeal was declined by only a narrow four to three margin. Appellees note that the only Proposition of Law which was declined by a four to three margin was Proposition of Law IV. The remaining propositions of law only had one or two dissents.<sup>1</sup>

The highest Court of this State has carefully reviewed the matter and has chosen to decline jurisdiction. The City has failed to prove that any Constitutional question exists<sup>2</sup>, and that this extremely fact specific matter demonstrates a case of public or great general interest.

The Appellees, Henry Jontony and family, respectfully request that this Court deny reconsideration of its prior decision declining jurisdiction of this matter.

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<sup>1</sup> This includes the dissent of Justice O’Neill, who would accept the entire appeal and cross-appeal.

<sup>2</sup> The City has never even cited to a specific section of the Constitution in any of its briefs or arguments in the trial court, court of appeals, or even in this Court.

**II. Proposition of Law I: This case does not involve a pleading technicality which prevented the case from being heard on its merits:**

The well-known legal maxim that a case should be decided on its merits has long been utilized when a trial court dismisses a case because of a pleading technicality. There was no pleading error or technicality in this case. In this matter, the City itself decided that immunity was not applicable under the law, and therefore stipulated that it would not be raised as a defense in writing to counsel and in person to the trial court stating:

This letter will confirm that the City of Strongsville does not intend to assert an immunity defense because Officer Colegrove was not on an "emergency call" **as that phrase has been defined by R.C. §2744.02(B)(1) and the case law interpreting the same.**

Additionally, as Officer Colegrove did during his deposition, the City is admitting he was negligent. ...the City is assuming 100% responsibility for the accident.

As I see it, the only remaining issues are what damages were proximately caused by this accident and whether the City is entitled to setoff under R.C. §2744.05(B).

Now, the City frames the issue to make it seem as if it meant to assert immunity as a defense for the City, but just mistakenly forgot to do so. The City hired competent counsel which regularly represents municipalities to defend this action. That very counsel analyzed the facts of the case and determined that immunity **did not apply**. There was no mistake or technicality in the pleadings. It was not until after thousands upon thousands of dollars in case expenses and hundreds of hours of litigation did the City attempt to seek leave to amend its Answer.<sup>3</sup> The City realized that this was not just a minor injury claim, and as such, frantically attempted to dispose of the very claim which it previously accepted 100% responsibility.

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<sup>3</sup> Leave was requested only five weeks before the scheduled trial date.

Interestingly, the City participated in private mediation mere weeks before it sought leave to Amend.

The Appellees submit that the issue is clear, concise and in no way an issue of public or great general interest. The entire issue is whether the trial court abused its discretion in holding that allowing the City to Amend its Answer to assert immunity five weeks before the scheduled trial was prejudicial to the Jontonys. After taking into consideration the specific facts including the stipulations, and the overwhelming amount of time and money spent on preparing the case on damages alone because of the stipulations, the Eighth District could not state that the trial court abused its discretion.

In no way has the decision of the trial court and Court of Appeals eroded away a defendant's right to timely request leave to amend its Answer. Amendment is freely granted when justice so requires, **except** when amendment is untimely, done in bad faith, or **would prejudice the opposing party**. The trial court's discretionary decision to deny leave to amend shall not be overturned absent an abuse of discretion.

The City's litigation strategy and actions in this matter lead to the trial court's finding of prejudice to the Jontonys. The City argues "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..." **The City did not ask for leave because it learned of a new legal theory. It attempted to assert a theory which it had previously said did not apply.** That conscious action completely removed the issue of liability from discovery and from the litigation. To argue that this specific issue affects other litigants' rights to amend their answers is nonsensical. When leave to amend is prejudicial, it should not be granted. The precedence in *Turner, Hoover* and its progeny are clear, concise and are not in need of clarification.

The prejudice to the Appellees would have been immeasurable had leave been granted at that point in time. Any ruling to the contrary would be contrary to justice.

The Jontons respectfully request this Honorable Court deny reconsideration of Proposition of Law I.

**III. Propositions of Law III and IV: There has been absolutely no finding of unconstitutionality by any Court, the City simply failed its burden of proof:**

The City of Strongsville's self-serving assumption that the Eighth District "must have found such a reduction to be unconstitutional" is completely incongruous. There has been absolutely no finding of unconstitutionality by the Eighth District Court of Appeals, as a constitutional question was **never** posed nor even mentioned in the trial court, or in the court of Appeals by the City of Strongsville. This argument was never even touched upon by the City in its Memorandum in Support of Jurisdiction. For the first time in any of its arguments, the City attempts to argue that the Court of Appeals made an essential finding of unconstitutionality, and that it should be addressed by this Court. This argument fails, as no constitutional question exists.

This Honorable Court correctly declined to accept jurisdiction of Propositions of Law III and IV. Pursuant to this Court's decision in *Buchman v. Wayne Trace Local School District*, 73 Ohio St. 3d 260, 1995 Ohio 136, 652 N.E.2d 952 (1995), if the trial court is left to speculate as to how much of the jury's award is subject to set-off, the City has failed in its burden of proof. There is no issue of public or great general interest when a political subdivision fails to propose specific jury interrogatories so that it can prove what portions, if any, of the jury's award are subject to a statutory set-off. The matching requirement in *Buchman* is well established. The decisions of the trial court and Court of Appeals are completely in line with *Buchman* in holding that speculation means that the burden of proof has not been met. The City's lack of providing

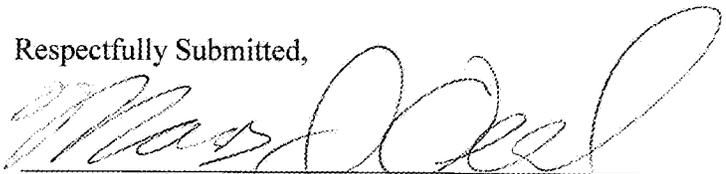
any meaningful jury interrogatories for a case involving a life altering traumatic brain injury caused the trial court to speculate.

Further, the trial court held an evidentiary hearing regarding the City's request for set-offs. The City did not call one witness or provide one shred of evidence as to applicability of social security benefits being set off for an award of loss of services. An expert witness could have easily been called to present evidence as to the purpose of social security disability payments, and what losses the payments are designed to compensate for. Without presenting any evidence, the City failed its burden of proof.

The City of Strongsville has failed to demonstrate that a constitutional question exists in any form whatsoever. To argue that the Eighth District Court of Appeals declared a statute unconstitutional with absolutely no evidence or discussion of the statute's constitutionality fails horribly. No issues of public or great general interest exist as political subdivisions are well aware that they bear the burden of proof and that they should provide adequate jury instructions to ensure that the trial court is not left to speculate as to what portion of a jury's award is subject to a set-off.

The City's Motion for Reconsideration should be denied in its entirety as this Court has correctly declined jurisdiction where no constitutional question or issues of public or great general interest exist.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of this Memorandum in Response to Motion for Reconsideration was sent by ordinary U.S. Mail on this 21<sup>st</sup>, day of June, 2013 to the following:

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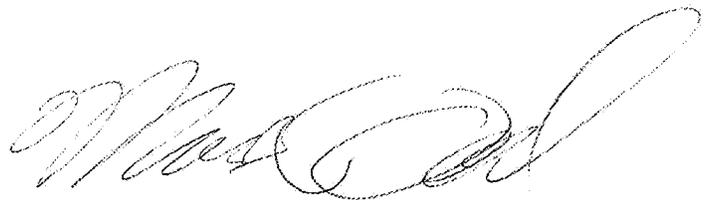
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