

IN THE SUPREME COURT OF OHIO

06-1589

DOTTIE HUBBELL)	CASE NO.: 06-1528
)	
Plaintiff-Appellee,)	On Appeal from the Greene County
)	Court of Appeals, Second Appellate
vs.)	District
)	
CITY OF XENIA, OHIO,)	Court of Appeals
)	Case No. 2005 CA 0099
Defendants-Appellants.)	
)	

**MEMORANDUM OF AMICUS CURIAE, THE CITY OF CIRCLEVILLE,
 URGING REVERSAL ON BEHALF OF
 APPELLANT THE CITY OF XENIA, OHIO**

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I. INTRODUCTION AND STATEMENT OF AMICUS INTEREST

The City of Circleville, as Amicus Curiae on behalf of the City of Xenia, urges this Court to reverse the decision of the Second District Court of Appeals. The Second District erred when it refused to exercise jurisdiction over the City of Xenia's interlocutory appeal pursuant to R.C. § 2744.02(C). The Section provides political subdivisions and their employees a right to appeal denials of the "benefit of an alleged immunity."

The City of Circleville is a political subdivision in which three of its police employees filed an interlocutory appeal of a denial of immunity that was pending in the Fourth District. *Estate of Jillian Graves v. City of Circleville et al*, Case No.: 06CA002900. Although for the purposes of that appeal the facts were admitted, the parties dispute the significance of whether the officers' admitted conduct rises to the level of "reckless and wanton" misconduct to constitute an exception to immunity. The court determined that jurisdiction did not exist pursuant to R.C. § 2744.02(C).

The City of Circleville urges this Court to consider the federal courts' approach to determining appellate jurisdiction. As demonstrated below, the federal appellate courts initially misinterpreted the scope of their jurisdiction over interlocutory appeals of orders denying immunity. Similarly, Ohio courts – like the

Second District in the case before this Court – have struggled with determinations of jurisdiction over orders denying sovereign immunity. The federal courts have resolved those issues and their example would inform the analysis for determining jurisdiction under R.C. § 2744.02(C). Those courts now distinguish between disputes of material “basic fact,” which preclude jurisdiction, and disputes of “ultimate fact,” which do not. Disputes of ultimate fact are mixed questions of law and fact that are treated as issues of law. Federal courts now routinely exercise jurisdiction over these interlocutory appeals.

The City of Circleville submits its amicus curiae brief to present persuasive federal case authority regarding appellate jurisdiction to supplement the authorities and arguments by the parties or other amici curiae. The City also submits its brief to present the implications the case has on employees of political subdivisions who desire an interlocutory appeal when denied immunity.

II. STATEMENT OF THE CASE AND FACTS

The City adopts and incorporates by reference the statement of the facts and case contained in the Appellant City of Xenia’s Brief.

III. ARGUMENT

Proposition of Law: An appellate court has an independent duty to ascertain whether disputed genuine issues of material fact preclude an interlocutory appeal under R.C. § 2744.02(C).

Federal appellate courts have resolved analogous issues when determining jurisdiction over interlocutory appeals of qualified immunity. Their resolution of those issues forced them to face many of the same issues encountered by Ohio courts (*e.g.*, Does a lower court's finding of genuine issues of material fact preclude jurisdiction? Does a disputed ultimate fact render an interlocutory order incapable of being a final appealable order when the basic facts are undisputed?). The City of Circleville submits that the federal courts' example would inform the analysis for determining jurisdiction over denials of immunity under R.C. § 2744.02(C).

1. An appellate court has jurisdiction over an interlocutory appeal under R.C. § 2744.02(C) to determine whether a given set of facts is subject to immunity.

The basis for an interlocutory appeal of a denial of qualified immunity is 28 U.S.C. § 1291 and the collateral order doctrine. Section 1291 gives federal courts of appeals jurisdiction over "all final decisions" of district courts. Rooted in case law, the collateral order doctrine accommodates a "small class" of rulings, not concluding the litigation, but conclusively resolving "claims of right separable

from, and collateral to, rights asserted in the action.” Behrens v. Pelletier (1996), 516 U.S. 299, 305.

A trial court order denying qualified immunity is one of those rulings and is immediately appealable. Mitchell v. Forsyth (1985), 472 U.S. 511, 530. Qualified immunity, like Chapter 2744 immunity, shields governmental officers who are performing discretionary functions from liability for civil damages and gives those actors freedom to perform their official duties without fear that even a slight misstep will trigger their financial ruin. Wyatt v. Cole, 504 U.S. 158, 167 (1982). Like Ohio sovereign immunity, qualified immunity is an entitlement not to stand trial in certain circumstances. Mitchell, 472 U.S. at 525-26; *see, e.g., Sciulli v. City of Rocky River* (8th Dist. 1998), 1998 WL 414928 (rejecting dismissal as premature because the plaintiff had not had an opportunity to engage in discovery). When raised, Chapter 2744 creates a statutory presumption of immunity for governmental entities and their employees. R.C. § 2744.02(A); R.C. § 2744.03(A)(6); *see e.g., Ross v. Trumbull County Child Support Enforcement Agency* (11th Dist. 2001), 2001 WL 114971 at *6 (citations omitted).

Also similar to qualified immunity, sovereign immunity is effectively lost if the case is erroneously allowed to go to trial. Certainly, the benefit of an interlocutory appeal via R.C. § 2744.02(C) is lost. This Court has identified that

“the manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.” Wilson v. Stark Ctr. Dept. of Hum Serv. (1994), 70 Ohio St.3d 450, 453. The Legislature passed Ohio R.C. § 2744.02(C) expressly to allow political subdivisions and their employees to immediately appeal the denial of an immunity. *See, e.g.,* Kagy v. Toledo-Lucas Ctr. Port Auth. (6th Dist. 1997), 121 Ohio App.3d 239, 244. Immediate appeal prevents political subdivisions and their employees from devoting 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. Id.

While the jurisdictional basis for appeals of qualified immunity is rooted in federal case law, Ohio’s Political Subdivision Tort Liability Act provides a statutory basis for an immediate appeal of a trial court’s denial of immunity:

[A]n 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.

R.C. § 2744.02(C). The express language of the Section is broad, allowing for the immediate appeal of an order that “denies ... the benefit of an alleged immunity.”

In 1995, the United States Supreme Court decided Johnson v. Jones (1995), 515 U.S. 304. The Johnson case involved a trial court’s denial of qualified

immunity to several police officers who filed a motion for summary judgment. A citizen accused several officers of using excessive force. Three of the officers appealed the denial, arguing that the citizen could not provide evidence to demonstrate that they were at the scene or involved in the battery. The lower court determined that there was circumstantial evidence that supported the citizen's case. The appellate court rejected jurisdiction, as did the Supreme Court. The Supreme Court noted that where a party only seeks to appeal the district court's determination of whether the evidence is sufficient or whether a party may be able to prove a claim at trial, the interlocutory appeal denying immunity is not immediately appealable.

After Johnson v. Jones and initially, some federal courts believed that they did not have jurisdiction over interlocutory appeals of orders that denied qualified immunity when a trial court would determine that "genuine issues of material fact exist." In the present case, the Hubbell court made the same conclusion that "when the trial court denies a motion for summary judgment because it finds that there are 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." Hubbell v. Xenia (2nd Dist. 2006), 167 Ohio App.3d 294, 298.

The U.S. Supreme Court, shortly after Johnson v. Jones, rejected this overly narrow view of appellate court jurisdiction:

[R]espondent asserts that appeal of denial of the summary-judgment motion is not available because the denial rested on the ground that "[m]aterial issues of fact remain." This, he contends, renders the denial unappealable under last Term's decision in *Johnson v. Jones*, 515 U.S., at 313-318, 115 S.Ct., at 2156-2158. **That is a misreading of the case.** Denial of summary judgment often includes a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that every such denial of summary judgment is nonappealable. ... [emphasis added.]

Behrens v. Pelletier (1996), 516 U.S. 299. After Behrens, federal courts complied with that clarification. One court recognizing in no uncertain terms that, "[i]f it were otherwise a district court could always insulate its qualified immunity rulings from interlocutory review by mouthing the appropriate shibboleth." Turner v. Scott, 119 F.3d 425, 428 (6th Cir.1997) (*quoting Behrens v. Pelletier*, 516 U.S. at 313). Johnson held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue is the determination of nothing more than whether the evidence could support a finding that particular conduct occurred. Johnson, 515 U.S., at 313-318. The rule is now well-settled that denials of summary judgment are appealable so long as "the issue on appeal is not

what facts the parties may be able to prove, but whether the plaintiff's facts, taken at their best, show a violation of clearly established law.” Williams v. Mehra, 186 F.3d at 689. In applying sovereign immunity under Chapter 2744, and analogous to qualified immunity, the issue always is whether the facts taken at their best establish a statutory exception to immunity.

After the United State Supreme Court’s decision in Behrens, the federal courts now routinely treat these type of appeals as “mixed issues of law and fact, which [the courts] treat as issues of law, not issues of fact.” *See, e.g., Williams* at 689-90. The courts hold that “disputes over such issues do not divest [the court] of jurisdiction to hear the appeal.” Indeed, even in cases where the appellate court’s review is made more difficult by the lower court’s failure to make findings of fact to assume as true, appellate jurisdiction still exists. Johnson, 515 U.S. at 319 (noting that when “[d]istrict judges ... deny summary judgment motions without indicating their reasons for doing so [,]” appellate courts “may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed”).

When the facts are not contested or when the appellant acknowledges the opposing parties’ facts (supported by the record) for purposes of the appeal, the appellate court must exercise jurisdiction. *See, e.g., Williams v. Mehra*, 186 F.3d at

690 quoting Johnson, 515 U.S. at 311 (because the case turns on whether the facts, admitted by the defendants for purposes of this appeal, “ ‘show[] a violation of clearly established law,’ not on ‘which facts the parties may be able to prove,’ the district court's denial of qualified immunity is a ‘final order’ under 28 U.S.C. § 1291, and we have jurisdiction to decide the case on the merits.”).

The Second District in the Hubbell decision expressly stated that it followed Ohio's Ninth District Court of Appeals' overly narrow approach to R.C. § 2744.02(C) appeals. Hubbell v. Xenia (2nd Dist. 2006), 167 Ohio App.3d 294, 298. The Ninth District's approach is based on the United States Supreme Court's Johnson decision **without** reference to Behrens and its clarification. The line of Ninth District cases denying jurisdiction on such grounds seemingly flow back to the Ninth District's prior decision in Brown v. Akron Board of Education (9th Dist. 1998), 129 Ohio App. 3d, 352. The Ninth District in Brown was called upon to determine the extent of its jurisdiction in reviewing a denial of sovereign immunity at the summary judgment stage. In examining the extent of its jurisdiction, the Ninth District looked at the U.S. Supreme Court's decision in Johnson v. Jones (1995), 515 U.S. 304. The U.S. Supreme Court noted that where a party only seeks to appeal the district court's determination of whether the evidence is sufficient or whether a party may be able to prove a claim at trial, the order is not immediately

appealable. Brown, *supra*, at 357-358, *citing* Johnson, *supra*. The court of appeals in Brown apparently concluded that so long as the parties agreed as to how the sovereign immunity statute reads, (i.e., if the conduct in Brown was with malicious purpose, in bad faith, or in a wanton or reckless manner no immunity existed and if the conduct was only negligent, it was barred by the immunity statute) the court had no obligation to determine whether on a given set of facts, those facts can even rise to the level of negligence, or willful, wanton or reckless misconduct. The court of appeals in Brown, and in its subsequent decisions, had taken the position that it has no obligation to review whether a trial court properly applied the immunity statute to any given set of facts so long as a trial court uses the magic incantation of “genuine issues of material fact remain.” The Hubbell court adopted the reasoning of the Ninth District without proper analysis of Behrens.

Federal jurisprudence suggests terms familiar to Ohio law that assist in determinations of jurisdiction. The federal courts discuss two types of facts: “basic fact” and “ultimate fact. “Basic fact” can be defined as facts about actual conduct and circumstances. *See* Williams v. Mehra (6th Cir. 1999), 186 F.3d 685, 690. Examples of basic facts are: Whether the public entity had certain records? Whether it knew certain things? Whether the public entity’s employees observed something? *Id.* A dispute of basic fact is exemplified by this simple situation: A

plaintiff testifies that a defendant hit him in the face without provocation; the defendant denies he hit the plaintiff at all.

“Ultimate fact” can be defined as applying the basic facts to the immunity law. Examples of a question of ultimate fact are: Whether a dispatcher who admittedly forgets to dispatch a call rises to the level of “malicious purpose, in bad faith, or [done] in a wanton or reckless manner,” thus constituting an exception to the employee’s immunity under R.C. § 2744.03(A)(6)(b). Whether an employee of a political subdivision’s driving of a vehicle during an “emergency call” rose to the level of “willful or wanton misconduct,” thus establishing an exception to a political subdivision’s immunity under R.C. § 2744.02(B)(1)(a).

Although unused in the context of Chapter 2744, the concepts of basic and ultimate fact are not foreign to Ohio law. Standards Testing Laboratories, Inc. v. Zaino (2003), 100 Ohio St.3d 240, 242 (defining ultimate facts as factual conclusions derived from given basic facts). These terms are significant in the context of R.C. § 2744.02(C) because they allow courts to properly discern between factual disputes that should preclude appellate jurisdiction and those disputes that do not. The federal nomenclature brings clarity to the discourse and a uniform way to discuss the issue, making distinct lines of when jurisdiction is appropriate and when it is not.

Federal law does not preclude jurisdiction when the parties merely disagree over whether undisputed conduct is subject to individual immunity. The federal courts expressly reject that position:

The only “facts” in dispute are the ultimate issues to be decided by applying law to the basic facts: Did Defendants treat Wade with deliberate indifference? Did Defendants violate Wade's established constitutional rights? These “facts,” however, are mixed issues of law and fact, which we treat as issues of law, not issues of fact. *Whitney v. Brown*, 882 F.2d at 1071. **Disputes over such issues do not divest us of jurisdiction to hear the appeal.**

Williams v. Mehra (6th Cir. 1999), 186 F.3d 685, 689-90 (emphasis added). When the basic facts are undisputed or acknowledged for the purposes of appeal, an appellate court has jurisdiction to review the application of the immunity standards to the static universe of facts. However, when the material basic facts are disputed, the appellate court does not have jurisdiction to reach the issue of immunity. A dispute of ultimate fact as to the immunity statute does not divest an appellate court of jurisdiction when the material basic facts are undisputed or admitted for purposes of appeal.

Ohio law is well established that what the evidence tends to prove is a legal question, not a factual question. This rule was stated as far back as 1867, when this Court stated: ‘What the evidence in a case tends to prove, is a question of law; and

when all the facts are admitted which the evidence tends to prove, the effect of such facts raises a question of law only.' Turner v. Turner (1867), 17 Ohio St. 449, 452; *also, see*, Ace Steel Baling. Inc. v. Porterfield (1969), 19 Ohio St.2d 137; Hocking Valley Ry. Co. v. Public Utilities Commission (1919), 100 Ohio St. 321. Ohio law is equally well established that an appellate court need not defer to a lower court's legal conclusion. *See*, Bronaugh v. R. & E. Dredging Co. (1968), 16 Ohio St. 2d 35.

The distinction has received little treatment in Ohio courts. But, Judge Shaw underscored this concept in Thomas Vending, Inc. v. Slagle (3rd Dist. 2000), 2000 WL 123804 (J. Shaw dissenting)¹:

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..., 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 fact finder. Moreover, the immunity question is properly decided prior to trial. *See id*; Linley v. DeMoss (1992), 83 Ohio App. 3d 594, 599, 615 N.E. 2d 631.

Id at 8. (Emphasis in original.)

¹ While he found that the interlocutory sovereign immunity appeal in Thomas Vending should have been precluded by the Supreme Court's decision in State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St. 3d 451, finding prior R.C. 2744.02(C) to be ineffective due to the unconstitutionality of H.B. 350, Judge Shaw addressed the merits of the appeal as follows:

This approach is consistent with this Court's holding that determinations of immunity are a question of law for a court to decide. Conley v. Shearer (1992), 64 Ohio St.3d 284, 292. The approach is also consistent with this Court's determination that when all the facts are admitted which the evidence tends to prove, the effect of such facts raises a question of law only. Turner, *supra*; Porterfield, *supra*.

2. The Appropriate Analysis

Amicus respectfully suggests the following approach to determining jurisdiction pursuant to R.C. § 2744.02(C). First, the appellate court must review the record before making a jurisdictional determination, rather than rely exclusively on the trial court's order or the parties' claims. This review is unequivocally within the appellate court's jurisdiction, as the finality of an order is a question of law subject to a de novo review. Wisintainer v. Elcen Power Strut Co. (1993), 67 Ohio St.3d 352, 354. Second, the Court must determine whether the parties dispute a material "basic fact" that precludes the determination of immunity. Third, if the dispute is about a material basic fact, the court must determine whether the competent record supports the fact. If the dispute is over a material basic fact supported by the record, the analysis ends and appellate

jurisdiction does not exist at that time. If the dispute is about an ultimate fact, then appellate jurisdiction exists and the immunity issue is ripe for determination.

In the context of summary judgment, the appellate court would then make a determination of ultimate fact by applying the basic facts to the law, construing those facts most favorably to the nonmovant.

a. Jurisdiction over the denial of a political subdivision's immunity.

There is no dispute that R.C. § 2744.02(A) provides complete immunity to a political subdivision, unless a narrow exception applies. R.C. § 2744.02(B)(1-5). A political subdivision can reclaim that immunity if it satisfies one of the sections of R.C. § 2744.03. Cater v. City of Cleveland (1998), 83 Ohio St.3d 24.

In Hubbell, the City of Xenia raised the issue of immunity in its summary judgment motion. Xenia supported such motion with competent evidence, thus raising the presumption of immunity. Xenia asserted that the plaintiff failed to establish an exception to immunity under R.C. § 2744.02(B)(2) for damages “caused by the negligent performance of acts by [a political subdivision’s] employees with respect to proprietary functions of the political subdivisions.” The trial court found genuine issues of material fact and denied Xenia’s motion.

On appeal, the Second District concluded that when the trial court makes a determination of a factual dispute precluding summary judgment, the trial court

has not yet adjudicated the issue of whether the political subdivision is entitled to the benefits of the alleged immunity. Citing no facts in its decision, the Second District relied on the trial court's determination – apparently without knowing if the decision was accurate or substantiated with Civil Rule 56(C) evidence under the competent record.

If the record is devoid of competent evidence to rebut the alleged immunity, the court is undoubtedly left with was the legal issue of whether R.C. § 2744.02 does or does not provide the City with immunity – a purely legal determination of whether the City had been denied “the benefit of an alleged immunity from liability.” But, under the Hubbell court's approach, this could not be known.

Under the appropriate analysis, an appellate court has a duty to raise its jurisdiction sua sponte and determine the finality of an order as a question of law. As such, an appellate court must review the record to determine whether the facts exist in the record and if they are material to the dispute. If the dispute is over a material basic fact, the court would not have jurisdiction. If the dispute is merely whether material facts exist in the record, the dispute is purely legal and must be examined.

The Hubbell court also erred when it refused to exercise jurisdiction over the issue of discretionary immunity pursuant to R.C. § 2744.03(A)(5). Immunity is

also bestowed upon a city under R.C. 2744.03(A)(5) "if the injury ... resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner." If the material facts supported by the record are undisputed or admitted by the appellant, the appellate court should exercise jurisdiction to determine the issue of ultimate fact. That is, can the acknowledged conduct rise to the level of "malicious purpose, in bad faith, or in a wanton or reckless manner." "What the evidence in a case tends to prove, is a question of law; and when all the facts are admitted which the evidence tends to prove, the effect of such facts raises a question of law only." Turner v. Turner (1867), 17 Ohio St. 449, 452; *also, see, Ace Steel Baling. Inc. v. Porterfield* (1969), 19 Ohio St.2d 137. An appellate court need not defer to a lower court's legal conclusion. *See, Bronaugh v. R. & E. Dredging Co.* (1968), 16 Ohio St. 2d 35. The determination of whether established conduct can rise to a legal standard is a threshold question of ultimate fact that should be determined as a question of law.

b. Jurisdiction over the denial of an employee's immunity.

The analytical method by which this Court determines the jurisdictional issue in this case will impact the ability of an individual employee to take an interlocutory appeal, perhaps a more prolific source of appeals. But, the method of determining jurisdiction would remain consistent.

In most cases, the pivotal determination regarding an employee's immunity is whether that employee acted negligently or with a higher degree of culpability. Under R.C. 2744.03, a governmental employee acting within the scope of his employment is immunized from liability arising from the negligent performance of his duties. R.C. 2744.03(A)(6)(b) provides that an employee of a political subdivision is immune from liability for his acts and omissions unless the "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. § 2744.03(A)(6)(b).

The Graves case arises out of an intoxicated driver fatally injuring a motorist. The estate of the motorist seeks to hold members of the Circleville Police Department liable, who arrested the intoxicated driver days before the accident occurred. The estate argues that the officers improperly released a vehicle to the driver who was sober at the time and who was accused of and has a history of criminal driving offenses. That driver was involved in the fatal accident about 14

hours after his release and days after his arrest. The officers acknowledged the record facts for the purposes of the appeal. The officers argued that their acknowledged conduct was immune because it did not rise to the level of “with malicious purpose, in bad faith, or in a wanton or reckless manner,” thus providing the appellate court with jurisdiction. R.C. § 2744.03(A)(6)(b). The plaintiff argued that the court did not have jurisdiction because whether the officers acted in a “wanton and reckless” manner was a dispute that must be resolved by a jury. In other words, the estate argued that immunity had not yet been denied at the time, rendering the court without jurisdiction.

The factual situations may differ dramatically, but when the material basic facts are undisputed or acknowledged for purposes of appeal, the application of the immunity standard to the facts is a question of ultimate fact that is determined as a matter of law.

3. The Incorrect Analysis

Amicus respectfully suggests that the Hubbell court’s approach is contrary to the express language of R.C. § 2744.02(C). The court’s approach also minimizes the broader intent of Chapter 2744 immunity and misinterprets the federal law for which its decision was ultimately based. This Court should reject the Hubbell court’s approach.

The Hubbell court determined that a trial court's mere "finding" of genuine issues of material fact prohibits an interlocutory appeal until the completion of the trial. This position renders nugatory an interlocutory appeal under R.C. § 2744.02(C). An interlocutory appeal of immunity will derive from an order denying a dispositive motion. An order denying immunity at trial could always be appealed at the end of a trial. Section 2744.02(C) would be unnecessary if the Legislature intended that to be the scope of interlocutory appeals.

The Hubbell approach also insulates even the most egregious errors from appellate review by the trial court's mere recitation of the words "genuine issues of material fact in dispute," whether or not one really exists. As demonstrated in its opinion, the Second District did not reference any facts and did not expound the disputed facts that it believed deprived the court of jurisdiction.

Further, the Hubbell court's rationale expressly relies upon the Ninth District line of cases that flows directly from Johnson v. Jones (1995), 515 U.S. 304, without proper deference to the United States Supreme Court's clarification in Behrens v. Pelletier 516 U.S. 299 (1996). The Supreme Court made clear that interpreting Johnson v. Jones to mean that the lower court's determination that "material issues of fact remain" divests the appellate court of jurisdiction was "a

misreading of the case.” (*Id.*) The Hubbell court relied upon that misreading to hold that the trial court’s finding was dispositive of jurisdiction.

The Hubbell court’s additional rationale provides no sound reason for avoiding its jurisdiction under R.C. § 2744.02(C). The Hubbell court justified its decision by stating it is “conserve[ing] judicial resources” and by speculating that “when a trial court concludes that there is a genuine issue of material fact ... it is unusual for a reviewing appellate court to find [] to the contrary.” The claim is not supported by R.C. § 2744.02(C) and does a profound injustice to those who should be able to take an appeal to review the trial court’s mere claim of genuine material dispute under R.C. 2744.02(C). The Hubbell court also suggested that narrowly interpreting the appeal provision would “provide a simple, easily-applied test for determining whether an order that did not grant a request for immunity was immediately appealable.” While it may be simple, allowing the immediate appeal of all interlocutory orders denying immunity would be equally simple. But, that interpretation would also not be reasonable. For instance, when material basic facts are in dispute, the issue of immunity could not be reached and jurisdiction would not be appropriate. The better approach is to discern between disputes of material basic fact, which preclude jurisdiction, and disputes of ultimate fact, which allow for jurisdiction.

IV. CONCLUSION

Amicus curiae City of Circleville respectfully requests that this Court reverse the decision of the Second District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Amicus Curiae The City of Circleville in Support of Jurisdiction on Behalf of Appellant The City of Xenia, Ohio was served December 13, 2006 by depositing same in first-class United States mail, postage prepaid, to the following:

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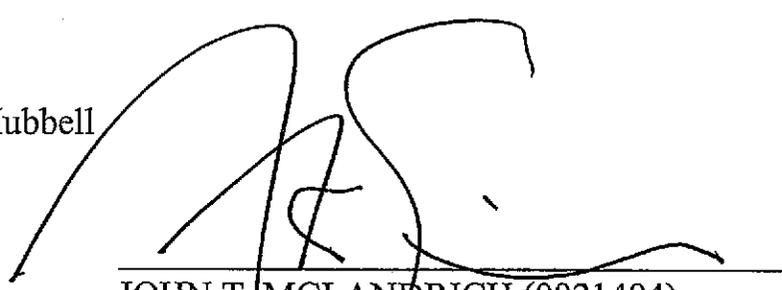
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