IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MUSIAL OFFICES, LTD., *etc.*, *et al*.	)	**CASE NO. CV 11 746704**
	)	
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JUDGMENT ENTRY ON THE**
	)	**PLAINTIFF'S MOTION TO**
COUNTY OF CUYAHOGA, *et al.*	)	**SANCTION THE DEFENDANTS**
	)	**FOR FRIVOLOUS CONDUCT**
Defendants.	)	**IN FILING AN APPEAL**

John P. O'Donnell, J.:

This is a class action lawsuit for the restitution of overcharged real estate property taxes. The primary defendant is Cuyahoga County, a governmental subdivision, and the other defendants are officials in the county's executive branch and its board of revision. This judgment entry addresses the plaintiff's pending motion to recover attorney's fees and costs incurred in connection with alleged frivolous conduct by Cuyahoga County by pursuing an appeal of the trial court's denial of a motion for reconsideration.

Pertinent case history

The original complaint named only Cuyahoga County as a defendant. The county's March 31, 2011, answer did not raise the defense of governmental subdivision immunity. On October 12, 2011, the county filed a motion to dismiss or for summary judgment that did not

raise the defense of governmental subdivision immunity.[1] After the plaintiff filed a first amended complaint the county moved, on December 11, 2012, to dismiss it without raising the immunity defense. Only after the plaintiff filed a second amended complaint did the defendants assert their immunity defense, first by their March 5, 2015, answer and, on that same date, through a motion for judgment on the pleadings.

The motion for judgment on the pleadings was decided on June 19, 2015. The trial court explicitly rejected the defendants' claim of governmental subdivision immunity under Chapter 2744 of the Ohio Revised Code, thus permitting the plaintiff to proceed on the claim for unjust enrichment, among other causes of action. The defendants then moved on July 2, 2015, for leave to file *instanter* a motion for summary judgment based in part on their immunity from suit under R.C. 2744.01 *et seq*. The trial court denied the motion for leave five days later.

On August 6, 2015, this lawsuit was transferred from the originally assigned judge to me, and the next day the defendants moved again for leave to file a motion for summary judgment, but the motion for leave (which was denied) did not assert immunity as one of the reasons justifying summary judgment.

The second amended complaint was tried to the court, with an advisory jury under Rule 39(C) of the Ohio Rules of Civil Procedure, in September, 2015, and on October 1, 2015, the advisory jury's verdict against the defendants on the unjust enrichment claim was journalized. At the same time, closing argument on all other claims was deferred and later set for December, 2015. At the closing argument on the oral record the defendants did not argue the affirmative defense of immunity and in their brief filed after the trial in connection with the closing arguments they did not assert the immunity defense.

[1] The motion was denied on May 16, 2012.

A judgment entry of findings of fact and conclusions of law was journalized on March 23, 2018. Although that entry was explicitly not a final judgment entry – questions remained on whether any class members had opted out and class counsel's claim for an award of fees still had to be decided – it was obvious that the county was deemed liable to the class members on the unjust enrichment claim for restitution in the amount of $3,927,385.91.

The motion for reconsideration and appeal

On April 2, 2018, the defendants filed a motion for reconsideration of the findings of fact and conclusions of law. One of several arguments for reconsideration was that the defendants were immune from liability on the unjust enrichment claim pursuant to common law or statutory governmental immunity. In opposition to the motion for reconsideration, the plaintiff noted that the defendants "argued political subdivision immunity in their March 5, 2015, motion for judgment on the pleadings" and "[t]hat argument was rejected."[2]

The motion for reconsideration was denied on January 7, 2019.

On February 5, 2019, when there was still no final judgment entry in the case, the defendants filed an appeal of the denial of reconsideration with the Eighth District of Ohio Court of Appeals. The court of appeals case was assigned case number 108188. The defendants' docketing statement filed with the notice of appeal listed R.C. 2744.02(C) – i.e., the governmental subdivision immunity statute – as the authority for an interlocutory appeal.

The plaintiff moved in the court of appeals on February 11, 2019, to dismiss the appeal for want of a final appealable order. Five days after the defendants opposed the motion to dismiss the appeal the court of appeals granted a dismissal, saying:

> Motion by Appellee to dismiss appeal is granted. Appellant's appeal concerns the trial court's denial of a motion for reconsideration. A motion for reconsideration of a

[2] Plaintiff's April 2, 2018, brief in opposition to reconsideration, page 2.

final appealable order is a nullity. *Pitts v. Ohio Dept, of Trans*., 67 Ohio St.2d 378, 380 (1981). Appellant should have appealed from the trial court's original order denying sovereign immunity, which was entered on June 19, 2015. Pursuant to R.C. Chapter 2744.02(C), an order that denies a political subdivision the benefit of an alleged immunity is a final appealable order. Therefore, appellant should have filed an appeal from the denial of the immunity no later than July 19, 2015. See *Ritchie v. Mahoning Cty*., 7th Dist. No. 15 MA 0167, 2017-Ohio-1213. Appellant contends that it further argued the defense of sovereign immunity during the bench trial. However, the trial court issued its order ruling on the evidence and arguments at trial on March 23, 2018. Appellant did not file a timely appeal from the trial court's order. Appeal is untimely filed; we therefore lack jurisdiction over the appeal.[3]

The motion for sanctions for frivolous conduct on appeal

As part of the proceedings in case number 108188, the plaintiff moved for an award of its attorney's fees and costs incurred defending the appeal as a sanction for the defendants' frivolous conduct in filing it. The motion was based on Rule 23 of the Ohio Rules of Appellate Procedure, which provides that if a court of appeals determines that an appeal is frivolous then it may require the appellant to pay reasonable expenses of the appellee including attorney fees and costs.

After the motion for sanctions was fully briefed, the court of appeals ordered on February 26, 2019, that the "motion by appellee for costs and attorney fee recovery for filing frivolous and dilatory appeal is remanded to the trial court for determination." Upon remand I construed the motion as if it were made under R.C. 2323.51 and conducted an evidentiary hearing on May 16, 2019.

[3] February 26, 2019, judgment entry in case number 108188 in the court of appeals.

R.C. 2744.02(C) provides 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 this chapter or any other provision of the law is a final order."

The plaintiff's essential argument in the court of appeals in support of the proposition that the denial of the motion for reconsideration did not amount to depriving the county the benefit of an immunity since the defendants' claim of immunity had already been denied by the trial court's June 19, 2015, ruling on the motion for judgment on the pleadings. As a result, the defendant was required by R.C. 2505.03 and 2505.07 to appeal that ruling within 30 days. The plaintiff also pointed out that a motion for reconsideration is a procedural nullity, thus any ruling on such a motion is not an appealable order.

The defendants opposed the motion to dismiss in the court of appeals on the basis that the order they asked the court to reconsider – the March 23, 2018, findings of fact and conclusions of law – was not a final order because it was still subject to revision at any time under Civil Rule 54(B). But, according to the defendants, the denial of the motion for reconsideration deprived them of the benefit of an immunity and was thus immediately appealable under R.C. 2744.02(C).

That argument is not supported by evidence, logic or the law.

On the one hand, the defendants claim that the March 23, 2018, findings of fact and conclusions of law – rendered after a trial court ruling on June 19, 2015, that "political subdivision immunity does not apply"[4] to the claims in this case and after a trial on the merits where the affirmative defense of immunity[5] was never briefed or argued, much less proved – which made a finding that the defendants were liable to the taxpayers in the class for almost four

[4] June 19, 2015, judgment entry, p. 13.
[5] The R.C. 2744.03 immunity is an affirmative defense, which must be raised and proven. *City Of Whitehall ex rel. Wolfe v. Ohio Civ. Rights Comm'n*, 74 Ohio St. 3d 120, 123 (1995).

million dollars did not deprive them of an immunity, while on the other hand the county asserts that a denial of a motion for reconsideration of that very same ruling – a denial that did nothing to alter the status of the March 23 entry as a non-final judgment – did deprive them of an immunity. Both of those things cannot be true.

It is also worth noting that the defendants' 30-page brief in support of its motion for reconsideration argued that the findings of fact and conclusions of law should be revisited because the court "was without jurisdiction to hear Plaintiff's claim for unjust enrichment" and "since all claims lack merit as a matter of law, the order fails to address binding precedent and the order fails to address any of the county's affirmative defenses."[6] The argument for immunity is found at pages 18-21 of the motion and basically repeats the same arguments made in the 2015 motion for judgment on the pleadings. So, if the denial of the motion for judgment on the pleadings that expressly found that immunity does not apply is not a final appealable order, then how is a one-word ruling denying a motion for reconsideration of every finding of fact after trial – except immunity, which was not part of the trial because it had been denied three years earlier – a final appealable order?

Hence, the court of appeals likely did not expend much sweat to reach the conclusion that the denial of the motion for reconsideration was not a final appealable order. But that doesn't mean the county's appeal of the denial was frivolous since merely advancing a losing argument does not amount to frivolous conduct. Instead, under R.C. 2323.51(A)(2)(a)(ii), frivolous conduct is the assertion of a position in a civil action that "is not warranted under existing law."

If, therefore, the county's position in the court of appeals that the June 19, 2015, denial of immunity is not a final appealable order while the January 7, 2019, denial of the motion for reconsideration is a final appealable order is not warranted under existing law, then the county's

[6] April 2, 2018, motion for reconsideration, p. 7.

conduct in filing the appeal was frivolous. Conveniently, the county itself has provided the answer. According to the county:

> Ohio courts, including the Ohio Supreme Court, have ruled that the purpose of 2744 immunity is to "protect the fiscal integrity of political subdivisions," and that R.C. 2744.02(C) should be read to allow political subdivisions to appeal from any order that denies the benefit of alleged immunity.[7] ***Trial court orders denying motions for judgment on the pleadings*** or motions to dismiss ***where a political subdivision has asserted immunity are final, appealable orders***, even where the trial court does not explain the basis for its decision on the immunity issue.[8] (Emphasis in bold and italics added.)

The trial court record, then, is clear that 1) the county knew on March 5, 2015, that a denial of its motion for judgment on the pleadings based on R.C. 2744 immunity would be a final appealable order and 2) the county never appealed the June 19, 2015, denial of immunity. By not appealing that order within 30 days the county was barred from an appeal and the question of immunity was settled – there was none.

Because the county's position in the appeal in case number 108188 was not warranted under existing law, and the existing law was conceded by the county as early as March 5, 2015, the county's conduct in filing the appeal was frivolous and the plaintiff was adversely affected by the county's frivolous conduct by having to defend against the frivolous appeal. Thus, the plaintiff is entitled to recover from the county its reasonable costs, expenses and attorney's fees in opposing the appeal.

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[7] Defendants' February 21, 2019, brief in opposition to the motion to dismiss in the court of appeals, p. 6.
[8] Defendants' March 5, 2015, motion for judgment on the pleadings on plaintiff's second amended complaint pursuant to ORCP 12(C) and R.C. 2744.02 *et seq.*, p. 15.

At the hearing on the motion for sanctions the plaintiff produced evidence that six lawyers spent 129.6 hours defending the appeal and prosecuting the motion for sanctions from the time the notice of appeal was filed until the day before the sanctions hearing. The plaintiff argues that total value on this time, on an hourly basis, is $67,142.50. While there is no arguing with results, I cannot find that every one of these hours was necessary. Instead, the uncomplicated nature of the issues on appeal suggests a dismissal of the appeal could have been reached with less effort and more efficiency, and I find that a reasonable amount of attorney's fees to get to the same outcome is $16,785.63.

Conclusion

The plaintiff Musial Offices, Ltd.'s motion for costs and attorney fee recovery pursuant to Appellate Rule 23 for filing a frivolous and dilatory appeal, filed February 12, 2019, in case number 108188 in the Eighth District Court of Appeals, remanded to the trial court by order of the court of appeals on February 26, 2019, and construed by the trial court as a motion pursuant to R.C. 2323.51, is granted and a judgment is hereby entered in favor of Musial Offices, Ltd. and against Cuyahoga County in the amount of $16,142.50 with interest at the statutory rate from the date this judgment is journalized, plus any court costs pertaining to the motion and related filings and proceedings.

IT IS SO ORDERED:

_____ Date: June 14, 2019
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email on June 14, 2019, to the following:

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Judge John P. O'Donnell