

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

June 18, 2025

[Cite as *06/18/2025 Case Announcements #2*, 2025-Ohio-2119.]

APPEALS NOT ACCEPTED FOR REVIEW

2025-0138. Smith v. Ohio State Univ.

Franklin App. No. 22AP-125, **2024-Ohio-5887**.

Fischer, J., dissents, with an opinion joined by Hawkins, J.

Brunner, J., dissents, with an opinion.

FISCHER, J., joined by HAWKINS, J., dissenting.

{¶ 1} I respectfully dissent from this court’s decision not to accept jurisdiction over appellant Brooke Smith’s appeal challenging the Tenth District Court of Appeals’ conclusion that the Court of Claims does not have jurisdiction to adjudicate her contract claims against appellee, Ohio State University (“Ohio State”), because Ohio State is entitled to sovereign immunity based on its exercise of a high degree of official judgment or discretion, also known as discretionary immunity.

{¶ 2} Without a doubt, this case involves issues of “public and great general interest,” Ohio Const., art. IV, § 2(B)(2)(e). This case involves the extent and application of the judicially created sovereign-immunity doctrine in contract matters involving the State of Ohio under R.C. 2743.02. And it requires that we evaluate the interplay between the State’s sovereign immunity and a party’s fundamental right to contract, *see Blount v. Smith*, 12 Ohio St.2d 41, 47 (1967), and constitutional right to a remedy in Ohio, Ohio Const., art. I, § 16. In essence, the final resolution of this matter determines whether Ohioans have enforceable rights when contracting with the State—a government that is instituted for the people’s equal protection and benefit, Ohio Const., art. I, § 2. I would accept jurisdiction over Smith’s appeal.

A. The plain language of R.C. 2743.02(A)(1) and *Reynolds v. State*

{¶ 3} In her memorandum in support of jurisdiction, Smith argues under her fourth proposition of law that this court’s interpretation of R.C. 2743.02(A)(1) in *Reynolds v. State*, 14 Ohio St.3d 68 (1984), is not supported by the plain language of the statute. She makes an argument that is worthy of our review.

{¶ 4} The General Assembly, consistent with Article I, Section 16 of the Ohio Constitution, enacted R.C. 2743.02; division (A)(1) of that statute waives the State’s sovereign immunity from liability with limited exceptions, none of which are relevant here. This court recognized that by enacting R.C. 2743.02, the General Assembly abrogated the State’s sovereign immunity in a manner that was not significantly different from this court’s complete abrogation of municipal sovereign immunity in *Haverlack v. Portage Homes, Inc.*, 2 Ohio St.3d 26, 30 (1982). See *Reynolds* at 69-70. Thus, one might assume that by analogizing this court’s abrogation of municipal sovereign immunity to the General Assembly’s abrogation of the State’s sovereign immunity, the State would be excepted from liability only in circumstances that are explicitly set forth in the statute. See *Haverlack* at 30 (holding that a municipal corporation is liable for its negligence in the performance or nonperformance of an act unless immune by statute), *superseded by statute as stated in Moore v. Lorain Metro. Hous. Auth.*, 2009-Ohio-1250, ¶ 7.

{¶ 5} However, without any legal analysis or statutory interpretation, this court has held that

[t]he language in R.C. 2743.02 that “the state” shall “have its liability determined . . . in accordance with the same rules of law applicable to suits between private parties . . .” means that the state cannot be sued for legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.

(Ellipses in original.) *Reynolds* at 70. Only once the State has made the decision to engage in the type of function described in *Reynolds* can it be held liable in the same manner as private parties. *Id.* This court reaffirmed that statutory interpretation, again without any significant

analysis, in *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 2002-Ohio-4210, paragraph two of the syllabus.

{¶ 6} With the holding in *Reynolds*, this court established the “discretionary immunity” that Smith is challenging in this case. This court’s decision in *Reynolds* shields the State from liability and in doing so, fails to treat the State like any private litigant as contemplated by R.C. 2743.02(A)(1)—all without a proper statutory-interpretation analysis. Without a proper analysis, we cannot be sure that the interpretation rendered by this court in *Reynolds* is sound and does not unnecessarily deny Ohioans the right to bring suits against the State in a manner “as may be provided by law” and eliminate the possibility of citizens having a “remedy by due course of law” and having “justice administered without denial or delay,” Ohio Const., art I, § 16.

{¶ 7} Because this court “must give effect to the words used in the statutes and refrain from adding or deleting words or phrases to the language chosen by the General Assembly” and must refrain from creating “an exception to a statute where none exists,” *Vandercar, L.L.C. v. Port of Greater Cincinnati Dev. Auth.*, 2024-Ohio-1501, ¶ 12, this court should accept Smith’s appeal on her fourth proposition of law to properly analyze the statutory language in R.C. 2743.02(A)(1) and review the discretionary-immunity rule announced by this court in *Reynolds* and reaffirmed in *Wallace*. See *Vandercar* at ¶ 24-27 (in which this court revisited a prior decision granting a political subdivision immunity from prejudgment interest when the applicable statute had not provided such an exception). Ohioans deserve at least that much when important constitutional rights are at stake.

B. The scope of *Reynolds* and the application of discretionary immunity to contract cases

{¶ 8} Even if this court declines to review the soundness of the holding in *Reynolds* by not accepting Smith’s appeal on her fourth proposition of law, we should at the very least take the opportunity to review Smith’s first, second, and third propositions of law to determine the scope of immunity granted to the State under *Reynolds*, as a means of ensuring that parties are not wrongly deprived of their day in court.

{¶ 9} In this case, the Tenth District expanded the application of this court’s holding in *Reynolds* to contract cases in which the State has exercised a high degree of official judgment or discretion. 2024-Ohio-5887, ¶ 40-45 (10th Dist.). While this court’s holding in *Reynolds* is written broadly, we have applied it only in tort cases. See, e.g., *Crawford v. Ohio Div. of Parole & Community Servs.*, 57 Ohio St.3d 184 (1991) (wrongful death); *Hurst v. Ohio Dept. of Rehab.*

& *Corr.*, 1995-Ohio-68 (negligence), *overruled in part by Wallace*, 2002-Ohio-4210; *Baum v. Ohio State Hwy. Patrol*, 1995-Ohio-155 (negligence); *see also Elston v. Howland Local Schools*, 2007-Ohio-2070, ¶ 28 (noting that the State waived immunity in R.C. 2743.02 for certain *torts*).

{¶ 10} This is not to say that the Tenth District got it wrong. The Tenth District’s decision to apply this court’s holding in *Reynolds* to Smith’s contract case and hold that Ohio State is immune from any contractual liability because it exercised a high degree of official judgment or discretion in its response to the COVID-19 pandemic, *see* 2024-Ohio-5887 at ¶ 40-45 (10th Dist.), may be correct. Indeed, there is some support for applying the holding in *Reynolds* equally to other matters based on the State’s sovereign immunity at common law, including its immunity to matters arising in contract. *See State ex rel. Parrott v. Bd. of Pub. Works*, 36 Ohio St. 409, 414-415 (1881) (holding that the State could not be held liable to pay interest as a debtor under statute that did not expressly render it so liable); *Chisholm v. Georgia*, 2 U.S. 419, 445-446 (1793) (noting that under the common law, if a party is owed a debt by or has a contract claim against the legislative or the executive authority of a State, that party would be without remedy unless the legislature expressly provided for one), *superseded by constitutional amendment on other grounds as stated in FMC v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Schwarz v. Ohio State Univ. Bd. of Trustees*, 31 Ohio St.3d 267, 274 (1987) (Holmes, J., dissenting) (noting that prior to the enactment of R.C. Ch. 2743, sovereign immunity applied whenever the State was sued in contract or tort).

{¶ 11} However, even if the Tenth District is right, *this court* should decide whether to expand the holding in *Reynolds*, because such a decision directly impacts a party’s “‘fundamental right to contract freely with the expectation that the terms of the contract will be enforced,’” *Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.*, 2023-Ohio-3398, ¶ 14, quoting *Nottingdale Homeowners’ Assn., Inc. v. Darby*, 33 Ohio St.3d. 32, 36 (1987). “The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and speak without restraint.” *Blount*, 12 Ohio St.2d at 47. If a party’s right to contract is to be limited and a party can expect the State not to uphold the terms of a contract when a high degree of official judgment or discretion is involved, then *this court* should announce that holding to the people of Ohio.

{¶ 12} If this court does not take the opportunity to address this important issue, all parties in Ohio who sue the State for breach of contract will be bound by the Tenth District’s

expansion of this court's holding in *Reynolds*, unless the Tenth District changes course. *See* R.C. 2743.20 (granting the Tenth District exclusive jurisdiction over appeals from orders and judgments of the Court of Claims). It is our duty to decide issues of public and great general interest that will affect all Ohioans, *see* Ohio Const., art. IV, § 2(B)(2)(e), and we should not abdicate that duty to appellate-court judges who are elected by Ohioans who reside in just one appellate district, which for the Tenth District equates to Ohioans who reside in only one county, *see* Ohio Const., art. IV, § 3(A); R.C. 2501.01(J). Abdicating that duty here is unfair to the rest of the State's citizens who have elected the members of this court to resolve the hard issues that affect *all* Ohioans.

C. This court should accept jurisdiction over Smith's appeal

{¶ 13} This court should accept jurisdiction over Smith's appeal to decide these issues of public and great general interest. We should not leave such important issues to be decided by the Tenth District, especially when such issues may affect all Ohioans. For these reasons, I respectfully dissent.

BRUNNER, J., dissenting.

{¶ 14} In recent months, the federal government has canceled over 16,500 contracts and grants. *See Department of Government Efficiency*, <https://doge.gov/savings> (accessed Apr. 14, 2025). Many of those canceled contracts and grants affect people and organizations in Ohio. *See, e.g., Columbus Dispatch, DOGE to Shutter 47 Social Security Offices. See Which Ohio Location Will Close this Year* (Mar. 27, 2025), <https://www.dispatch.com/story/news/2025/03/27/doge-social-security-offices-ohio-location-elon-musk-donald-trump/82686581007/> (accessed Apr. 14, 2025) [<https://perma.cc/KHE4-LC9E>]; WOSU, *Federal Judge Reinstates HUD Fair Housing Grants, Including One for Local Legal Aid Program* (Mar. 26, 2025), <https://www.wosu.org/politics-government/2025-03-26/federal-judge-reinstates-hud-fair-housing-grants-including-one-for-local-legal-aid-program> (accessed Apr. 14, 2025) [<https://perma.cc/664R-FW4Z>]; NBC4i, *DOGE Cuts Hitting Ohio Farmers, Food Banks* (Mar. 19, 2025), <https://www.nbc4i.com/news/local-news/columbus/doge-cuts-hitting-ohio-farmers-food-banks/> (accessed Apr. 14, 2025).

{¶ 15} State lawmakers are poised to mimic this federal activity. *See cleveland.com, DOGE in Ohio? House Republicans launch their own DOGE Caucus* (Mar. 5, 2025),

<https://www.cleveland.com/news/2025/03/doge-in-ohio-house-republicans-launch-their-own-doge-caucus.html> (accessed Apr. 14, 2025) [<https://perma.cc/9CK3-R6L6>]. This court’s decision to not accept jurisdiction over this appeal denies the public the benefit of our consideration of the issue whether the State may avoid liability for breach of contract based on governmental immunity—a matter of great and general public interest and a matter that involves a substantial state constitutional question. *See* Rule 7.08(B)(4).

{¶ 16} This appeal involves claims raised by appellant, Brooke Smith, who alleges that appellee, Ohio State University (“Ohio State”), breached its contract with her when it canceled in-person instruction during the COVID-19 pandemic and only partially refunded fees and charges she had paid as a student. When we reviewed this case last year, we were asked to decide whether Ohio State could assert discretionary immunity to bar Smith’s suit. *Smith v. Ohio State Univ.*, 2024-Ohio-764, ¶ 9-10. A majority of this court held that discretionary immunity was a jurisdictional bar rather than an affirmative defense and thus could be raised by the State at any time. *Id.* at ¶ 10. The majority remanded the case to the Tenth District Court of Appeals to decide whether Ohio State could use discretionary immunity against Smith’s claim. *Id.*

{¶ 17} I dissented from this court’s judgment because Ohio State had waived the issue of immunity by failing to raise it before the Court of Claims, raising it instead for the first time on appeal to the Tenth District. *Id.* at ¶ 31-32, 42-44 (Brunner, J., dissenting). I also noted that if Ohio State were permitted to belatedly argue the issue, the Court of Claims should first decide the issue, not the Tenth District. *Id.* at ¶ 31-33, 44 (Brunner, J., dissenting). Determining whether immunity applies often requires discovery and the presentation of evidence, and the Court of Claims, which has exclusive jurisdiction over claims against the State, has developed expertise on the issue of the State’s immunity. *Id.* at ¶ 32-33 (Brunner, J., dissenting).

{¶ 18} I also cautioned that interpretation of our case law in this area has been limited to protect the State from suits that challenge a governmental *decision* involving a “‘high degree of official judgment,’” such as legislative or judicial acts. *Id.* at ¶ 38 (Brunner, J., dissenting). We have, in cases like Smith’s, expressly allowed claims to proceed against the State for money damages arising from the *implementation* of those governmental decisions. *See id.* at ¶ 39 (Brunner, J., dissenting), citing *Reynolds v. State*, 14 Ohio St.3d 68, 70-71 (1984). Therefore, a litigant may not sue to challenge a *decision* of the State, but discretionary immunity “does not

shield the state from liability for an injury or loss that occurs in implementing that decision.” *Id.* at ¶ 39 (Brunner, J., dissenting).

{¶ 19} This court, nonetheless, remanded the case to the Tenth District “to determine whether discretionary immunity protects Ohio State from Smith’s suit.” *Smith*, 2024-Ohio-764, at ¶ 21.

{¶ 20} The Tenth District found that it does. *See* 2024-Ohio-5887, ¶ 53 (10th Dist.) It determined that Ohio State cannot be sued by Smith for breach of contract, because the university’s “decisions regarding refunds were, themselves, basic policy decisions characterized by the exercise of a high degree of official judgment or discretion as to an executive or planning function.” *Id.* at ¶ 35. The Tenth District recognized that “questions concerning the application of discretionary immunity have most often arisen in relation to tort claims,” but then concluded that the application of discretionary immunity is not limited to tort claims but may also be applied to breach-of-contract claims, including Smith’s. *Id.* at ¶ 45. This statement of law has wide-ranging implications, including that the State and any of its instrumentalities, such as state universities, may commit a breach of contract and be immune from liability for doing so. What we are left with is tantamount to a stacked deck against citizens seeking redress for grievances against the State when an out-of-balance government exercises authoritarian power and that power goes unchecked.

{¶ 21} Because all Court of Claims decisions are appealed to the Tenth District, *see* R.C. 2743.20, and because today this court denies Smith’s request for discretionary review of the Tenth District’s decision on remand in this case, that decision now binds the Court of Claims in future matters involving breach-of-contract claims against the State. This is troubling for several reasons: Because this matter was not remanded to the Court of Claims, there has not been a thorough development of the record or trial-level analysis of the discretionary-immunity issue as applied to a breach-of-contract claim. And the binding legal precept that we are left with did not develop from cases percolating to this court from courts of appeals around the State. The law was decided by a single decision of the *only* appellate court that is empowered to review cases from the Court of Claims, the decisions of which affect the entire State.

{¶ 22} Given the likely far-reaching impact of the Tenth District’s decision and the recent examples of federal officials terminating public contracts regardless of legal constraints, there rests with this court a responsibility to review the Tenth District’s decision and ascertain whether

it was correct in determining that Ohio State is entitled to discretionary immunity in a context outside typical tort suits, thus shielding the university from liability against Smith's breach-of-contract claim. I respectfully dissent from the majority's decision to not accept jurisdiction over Smith's appeal.
