

IN THE SUPREME COURT OF OHIO

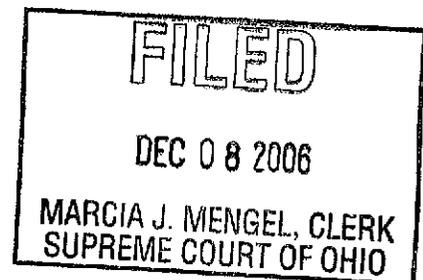
DOTTIE HUBBELL	:	CASE NO. 2006-1528
	:	
Plaintiff - Appellee	:	
	:	On Appeal from the
	:	Greene County
v.	:	Court of Appeals,
	:	Second Appellate District
	:	
CITY OF XENIA, OHIO	:	Court of Appeals
	:	Case No. 2005 CA 0099
Defendants-Appellants	:	
	:	

**BRIEF OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE
URGING REVERSAL ON BEHALF OF APPELLANT
THE CITY OF XENIA, OHIO**

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INTRODUCTION.

If a political subdivision's immunity from liability depends upon the favorable resolution of a genuine issue of material fact, summary judgment in favor of the political subdivision is inappropriate. This is the ordinary consequence of the finding of a genuine issue of material fact in a summary judgment exercise. See, Civ.R.56(C) ("Summary judgment shall be rendered forthwith if the pleadings, (and certain evidentiary materials) show that there is no genuine issue as to any material fact ***.")

If, however, a trial court erroneously determines that an issue fact is "material" to the legal analysis of the case, and the effect of that error "denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability," R.C. 2744.02(C) provides that the order denying summary judgment is subject to immediate appellate review. Under the terms of the statute, the propriety of the determination of the trial court will not be known unless a court of appeals reviews the evidentiary record and makes its own, de novo judgment on the merits of the motion for summary judgment. See, e.g., *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000 Ohio 186, 738 N.E.2d 1243 ("We review the grant of summary judgment de novo.")

The Greene County Court of Appeals, in this case, concluded that a mere finding of a genuine issue of fact by a trial court prevents a court of appeals from acquiring jurisdiction over a case. The appellate court did not determine whether the issue of fact was legally "material" to the case. The court did not even set forth the facts of the case in its opinion.

In deciding the case in this fashion, the appellate court disregarded the policy preference of the Ohio General Assembly to allow interlocutory appellate review of an order which “denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability,” and asserted its own policy preference regarding “judicial economy.”

The Ohio Municipal League (the “League”), as amicus curiae on behalf of the City of Xenia, Ohio, urges this court to reverse the decision in *Hubbell v. City of Xenia, Ohio*, 2006-Ohio-3369, (“Appendix i”). This case should be remanded to the Greene County Court of Appeals for a consideration of the city’s motion for summary judgment on its merits.

STATEMENT OF AMICUS INTEREST

The League is a non-profit Ohio Corporation composed of a membership of more than 750 Ohio cities and villages. Pursuant to Chapter 2744 of the Ohio Revised Code, municipalities are “political subdivisions,” subject to certain immunities from suit for allegedly tortious conduct. R.C. 2744.01(F).

The League, on behalf of its member municipalities, has a strong interest in seeing immunities granted by law to political subdivisions invoked and applied at the earliest stages of litigation so that its employees may continue to provide necessary public services, rather than respond to lawsuits which are not legally meritorious. To the extent a statutory interlocutory appeal provision is subverted by a judge-made policy choice, this interest is thwarted.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Merit Brief of the City of Xenia.

ARGUMENT

Proposition of Law: A trial court decision overruling a Civ. R. 56 motion for summary judgment in which a political subdivision or its employee had sought immunity is an order denying “the benefit of an alleged immunity” and is, therefore, a “final” and appealable order under R.C. § 2744.02(C).

The League asserts that R.C. 2744.02(C) vests a court of appeals with jurisdiction when a motion for summary judgment is made, pursuant to Civ. R. 56, which alleges the existence of a statutory immunity from liability and the trial court does not grant judgment on behalf of the political subdivision. The statute expressly provides this jurisdiction and, unless the statute is unconstitutional,¹ the courts are bound by this legislated policy choice.

There may or may not be a genuine issue of material fact in such a case, regarding the alleged immunity, which precludes summary judgment in favor of the political subdivision, but given the existence of R.C. 2744.02(C) such a decision should be made on the merits of the appeal, rather than on a motion to dismiss for lack of jurisdiction. If an “order” of the trial court is rendered which “denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability ***,” and a timely appeal is filed, the jurisdiction of the appellate court is vested by operation of R.C. 2744.02(C), and the court of appeals has an obligation to review the case on the merits. App.R.12(A).

¹ There has been no assertion in this case that R.C. 2744.02(C) is unconstitutional.

The Authority of the Legislature:
Article IV, Section 3(B)(2) of The Ohio Constitution

The General Assembly has the authority to establish the jurisdiction of Ohio's appellate courts:

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

Article IV, Section 3(B)(2) of the Ohio Constitution. (Emphasis added.)

There as there has been no challenge to the constitutionality of R.C. 2744.02(C) raised in this case. Consequently, this court should presume that the legislature has validly enacted such a statute, and that the statute comports with this constitutional provision. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 147, 57 O.O. 134, 128 N.E.2d 59. (“A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.”)

The Statute

R.C. 2744.02(C) provides, in its entirety: “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.”

By specifically identifying orders which deny “the benefit of an alleged immunity” as “final,” and therefore immediately appealable, the Ohio General Assembly has expressed

its extremely broad policy choice to interrupt the ordinary flow litigation to determine whether or not a trial court properly denied a motion which asserts the existence of an immunity from liability.

This court has repeatedly upheld the constitutionality of various provisions of Ohio's Political Subdivision Tort Immunity Act. *Fahnbulleh v. Strahan*, 73 Ohio St. 3d 666, 1995 Ohio 295, 653 N.E.2d 1186, *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 1994 Ohio 368, 639 N.E.2d 31; *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 550 N.E.2d 181. The court has noted that the preservation of fiscal resources is a legitimate public policy consideration, which provides a rational basis for the Act. *Id.* It is reasonable to assume that a statutorily granted right to intermediate appellate review springs from the similar policy considerations. To the extent a trial court erroneously denies a motion for summary judgment, which is predicated upon an immunity provided by law, the political subdivision and its employees may be diverted from their principal functions of providing services to municipal taxpayers. Thus, one "benefit" of the statutory immunity is the avoidance of a trial, and its attendant costs to the community (including lost work by the employees) and emotional strains on municipal personnel.

The court of appeals identified two policy reasons why it was adopting a rule which is contrary to the language of R.C. 2744.02(C): judicial economy and ease of application. *Hubbell, supra*, at §§14-15. Whether or not such policy choices are meritorious, they must be rejected as a matter of law: "Judicial policy preferences may not be used to override valid

legislative enactments, for the General Assembly should be the final arbiter of public policy.” *State v. Smorgala* (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672, superseded by statute on other grounds.

Why *Brown* was Wrong

The first appellate court to erroneously interpret R.C. 2744.02(C) was the Ninth District Court of Appeals in *Brown v. Akron Board of Education* (1998), 129 Ohio App.3d 352, 717 N.E.2d 1115.² In its decision, the *Brown* court looked to federal common law, noting that the United States Supreme Court, in *Mitchell v. Forsyth* (1985), 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806, had determined that certain “collateral orders” denying summary judgment were “final decisions” and immediately appealable under 28 USC § 1291. The *Brown* court went on to review *Johnson v. Jones* (1995), 515 U.S. 304, 132 L.Ed.2d 238, 115 S.Ct. 2151, and noted that the U.S. Supreme Court had determined that if there is an issue of fact in the case, the federal courts of appeals have no jurisdiction to review the denial of a motion for summary judgment. There are three major errors in the analysis put forward by the *Brown* court.

First, it should be noted that the existence of a statute in this case, which provides extremely broad jurisdiction for appellate review, makes Ohio law quite different from the

² *Brown* interpreted R.C. 2744.02(C), as enacted in 1997 under H.B. 350. H.B. 350 was the Ohio tort reform bill, declared unconstitutional in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 1999 Ohio 123, 715 N.E.2d 1062. The current version of R.C. 2744.02(C), however, enacted in 2002 is identical to the prior version. *Hubbell v. City of Xenia*, supra, at ¶ 5

federal appellate practice. The *Brown* court even recognized this distinction: “There is no federal statute similar to *** 2744.02(C) of the Ohio Revised Code.” *Brown*, supra, at 357. Because there is no federal statute expressly establishing interlocutory appellate jurisdiction, the federal appellate courts remain free to develop common law doctrine establishing the breadth and depth of their jurisdiction on interlocutory appeals. The existence of a statute in Ohio constrains such judicial discretion over the determination of jurisdiction.

Second, there is no limitation on the grant of jurisdiction, provided by R.C. 2744.02(C). Significantly, the statute does not say “An order that conclusively denies a political subdivision or an employee of a political subdivision the an immunity from liability ***” is subject to an immediate appeal. Rather, any order that denies the “benefit” of an “alleged immunity” is immediately reviewable. It is important to note that the *Brown* court actually misstated the statutory standard, when it said: “The issue this Court must determine is whether the trial court's order denying the Board's motion for summary judgment was an order denying the Board ‘an alleged immunity from liability as provided in Chapter 2744.’” *Brown*, at 356, 717 N.E.2d 1115, 1118. By stating the test in this manner, the court ignored the word “benefit,” which is included in R.C. 2744.02(C). This reading violates a well established tenet of statutory construction: words of a statute are to be read as they are written, when they are unambiguous and definite, and words of a statute are not to be added or ignored. *Portage County Board of Commissioners v. Akron* , 109 Ohio St.3 106, 2006 Ohio 954, 846 N.E.2d 478, at ¶ 52.

One “benefit” of a statutory “immunity from liability” is not having to stand trial. As noted above, this “benefit” permits the political subdivision and its employees to avoid both the financial costs and the emotional stresses of a trial. An order which improperly denies a motion for summary judgment denies this “benefit” of a statutory immunity. Moreover, the statute’s inclusion of the broad language, covering even “alleged” immunities, indicates that the General Assembly wanted to grant political subdivisions the earliest opportunity to have the appellate courts of Ohio review orders which deny them a potential benefit of an immunity from liability, so that there is an early opportunity to terminate legally meritless litigation. By ignoring the words of the statute, and substituting their own policy preferences, the *Brown* court and the court below have failed to properly apply the law in this case.

The third problem with *Brown* is that, even if the federal common law determination of jurisdiction were to be followed in Ohio, the federal courts of appeals review the case to determine whether or not an issue of fact was material to resolving legal issues presented by the case. In doing so, the appellate court reviews the record to determine the materiality of any factual questions.

For example, in *Estate of Bing v. Whitehall* (6th Cir., 2006), 456 F.3d 555, the trial court had determined that issues of fact precluded summary judgment: “The district court held that the defendant officers are not immune from suit under the doctrine of qualified immunity because a trial is needed to resolve the parties' various factual disputes. Regarding the plaintiffs' § 1983 claim for warrantless entry, the district court held that the alleged facts

permitted the inference that the police violated Bing's rights twice: first, when they broke Bing's windows and battered in his door; and second, when S.W.A.T. fireteams invaded his home. *** The district court also held that genuinely disputed issues of material fact precluded summary judgment on the plaintiffs' § 1983 excessive force claims regarding the police's use of pepper gas and flash bangs.” *Id.*, at 562 - 563. Yet, the court of appeals reviewed the case to determine “purely legal arguments.” *Id.*, at 563, citing *Smith v. Cupp* (6th Cir., 2005), 430 F.3d 766, 772. In doing so, the court determined that the “issues of fact” identified by the trial court did not materially affect the legal analysis in the case: assuming the worst factual case against the defendants (consistent with the evidence), the defendants were still entitled to judgment as a matter of law (except with respect to an issue of fact related to a claim of improper use of deadly force.) *Id.*, at 572.

State Auto does not apply

The lower court looked to this court’s decision in *State Automobile Mut. Ins. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199, as supporting of its choice to dismiss the appeal.

The *State Auto* case, however, expressly disclaimed determination of the applicability of R.C. 2744.02(C): “Because the appellate court proceeded to adjudicate the merits of this case, the parties did not appeal the question of the applicability of R.C. 2744.02(C). Therefore, because the issue is not ripe, we express no opinion on whether the April 9, 2003 version of R.C. 2744.02(C) applies.” *Id.*, at paragraph 9.

In this case, R.C. 2744.02(C), effective April 9, 2003, has been litigated and is ripe for review. The statute provides for interlocutory appellate jurisdiction, and the courts of appeals are now bound by the law.

Frivolous Appeals

A concern could be raised that political subdivisions will have the opportunity to file multiple interlocutory appeals, which border on the frivolous (e.g. an appeal of a motion to dismiss, then an appeal of the denial of a motion for summary judgment raising precisely the same legal argument which was previously rejected on appeal). The response to this concern is two-fold: 1) If that is a problem, it is a problem created by the General Assembly and one avenue of remedy lies with the legislative process; and 2) Appellate courts are not divested by R.C. 2744.02(C) of their authority to determine that an appeal is frivolous, pursuant to App.R.23. To the extent a political subdivision does not have a good faith basis for taking an interlocutory appeal, a court of appeals has the authority to require the political subdivision to pay the attorney fees of the opposing party.

As the *Bing* case and this case demonstrate, however, there are frequently meritorious bases for arguing that an issue fact, which has been erroneously identified by the trial court as material to the case, is not legally material due to other failures in a plaintiff's case. When such an error is made, the trial court has denied the political subdivision "the benefit of an alleged immunity from liability." Pursuant to R.C. 2744.02(C), such a determination is immediately appealable.

CONCLUSION

The Ohio Municipal League respectfully requests this court reverse the decision of the Greene County Court of Appeals and remand the case for a review of the merits of the case. Such a result will recognize the policy choice of the Ohio General Assembly to vest the Courts of Appeals of this state with jurisdiction to review any denial of the benefit of an alleged immunity under R.C. Chapter 2744, or any other provision of law.

Even if this court were to determine that the existence of a genuine issue of material fact is jurisdictional, and warranted the dismissal of an appeal rather than an affirmance of the trial court's judgment upon the merits of the appeal, the courts of appeals of this state should still review the record in each case in order to determine whether or not the issue of fact is material. The courts of appeals ought not be bound by the trial court's determination of the legal question of materiality when considering their own jurisdiction in the case. Moreover, if the case does not depend upon the issue of fact being resolved in favor of the political subdivision, and if the political subdivision is entitled to judgment as a matter of law, the judgment of the trial court should not be insulated from reversal by its own erroneous decision of law.

For the foregoing reasons, the judgment of the Greene County Court of Appeals should be reversed and remanded for further consideration consistent with the opinion of this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the within Brief of Amicus Curiae the Ohio Municipal League Urging Reversal on Behalf of the Appellant City of Xenia, Ohio has been mailed, via regular U.S. mail, on the 7th day of December, 2006, to:

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[Cite as *Hubbell v. Xenia*, 167 Ohio App.3d 294, 2006-Ohio-3369.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

HUBBELL, :
Appellee, : C.A. CASE NO. 2005 CA 99
v. : T.C. CASE NO. 2004 CV 0507
CITY OF XENIA, : (Civil Appeal from
Appellant. : Common Pleas Court)

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DECISION AND ENTRY

Rendered on the 29th day of June, 2006.

.....
Michael P. McNamee and Gregory B. O'Connor, for appellee.

Lynnette Pisone Ballato and Tabitha Justice, for appellant.

.....
Per Curiam.

{¶ 1} The city of Xenia appeals from an order of the Greene County Court of Common Pleas, which denied its motion for summary judgment on sovereign immunity pursuant to R.C. 2744.03(A)(5). In denying the motion, the trial court found that genuine issues of material fact existed as to whether the actions of the city's employees were negligent. At oral argument held on November 15, 2005, we requested that the parties brief the issue of appellate jurisdiction under R.C. 2744.02(C) when the trial court concludes that

a genuine issue of material fact exists as to whether the political subdivision is entitled to immunity. Upon review of the parties' supplemental briefs and relevant authority, we conclude that appellate jurisdiction does not exist.

{¶ 2} Before proceeding to the merits of an appeal, an appellate court is obligated to ensure that it has jurisdiction. "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266. Normally, the denial of a motion for summary judgment is not a final, appealable order under R.C. 2505.02 and Civ.R. 54(B). *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 90, 554 N.E.2d 1292; *Shump v. First Continental-Robinwood Assoc.* (2000), 138 Ohio App.3d 353, 741 N.E.2d 232.

{¶ 3} The city has filed its appeal pursuant to R.C. 2744.02(C), as amended effective April 9, 2003, which states, "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 city claims that the trial court's decision constituted a denial of the benefit of immunity from liability and, consequently, the decision was a final, appealable order.

{¶ 4} Hubbell asserts that the trial court's order is not immediately appealable under R.C. 2744.02(C) because the court did not deny sovereign immunity as a matter of law. She asserts that the trial court merely found that genuine issues of material fact precluded a determination, at that time, of whether the city was entitled to immunity. In support of her assertion, Hubbell primarily relies upon authority from the Ninth District Court of Appeals, such as *Brown v. Akron Bd. of Edn.* (1998), 129 Ohio App.3d 352, 717 N.E.2d 1115, and the

cases that follow its reasoning. See, e.g., *Thomas Vending, Inc. v. Slagle* (Feb. 3, 2000), Marion App. No. 9-99-16, 2000 WL 123804.

{¶ 5} Although few courts have yet to address the current version of R.C. 2744.02(C), some previously faced this issue under the 1997 version of R.C. 2744.02(C), which was adopted in Am.Sub.H.B. No. 350. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062, the Supreme Court held H.B. 350 unconstitutional as violative of the single-subject rule of the Ohio Constitution. The language of the current version of R.C. 2744.02(C), enacted in 2002, is identical to that of the 1997 version.

{¶ 6} Although we did not directly resolve the present issue, we have implicitly employed a broad construction of our jurisdiction. Addressing the 1997 version, we have stated, without qualification, that “a denial of summary judgment in immunity situations is a final order under R.C. 2501.02 and R.C. 2744.02(C).” *Carlson v. Woolpert Consultants* (Nov. 24, 1998), Montgomery App. Nos. 17292 and 17303. In *Garrison v. Bobbitt* (1999), 134 Ohio App.3d 373, 731 N.E.2d 216, we addressed the trial court’s denial of a municipal fire department’s motion for summary judgment on its employee’s claim of intentional infliction of emotional distress and on its claim of sovereign immunity. We noted as a preliminary point that “the trial court did not reject defendants’ immunity claim. Instead, the court simply felt the question should be heard by a jury, due to factual issues.” Upon review, we agreed with the trial court that genuine issues of material fact existed as to whether the defendants had acted with malicious purpose, in bad faith, or in a reckless or wanton manner. We thus affirmed the trial court’s denial of summary judgment on the defendants’ claim of immunity. (We also affirmed the denial of summary judgment on the plaintiff’s tort

claim.)

{¶ 7} Likewise, in *Weber v. Haley* (May 1, 1998), Clark App. No. 97CA108, we addressed the denial of the Springfield Township Board of Trustees' motion for summary judgment on immunity grounds. The trial court had determined that a factual question existed as to whether the township employee's conduct had been willful, wanton, or reckless. Although we did not discuss distinctions between a denial of summary judgment as a matter of law and denial on the ground that a factual question exists, we proceeded to address the merits of whether the trial court had properly denied the township's motion. Upon doing so, we concluded, as a matter of law, that the employee's conduct constituted, at most, negligence and, thus, the employee and the board of trustees were immune from liability.

{¶ 8} In short, our past approach was to consider denials of summary-judgment motions based on claims of governmental immunity as final, appealable orders when the trial court had concluded that there were genuine issues of material fact.

{¶ 9} Contrary to our past approach, the Ninth District and other courts have held that the finding of a fact question is not a denial of immunity. The Third District has supported this approach, stating 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." *Slagle*, Marion App. No. 9-99-16, 2000 WL 123804; see, also, *Burley v. Bibbo* (1999), 135 Ohio App.3d 527, 529, 734 N.E.2d 880.

{¶ 10} The Fourth District, however, has also found the denial of summary judgment on immunity due to presence of a genuine issue of material fact to be a final order. As it

stated in *Lutz v. Hocking Technical College* (May 18, 1999), Athens App. No. 98CA12:

{¶ 11} “The conservation of fiscal resources of political subdivisions is one of the principal statutory purposes behind R.C. Chapter 2744's immunities and liability limitations. See *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29. R.C. 2744.02(C) furthers this legislative purpose by allowing political subdivisions (and their employees) to immediately appeal the denial of an immunity. *Kagy v. Toledo-Lucas Cty. Port Auth.* (1997), 121 Ohio App.3d 239, 244. Immediate appeal may help prevent political subdivisions from devoting time and resources to defending a suit, only to have an appellate court determine *after* trial that they were immune from suit all along. *Id.*”

{¶ 12} We note that in *Lutz*, the appellate court affirmed the denial of summary judgment to the police officers due to a fact question as to whether the officers had acted with malice, bad faith, wantonness, or recklessness, but held that the trial court should have granted immunity to the college because R.C. 2744.03(A)(6) applies only to employees.

{¶ 13} Despite our past willingness to interpret R.C. 2744.02(C) broadly, we find the approach taken by the Ninth District to be the better approach. When the trial court denies a motion for summary judgment because it finds that there are genuine issues of material fact as to the government's immunity, the trial court has not yet adjudicated the issue of whether the political subdivision or its employee is entitled to the benefit of the alleged immunity. In other words, the trial court has concluded that the state of the record does not permit an adjudication of that issue due to the question of fact. In our view, a governmental entity or its employee is not denied the benefit of immunity until the issue of whether the government or its employee is entitled to immunity has been fully resolved.

{¶ 14} This approach has several benefits. First, this conservative construction of

R.C. 2744.02(C) best serves the purpose of judicial economy. Generally, when a trial court concludes that there is a genuine issue of material fact concerning an issue – thus requiring more work for the trial court in the form of a trial on that issue – it is unusual for a reviewing appellate court to find, to the contrary, that there is no genuine issue of material fact. So, in the usual situation when an appellate court would agree that a factual question exists concerning governmental immunity, an immediate appeal would merely add an unnecessary appeal – with its attendant delay – to the litigation. Only in an unusual case would an immediate appeal conserve judicial resources by avoiding an ultimately unnecessary trial.

{¶ 15} Second, a narrow interpretation of R.C. 2744.02(C) would provide a simple, easily applied test for determining whether an order that did not grant a request for immunity was immediately appealable. By limiting appeals under R.C. 2744.02(C) to those orders to which the court has determined, as a matter of law, that governmental immunity does not apply, the parties (and the court) can ascertain with minimal difficulty whether an order is immediately appealable. In contrast, if we were to interpret R.C. 2744.02(C) broadly, any order that failed to grant immunity when requested would raise the question of whether the case was in an appropriate procedural posture for appellate review.

{¶ 16} We note that the Supreme Court of Ohio has recently reviewed whether an appeal from the trial court's denial of a Civ.R. 12(B)(6) motion was a final, appealable order under R.C. 2744.02(C). *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199. In that case, the plaintiff, an insurance company, asserted a cause of action in negligence to recoup proceeds that it had paid to its insured arising out of a fire at the insured's business. A third-party complaint was filed against the Oakwood Village Fire Department and the fire chief, alleging that the department had acted

recklessly by using an improper fire suppressant that caused explosions and substantially exacerbated the fire. In response, Oakwood Village filed a motion to dismiss, pursuant to Civ.R. 12(B)(6), asserting that it was immune from liability under R.C. Chapter 2744 and that R.C. 2744.05(B) precluded liability for indemnity or contribution on a subrogation claim. The trial court denied the motion without opinion. The Eighth District, accepting the allegations in the complaint as true, addressed whether Oakwood Village was entitled to sovereign immunity and affirmed.

{¶ 17} On appeal, the Supreme Court vacated the Eighth District's judgment on the ground that the trial court's ruling was not a final, appealable order. The court reasoned:

{¶ 18} "The trial court provided no explanation for its decision to deny the motion to dismiss. The court made no determination as to whether immunity applied, whether there was an exception to immunity, or whether R.C. 2744.05(B)(1) precludes contribution as the basis for its decision. The court did not dispose of the case.

{¶ 19} "At this juncture, the record is devoid of evidence to adjudicate the issue of immunity because it contains nothing more than [the] third-party complaint and Oakwood's Civ.R. 12(B)(6) motion to dismiss. No fact-finding or discovery has occurred. The trial court's denial of the motion to dismiss merely determined that the complaint asserted sufficient facts to state a cause of action.

{¶ 20} "*** The court of appeals considered the issue of immunity prematurely. The record below must be developed in order to reach this issue." *Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199, at ¶ 10-12.

{¶ 21} Although the procedural posture of the present case makes it readily distinguishable from *Titanium Metals Corp.*, *Titanium Metals Corp.* is instructive in that an

order is not immediately appealable merely because the trial court denied a request for immunity. Although the trial court's order herein discussed whether the city of Xenia is entitled to immunity, and the court made that determination in response to summary-judgment motions that were supported with evidence, we believe that the court's failure to resolve the immunity question likewise renders appellate review of the immunity issue premature. Until the trial court has denied the claim of immunity – as opposed to failing to grant the request for immunity at that time – the trial court has merely determined that there are questions of fact that need resolution before the immunity question can be fully addressed.

{¶ 22} We thus conclude that the trial court's decision denying summary judgment on the city's claim of immunity from liability is not a final, appealable order, pursuant to R.C. 2744.02(C). This appeal is dismissed.

So ordered.

WOLFF, FAIN, and GLASSER, JJ., concur.

GEORGE M. GLASSER, J., retired, of the Sixth Appellate District, sitting by assignment.