COURT OF APPEALS
THIRD APPELLATE DISTRICT
MARION COUNTY

THOMAS VENDING, INC.

PLAINTIFF-APPELLEE **CASE NUMBER 9-99-16**

v.

JIM SLAGLE **O P I N I O N**

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Appeal dismissed.

DATE OF JUDGMENT ENTRY: February 3, 2000

ATTORNEYS:

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WALTERS, J. Defendant-Appellant, Jim Slagle ("Slagle"), brings this appeal from an order of the Court of Common Pleas of Marion County denying his motion for summary judgment in a tort action brought by Plaintiff-Appellee, Thomas Vending, Inc. Because we find that Slagle has attempted to appeal from an order that is not final, this appeal is dismissed.

The following provides a brief background summary:

At all times relevant, Slagle acted in his capacity as the prosecuting attorney for Marion County. Appellee is a corporation that supplies vending machines to various buildings and offices around the city and county of Marion. As part of an investigation into Appellee's alleged participation in an illegal gambling operation, Slagle assisted the authorities in preparing an affidavit for a search warrant of Appellee's warehouse. The search warrant was executed on December 13, 1995, and the authorities seized several gambling devices, financial records and a computer system. While the property was being held, Slagle began to examine whether to file felony criminal charges against Appellee. Even though criminal charges were ultimately not filed, much of the property remained in the custody of law enforcement officials for approximately two years.

Meanwhile, during the investigation into Appellee's business practices, Slagle discovered that Appellee supplied various county buildings, including the Marion County Courthouse and the Marion County Sheriff's Department, with

vending machine services in accordance with several resolutions adopted by the Marion County Board of Commissioners ("Board"). Due to this discovery, Slagle drafted a letter to the Board in his capacity as the organization's legal counsel. The November 22, 1995 letter advised the Board to discontinue its relations with Appellee and to remove the vending machines from the various county buildings, especially the Sheriff's Department, as a matter of public policy. On January 4, 1996, the Board served Appellee with written notice of its intention to end the business relationship. After these events, the City of Marion also discontinued its business dealings with Appellee.

As a result, Appellee filed its initial complaint in the trial court on September 5, 1997, asserting claims for failure to return the seized property and for intentional interference with a business relationship. The complaint prayed for damages in excess of $25,000 and the return of the property. However, because law enforcement officials returned all of the property to Appellee by November 6, 1997, an amended complaint was filed asking the court to enter a judgment for damages only. Slagle properly answered both complaints and set forth several affirmative defenses, including that of immunity.

Thereafter, in September 1998, Slagle filed a motion for summary judgment, arguing, among other things, that he was entitled to immunity for his actions taken as the prosecuting attorney for Marion County. Appellee filed a

memorandum in opposition to Slagle's motion, and admitted that the actions taken by Slagle, as an employee of Marion County, may generally fall within the purview of the relevant immunity statutes. However, Appellee asserted that Slagle was not entitled to immunity protection in this case because he acted unreasonably and/or maliciously. On February 22, 1999, the trial court denied Slagle's motion due to the finding that genuine issues of fact existed as to whether the immunity protections were applicable to this case.

Slagle then filed the instant appeal, asserting six assignments of error for our review. For the sake of clarity, we have chosen to discuss Slagle's assignments of error out of their original order. We have also elected to discuss certain assignments of error together since they raise similar issues for our consideration.

Assignment of Error IV

The Court erred by denying Defendant's Motion for Summary Judgment as the Marion County Prosecuting Attorney is immune from this action based upon the sovereign immunity afforded to employees of political subdivisions by Revised Code [section] 2744.03.

Assignment of Error V

The Court erred by denying Defendant's Motion for Summary Judgment as the Marion County Prosecuting Attorney is immune from this action based upon absolute prosecutorial immunity.

Assignment of Error VI

The Court erred in denying Defendant's Motion for Summary Judgment as the Marion County Prosecuting Attorney is immune from this action based upon qualified immunity.

Although a decision denying a motion for summary judgment is generally not considered a final, appealable order, Slagle has attempted to appeal in this case pursuant to R.C. 2501.02 and R.C. 2744.02(C).

R.C. 2501.02 provides:

> **[T]he court shall have jurisdiction upon an appeal upon questions of law to review * * * judgments or final orders of courts of record inferior to the courts of appeals * * * including an order denying a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability * * *.**

We note that this section of the Ohio Revised Code was amended, effective January 27, 1997, as part of Am. Sub. H.B. No. 350. In its recent decision of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Aug. 16, 1999), 86 Ohio St.3d 451, the Supreme Court of Ohio declared House Bill 350 unconstitutional in its entirety because it violated the one-subject provision of Section 15(D), Article II of the Ohio Constitution. Thus, this court does not have jurisdiction to hear Slagle's appeal under this section of the Ohio Revised Code.

However, although R.C. 2744.02(C) was also part of Am. Sub. H.B. No. 350, this section of the Ohio Revised Code was amended and re-enacted in its entirety as part of House Bill 215, effective June 30, 1997. Thus, because R.C.

2744.02(C) appears to provide the requisite jurisdiction to consider this interlocutory appeal, our analysis will focus on whether this section properly applies to the matter at hand. See also, *Burley v. Bibbo* (Nov. 10, 1999), Jefferson App. No. 97-JE-62, unreported.

R.C. 2744.02(C) states that:

> **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 Chapter 2744 or any other provision of the law is a final order.**

The plain language of this statute requires that these interlocutory appeals arise from an unambiguous denial of the benefit of an alleged immunity as a matter of law. For example, a trial court may conclude that an employee is not entitled to the protection of an immunity because at the time of the actions in question, the person was, in fact, not employed by the political subdivision. In that case, there is no doubt that the court has denied the benefit of immunity as a matter of law since there is no issue as to the material fact upon which the denial is based. That situation is entirely distinguishable from the case at bar.

Here, we are not yet faced with an order denying immunity. Rather, at this time, there is only a denial of a motion for summary judgment based on a finding that material issues of fact must first be resolved to determine whether immunity is applicable. We note, as did the Ninth District Court of Appeals in *Brown v. Akron Bd. of Edn.* (1998), 129 Ohio App.3d 352, that there is a distinction between the

denial of sovereign immunity as a matter of law and the denial of summary judgment when there are material issues of fact with respect to whether sovereign immunity exists. While the legal issues surrounding an immunity claim are often difficult to separate from the factual issues, in this case, the trial court properly found that there were "genuine disputed issues of fact", that would preclude the court from finding that Slagle was immune as a matter of law.

We therefore conclude that this order cannot be characterized as a final, appealable denial of immunity since the ultimate legal issue as to immunity has been preserved for later review. See *Brown, supra; Benson v. City of Akron* (Jan. 25, 1999), Summit App. No. 19076, unreported; *Carey v. Bosch* (Jan. 27, 1999), Summit App. No. 19102, unreported; *Burley v. Bibbo, supra.*

We acknowledge that this decision conflicts with that of the Fourth District Court of Appeals in *Lutz v. Hocking Technical College* (May 18, 1999), Athens App. No. 98CA12. The *Lutz* court, particularly the concurring opinion authored by Judge Milligan, recognizes the conflict, but explains that it has adopted a broad interpretation of the aforementioned statutes because political subdivisions should not be forced to devote substantial time and resources to defend an action, "only to have an appellate court determine after trial that they were immune from suit all along." While this may be a valid policy consideration, we find that the legislature's expansion of appellate jurisdiction should be narrowly construed to

comport with the language of the statute. Furthermore, if material issues of fact remain, it is no more possible for this court to resolve the issue of immunity than it was for the trial court.

Appellant's remaining assignments of error assert that the trial court erred in denying summary judgment because Slagle's actions were privileged; Appellee's evidence is speculative; and Slagle, as agent to the Board, could not interfere with a county contract. This court is compelled to mention that even if a denial of the benefit of an alleged immunity had occurred in this case, the disposition of these supplemental issues would not be properly before this court. Indeed, even the *Lutz* court stated that its broad interpretation of the interlocutory appeal statutes was limited to the issue of immunity.

Having found that this court is without jurisdiction to decide the merits of this case due to the fact that a final, appealable order has not been rendered by the trial court, the instant appeal is hereby dismissed.

Appeal dismissed.

HADLEY, J., concurs.

SHAW, J., dissents.

SHAW, J., dissenting. This case involves an interlocutory appeal by the Marion County Prosecutor pursuant to R.C. 2501.02 and R.C. 2744.02(C). On September 24, 1999, this court properly dismissed this appeal on the authority of

the decision of the Supreme Court of Ohio in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451. See *Thomas Vending, Inc. v. Slagle* (September 24, 1999), Marion App. No. 9-99-16, unreported at *3. As we stated in our judgment entry of dismissal, both R.C. 2501.02 and R.C. 2744.02(C) were amended, effective January 27,1997 as part of Am.Sub.H.B. No. 350 to allow appellate courts to hear interlocutory appeals from orders denying a political subdivision or an employee thereof the benefit of an alleged immunity. See *id.* at 2-3. However, in *Sheward* the Ohio Supreme Court expressly declared Am.Sub.H.B. No. 350 unconstitutional *in toto* because *inter alia*, it violates the one subject provision of Section 15(D), Article II of the Ohio Constitution. See *Sheward*, 86 Ohio St. 3d 451 at paragraph three of the syllabus. As a result, we found the foregoing Revised Code sections were now void pursuant to *Sheward*, and accordingly dismissed the appeal. See *Thomas Vending, Inc.*, Marion App. No. 9-99-16, at *3.

Subsequently, on motion of the appellant, a majority of this court granted reconsideration of our September 24, 1999 dismissal and now renders a decision which recognizes the continuing viability of R.C. 2744.02 even while construing its operation as precluding appellant's current appeal. In its new decision, the majority expressly adopts the theory advanced by appellant that R.C. 2744.02(C) and a number of other Revised Code Sections perhaps thought by the Ohio

Supreme Court and others to be part of Am.Sub.H.B. 350, are, in fact, totally unaffected by the *Sheward* decision because prior to *Sheward,* these sections of the Revised Code were amended in a separate act, Am.Sub.H.B. 215, are thus no longer part of Am.Sub.H.B. 350, and thereby evade any violation of the one subject provision of the Ohio Constitution contained in H.B. 350. See Am.Sub.H.B. 215, Section 1, 147 Ohio Laws ---, reprinted in Page's Ohio Rev. Code Ann. 1997 Bulletin #7 491-91(amending R.C. 2744.03(A)(6), eff. 06-30-97).

On this rationale, it appears that over one-fifth (some 22 of 99) of the total number of Revised Code Sections addressed by the Ohio Supreme Court as part of H.B. 350 in *Sheward,* having been amended in similar fashion, are now to be construed as entirely outside the scope of and unaffected by that decision, certainly insofar as the one subject rule is concerned and arguably for any purpose. For example, in addition to the Revised Code Section at issue in our case involving interlocutory appeals by public officials, other sections of considerable public interest once part of Am.Sub.H.B. 350 but subsequently amended in some fashion and hence to be construed as unaffected by the *Sheward* decision would include R.C. 2317.45, which abrogates the common-law collateral source rule and requires a jury to consider collateral benefits when calculating compensatory tort damages, and R.C. 4513.263(F), which requires the trier of fact to consider the

failure to wear a seat belt evidence of contributory negligence.[1]

It is important to note that the rationale adopted by the majority today also advances a judicial construction of legislative action in which the terms "amend," "enact," and "re-enact" are identical, interchangeable and carry the same specific legislative intent to enact new legislation in compliance with the one subject rule. Appellant's application for reconsideration is itself, in my view, rather misleading on this point. Quite simply, the application purports to quote Am.Sub.H.B. 215 so as to imply that the legislative intent was that relevant sections of R.C. Chapter 2744 "be amended and that new sections ….of the Revised Code be enacted…" as though the entire sentence was referring to R.C. Chapter 2744 when in fact, the relevant sections of R.C. Chapter 2744 were to be *amended* only and additional revised code sections, omitted from the quote by appellant, were to be *enacted*. See Appellant's Memorandum in Support of Application for Reconsideration, at *3. In short, the legislature was clearly using the terms "amend" and "enact" separately in this passage with regard to totally different code sections and not together in reference to R.C. Chapter 2744.

In our case, for example, the version of R.C. 2744.02 originally found in Am.Sub.H.B. 350 was amended in Am.Sub.H.B. 215 to the extent of changing approximately four words in a single subsection, although the entire text of the

[1] See also R.C. Sections 1707.01, 1901.041, 1901.18, 1901.181, 1901.20, 1905.032, 1907.262, 2305.25, 2305.251, 2307.60, 2743.18, 2743.19, 2744.01, 2744.03, 2744.05, 3113.219, 4507.07, 5111.81 and

statute was *restated* in the new bill. Apparently, the majority believes that *restating* the text of R.C. 2744.02 in the amending bill Am.Sub.H.B. 215 constitutes an intentional *re-enactment* of the entire statute by the legislature sufficient to avoid the implications of the one-subject rule addressed in the *Sheward* decision with regard to Am.Sub.H.B. 350.

No doubt the Ohio Supreme Court and others, will find the foregoing reduction of the *Sheward* decision by a majority of this Court interesting. However, because I am not convinced the rationale underlying our reconsideration of this case is sound and because I do not agree with the purported application of R.C. 2744.02 to the merits of this appeal by the majority, I respectfully dissent.

As the majority indicates, defendant is the prosecutor of Marion County. He is also the statutory legal adviser to the Marion County Sheriff and the Marion County Commissioners. See R.C. 309.09(A). The plaintiff is a vending company that provided snack and soft drink machines to both the city of Marion and Marion County.

In his capacity as prosecutor, defendant was involved in the preparation of several search warrants by which gambling machines belonging to the plaintiff were seized. He also sent a letter to the County Commissioners and suggested that any vending arrangements the County maintained with the plaintiff should be

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terminated based on public policy. Acting "on the advise [sic] of our Prosecuting Attorney (legal counsel)," (Letter to plaintiff from Marion County Commissioners dated January 4, 1995, quoted in plaintiff's brief, at *3), the Marion County Commissioners terminated the County's vending arrangements with the plaintiff. According to the plaintiff, the defendant's action in sending this letter constitutes interference with its business relationship with Marion County.

Subsequently, the City of Marion also terminated its contracts with plaintiff. The City's law director later averred that neither the defendant "nor any other representative of the Marion County Prosecutor's Office contacted me directly or indirectly to request that [plaintiff] remove their vending machines." However, the plaintiff alleges that this must be a lie, because according to other witnesses the City's law director could not have seen the police reports he claims to have relied upon in his decision to terminate the contracts. Based on this dispute over access to police reports, the plaintiff argues that the only possible conclusion is that *the defendant* must have requested the City to terminate its contracts with the plaintiff.

Solely based on the foregoing evidence, the plaintiff alleges that the defendant tortiously interfered with its business relationships with the City and the County. The trial judge denied defendant's motion for summary judgment, allegedly based on "material issues of fact with respect as to whether sovereign

immunity exists." The trial court's decision ostensibly rested upon the reasoning, apparently adopted by the majority, that the foregoing evidence and the timing of the return of some of the seized property creates a factual dispute as to whether the defendant acted "manifestly outside the scope of [his] * * * employment of official responsibilities," R.C. 2744.03(6)(a), or "with malicious purpose, in bad faith, or in a wanton or reckless manner," R.C. 2744.03(6)(b).

The trial court's decision is incorrect in virtually every way. First, it overlooks the fact that the defendant is the statutory legal adviser to Marion County, and in that agency capacity he is a party to the County's business relationships. He cannot be sued for interference with this business relationship because he is a *party* to the relationship. See *Garg v. Venkataraman* (1988), 54 Ohio App.3d 171, 174. Therefore, insofar as plaintiff's cause of action deals with Marion County, it has failed to state a valid claim for relief.

Moreover, while the R.C. 2744.03(6) exceptions result in a forfeiture of immunity in many cases, the trial court's analysis completely overlooks R.C. 2744.03(A)(7).

> **The political subdivision, and an employee who is a *county prosecuting attorney*, city director of law, village solicitor, or similar *chief legal officer of a political subdivision*, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity *available at common law* or established by the Revised Code.** (emphasis added).

Prosecutors are protected by the same common-law immunity as judges. See, *e.g.* *Bertram v. Richards* (1974), 49 Ohio App.2d 3, 4.

> **However, if the prosecuting attorney stops acting in a quasi-judicial capacity and begins functioning as a policeman, he loses that immunity. * * * * *As long as the prosecuting attorney maintains his role of observer or advisor, he will not lose that immunity*[.]**

Id. at 5 (citations omitted, emphasis added). The legislature preserved this common law immunity *in addition* to the normal qualified immunity granted to employees of political subdivisions. See R.C. 2744.03(A)(6). Defendant's letter to the commissioners was dated November 22, 1995—prior to the execution of the search warrant and, as the majority correctly observes, "*during* the [criminal] investigation into Appellee's business practices." Majority opinion, ante at *2 (emphasis added). While no charges were brought as a result of that investigation, defendant was clearly acting in his capacity as a prosecutor and as statutory legal advisor to Marion County. The trial court's decision was predicated upon the idea that defendant could lose his immunity if he acted within one of the exceptions enunciated in R.C. 2744.03(A)(6). However, the defendant had common law immunity from suit under R.C. 2744.03(A)(7),[2] *even if* his actions fall under one

[2] I note that the legislature chose not to extend this immunity to police officers, thus making them open to suit under the R.C. 2744.03(A)(6) exceptions. Cf. *Lutz v. Hocking Technical College et al.* (May 18, 1999), Athens App. No. 98CA12, unreported, 1999 WL 355187.

of the exceptions from qualified immunity announced in R.C. 2744.03(A)(6).[3]

> ***In addition to any immunity or defense referred to in division (A)(7) of this section*** **and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:**
>
> **(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;**
>
> **(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]**
>
> (emphasis added).

Finally, even if we are to assume that defendant's absolute prosecutorial immunity does not apply, he is still entitled to a qualified immunity under R.C. 2744.03(A)(6), because as a matter of law, the scant evidence cited by plaintiff cannot establish either that the defendant's acts "were manifestly outside the scope" of his official responsibilities or were wanton, reckless, malicious or in bad faith. Defendant's letter to his statutory clients, even if it may be outside the scope of his representation (and I do not believe it is) is not *manifestly* so, and plaintiff can cite *no evidence* the advice given was wanton, malicious, reckless or in bad faith. Likewise, plaintiff has no evidence permitting the inference that defendant even discussed this issue with the Marion city law director, and thus clearly cannot infer that *alleged* discussion to be wanton, reckless, malicious, or in bad faith. Cf.

[3] It may be argued that the defendant's common-law immunity does not cover some egregious activities. I suggest, however, that it does immunize him from liability for a tort that was unknown at common law and was not recognized as a cause of action for money damages until 1972. Cf. *Anderson v. Minter* (1972), 32 Ohio St.2d 207, 213.

e.g. Titanium Ind. V. S.E.A., Inc. (1997), 118 Ohio App.3d 39, 49-50 (recognizing that Ohio rejects inferences based solely upon inferences).

Finally, the trial court's order also erroneously purports to deny summary judgment "on the failure to return the property claim[.]" Decision on Defendants [sic] Motion for Summary Judgment, at *4. Even assuming that such a tort exits and that R.C. 2933.41 imposes a statutory duty on the defendant, who is clearly not a "law enforcement agency," cf. *Globe Amer. Cas. Co. v. Cleveland* (1994), 99 Ohio App.3d 674, 678, the plaintiff in this case filed an amended complaint on November 17, 1997 that abandoned that claim altogether.

For the foregoing reasons, defendant is clearly entitled to judgment as a matter of law based on immunity. In my view, the majority has erroneously declined to address the merits of immunity, simply because the trial court obliquely refers to a factual dispute which a cursory examination reveals to be entirely specious and irrelevant to the law governing the disposition of this case.

Essentially, the majority argues that there is a distinction between an order determining immunity does not exist as a matter of *law*, and an order holding that there is a disputed question of *fact* that prevents the court from determining whether immunity exists. However, I believe this is a false distinction which inevitably undermines the substantive application of the immunity law. There are *always* both factual and legal disputes involved with immunity determinations,

because the question is always *whether immunity exists on any given state of facts.* Immunity determinations are therefore always mixed questions of law and fact.[4] Cf. *Roe v. Hamilton Cty. Dept. of Hum. Serv.* (1988), 53 Ohio App.3d 120, 126. Thus, even though whether immunity exists may be a fact-driven inquiry, it is a determination to be made by the judge, not a question for determination by the factfinder. Moreover, the immunity question is properly decided *prior to trial*. See *id*; *Linley v. DeMoss* (1992), 83 Ohio App.3d 594, 599.

Finally, I disagree with the majority's holding that to be immediately appealable a trial court order must deny the *existence* of an immunity. The statute does not require that the order deny the existence of an immunity, but rather "den[y] the *benefit* of an alleged immunity." R.C. 2744.02(C). In my opinion, any order that addresses immunity but forces a trial is also an order that denies the *benefit* of an immunity, since one of the "benefits" of Chapter 2744 immunity is the ability to take an immediate appeal and have a reviewing court properly decide the issue as a matter of law. See *Lutz v. Hocking Technical College, et al.* (May 18, 1999), Athens App. No. 98CA12, unreported, 1999 WL 355187 at *12 fn.5; *id.* at *10 (Milligan, J., concurring).

In contrast to the majority, I would adopt the position on this issue taken by Judge Milligan in his well-reasoned *Lutz* concurrence:

[4] The majority seems to concede this point, noting that "the legal issues surrounding an immunity claim are often difficult to separate from the factual issues[.]" Majority Opinion, *ante* at *7.

> **[I]t is the claimed "status" as a government agency or employee that is accorded special legislative protection. Whenever the procedural priority accorded such is denied, the government agency (or employee) should have the benefit of an expedited appeal. * * * * Interlocutory appeal is appropriate when prosecuted by a subdivision or its employees where (1) immunity has been claimed as to state based causes of action, (2) the trial court as overruled a motion to dismiss or a motion for summary judgment, and (3) the legal consequence of an opposite ruling by the trial court would have resulted in and end to the litigation on that cause of action or claim.**

For the reasons stated earlier, I believe this Court should deny appellant's motion for reconsideration and reinstate our original dismissal of this case pursuant to the decision of the Ohio Supreme Court in *Sheward*, 86 Ohio St.3d 451 at paragraph three of the syllabus. In the alternative, assuming the current viability of the statute, I would hold that there is a final order for review under R.C. 2744.02(C). Moreover, on the record presently before us, the judgment of the trial court should be reversed and remanded with instructions to enter summary judgment in favor of the defendant.

Presumably, all of the issues raised by this case will come to the attention of the Ohio Supreme Court in due course. However, in the meantime, because of the importance of this decision to political subdivisions and their representatives throughout the state, this Court should *sua sponte* certify its decision to the Ohio Supreme Court for conflict with the decision of the Fourth District in *Lutz v.*

Hocking Technical College, et al. (May 18, 1999), Athens App. No. 98CA12, unreported, 1999 WL 355187.

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