IN THE SUPREME COURT OF OHIO

DOTTIE HUBBELL,	:	**Case Nos. 06-1528 and 06-1589**
Appellee/Plaintiff,	:	**On Appeal from the Greene County Court of Appeals, Second Appellate District**
v.	:	
CITY OF XENIA, OHIO	:	
Defendant/Appellant.	:	

MERIT BRIEF OF AMICUS CURIAE, THE OHIO SCHOOL BOARDS ASSOCIATION, IN SUPPORT OF DEFENDANT/ APPELLANT, CITY OF XENIA, OHIO

LYNETTE PISONE BALLATO
TABITHA JUSTICE
SUBASHI, WILDERMUTH & BALLATO
The Oakwood Building
2305 Far Hills Ave.
Dayton, Ohio 45419
Telephone: (937) 534-0500
Facsimile: (937) 534-0505
E-mail: lballato@swbohiolaw.com
tjustice@swbohiolaw.com
Attorneys for Defendant/Appellant, City of Xenia, Ohio

MICHAEL P. MCNAMEE
GREGORY B. O'CONNOR
MCNAMEE & MCNAMEE, PLL
2625 Commons Blvd.
Beavercreek, Ohio 45431
Telephone: (937) 427-1367
Facsimile: (937) 427-1369
E-mail: mike@mcnameelaw.com
goconnor@mcnameelaw.com
Attorneys for Plaintiff/Appellee, Dottie Hubbell

Gregory B. Scott (0020248)
(COUNSEL OF RECORD)
Patrick J. Schmitz (0055729)
SCOTT, SCRIVEN & WAHOFF LLP
50 West Broad Street, Suite 2600
Columbus, Ohio 43215
Telephone: (614) 222-8686
Facsimile: (614) 222-8688
E-mail: Gregory@sswlaw.com
Pat@sswlaw.com
Attorneys for Amicus Curiae, Ohio School Boards Association

FILED
DEC 15 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	2
Proposition of Law No. 1:	
When a political subdivision or an employee of a political subdivision properly supports a motion for summary judgment asserting an immunity provided by R.C. Chapter 2744, a trial court's decision to overrule the motion denies a political subdivision or its employee "the benefit of an alleged immunity from liability." As such, the order is a final order pursuant to R.C. 2744.02(C) and is immediately appealable	2
CONCLUSION	14
PROOF OF SERVICE	16

TABLE OF AUTHORITIES

CASES Page

Am. Site Contrs., Inc. v. Willowick, Lake App. No. 2005-L-088, 2005-Ohio-4768..... 13

Colbert v. Cleveland, 99 Ohio St.3d 215, 2003-Ohio-3319..... 3

DeRolph v. State of Ohio (1997), 78 Ohio St.3d. 193..... 10, 12

Frederick v. Vinton Co. Bd. of Educ., Vinton App. No. 03CA357, 2004-Ohio-550..... 9

Gambill v. Lebanon City Bd. of Educ. (May 21, 1990), Warren App. No. CA89-06-034 9

Hall v. Fort Frye Local School Dist. Bd. of Educ. (1996), 111 Ohio App.3d 690..... 4, 8

Hallet v. Stow Bd. of Educ. (1993), 89 Ohio App.3d 309..... 7

Lutz v. Hocking Technical College (May 19, 1999), Athens App. No. 98CA12..... 3, 5, 13, 14

Marcum v. Talawanda City Schools (1996), 108 Ohio App.3d 412..... 9

Menefee v. Queen City Metro (1990), 49 Ohio St.3d 27..... 3

Nease v. Med. College Hospital, 64 Ohio St.3d 396, 1992-Ohio-97..... 4

Piispanen v. Carter, Lake App. No. 2005-L-133, 2006-Ohio-2382..... 13, 14

State Auto. Mut. Ins. Co. v. Titanium Metals Corp., 108 Ohio St.3d 540, 2006-Ohio-1713..... 12

State ex rel. Choices for South-Western City Schools v. Anthony, 108 OS3d 1, 2005-Ohio-5362 (2005)..... 11

State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 1999-Ohio-123..... 3

Vance v. Jefferson Area Local School Dist. Bd. of Educ. (Nov. 9, 1995), Ashtabula App. No. 94-A-0041..... 9

Weimer v. Springfield Twp. School Dist. Bd. of Educ. (May 11, 1994), Summit App. No. 16334..... 9

STATUTES

20 U.S.C. 6301 9
R.C. Chapter 2744 ..... 1, 2, 3, 6, 13, 14
R.C. 2744.01(C)(1) 6
R.C. 2744.01(C)(2)(c) 6
R.C. 2744.01(F) 6
R.C. 2744.02 ..... 6, 13
R.C. 2744.02(B) 3
R.C. 2744.02(B)(1) 6
R.C. 2744.02(B)(2) 6, 7
R.C. 2744.02(B)(3) 6
R.C. 2744.02(B)(4) 6
R.C. 2744.02(B)(5) 7
R.C. 2744.02(C) 1, 2, 3, 4, 5, 6, 9, 10 11, 12, 13, 14
R.C. 2744.02(G)(2)(e) 7
R.C. 2744.03 ..... 3, 4, 7
R.C. 2744.03(A)(5) 1, 2, 7, 8, 9, 12
R.C. 3313.20 8
R.C. 3313.47 8
R.C. 3313.203 11
R.C. 3319.081 12
R.C. 3319.17 12
R.C. 3319.172 12
R.C. 5705.261 11

STATEMENT OF FACTS

Amicus curiae, the Ohio School Boards Association (OSBA), is a private, 501(c)(4) not-for-profit statewide association of public school boards founded in 1955 to encourage and advance public education through local citizen responsibility. Membership is open to all public boards of education in Ohio. OSBA has a total membership of 723 public school boards across the state.

In this appeal, Appellant/ Defendant, the City of Xenia, asks this Court to resolve the novel question of whether R.C. 2744.02(C) grants a political subdivision the benefit of immediately appealing a denial of summary judgment premised upon the assertion of sovereign immunity pursuant to Chapter 2744 of the Revised Code. As political subdivisions, OSBA's members have a strong interest in this question of statutory interpretation.

A complete discussion of the facts leading to the instant action may be found in Xenia's Merit Brief. However, OSBA directs the Court's attention to the following facts for the purposes of the arguments asserted in its brief:

Plaintiff/Appellee filed a complaint against Xenia alleging acts of negligence that she claimed resulted in sewage flooding her home. In its defense, Xenia asserted that it owed no duty to Plaintiff and that, as a matter of law, it was not liable for Plaintiff's claims because of the statutory immunity found in R.C. 2744.03(A)(5). This provision of Ohio's political subdivision immunity law affords a political subdivision an absolute defense to any claim of negligence resulting "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 decision was made with a malicious purpose, in bad faith, or in a reckless manner.

Despite the broad statutory immunity conferred under R.C. 2744.03(A)(5), the trial court determined that there were genuine issues of material fact[1] as to whether Xenia was immune from suit. On this basis, the trial court denied Xenia's motion. The court's action effectively deprived Xenia of the "benefit of an alleged immunity from liability" that it asserted as a matter of law.

Relying upon the expressly stated right to an interlocutory appeal in R.C. 2744.02(C), Xenia appealed the trial court's decision to the Second District Court of Appeals. However, the Court of Appeals failed to exercise the statutory jurisdiction properly asserted by Xenia and, as a result, declined to recognize the immunity to which Xenia was entitled. Instead, the Court of Appeals held that when a trial court finds there are genuine issues of material fact concerning the government's immunity and denies a motion for summary judgment, that court has not actually adjudicated the issue of political subdivision immunity. As such, the Court of Appeals concluded that the trial court's order was not a final order, and there was no appellate jurisdiction.

The Court of Appeals decision left Xenia with the choice of either: (1) fully litigating the merits of a claim from which it ultimately may be immune or (2) bringing the instant appeal.

ARGUMENT

Proposition of Law No. 1:

When a political subdivision or an employee of a political subdivision properly supports a motion for summary judgment asserting an immunity provided by R.C. Chapter 2744, a trial court's decision to overrule the motion denies a political subdivision or its employee "the benefit of an alleged immunity from liability." As such, the order is a final order pursuant to R.C. 2744.02(C) and is immediately appealable.

[1] The perceived material facts included where in the sewer lines a blockage, if any, might have existed (Trial Decision, p. 3), whether there was a breach in the duty to respond to a call in a timely fashion (Trial Decision, p. 4), and whether city employees were negligent (Trial Decision, p. 5).

In 2003, the General Assembly restored former R.C. 2744.02(C), which had been struck down as part of H.B. 350 in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123. R.C. 2744.02(C) presently provides:

> (C) 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 clear intent of this provision is to conserve the limited and increasingly encumbered fiscal resources of political subdivisions by putting a stop to the waste of time and resources on the defense of lawsuits for which they may be immune. *Lutz v. Hocking Technical College* (May 19, 1999), Athens App. No. 98CA12, citing *Menefee v. Queen City Metro (1990),* 49 Ohio St.3d 27. Specifically, the General Assembly made the denial of "the benefit of an ***alleged*** immunity," not merely the denial of a proven defense of immunity, a final appealable order (emphasis added).

In Ohio, a three-tiered analysis often is used to resolve sovereign immunity questions brought under the Political Subdivision Tort Liability Act, R.C. Chapter 2744. *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319. The first tier, found in R.C. 2744.02(A), consists of the broad grant of immunity for the performance of either a governmental or proprietary function. *Id.* ¶ 7. The second tier sets forth five express exceptions provided in R.C. 2744.02(B) that can remove the cloak of political subdivision immunity. *Id.* ¶ 8. If any of these exceptions apply, the third tier requires a court to consider whether R.C. 2744.03 affords a statutory defense to the political subdivision to shield it from liability. *Id.* ¶ 9.

This matter concerns the application of the third tier of analysis for political subdivision immunity. As noted above, R.C. 2744.03 creates a statutory immunity for school districts, counties, cities, municipalities, public safety forces such as police and fire, public hospitals, and other public entities. A question concerning the availability of this statutory immunity is a purely legal issue that

may be resolved entirely as a matter of law. Either this immunity applies, or it does not, and a trial court is obligated to determine the availability of immunity pursuant to R.C. 2744.03 before a case proceeds to trial. *Nease v. Med. College Hospital*, 64 Ohio St.3d 396, 400, 1992-Ohio-97; *Hall v. Fort Frye Local School Dist. Bd. of Educ.* (1996), 111 Ohio App.3d 690, 694.

The purpose of R.C. 2744.02(C) is to facilitate the efficient resolution of the statutory immunity issues presented by R.C. 2744.03. The prompt resolution of these questions advances several significant public policy objectives because it has the effect of conserving scarce public resources of political subdivisions and advancing judicial economy for trial courts by avoiding the needless litigation of claims for which immunity applies as a matter of law. The primary beneficiaries of these objectives are the tax-paying citizens of Ohio.

For these reasons, when a trial court enters an order that denies a political subdivision statutory immunity in the context of a properly supported motion for summary judgment, it is critically important that the order must be construed as a final order that may be subject to an immediate appeal. This interpretation is not only rational, but also thoroughly supported by a plain reading of R.C. 2744.02(C).

As argued by Xenia, the trial court erred in not determining, as a matter of law, that political subdivision immunity completely barred Plaintiff's claims. Unfortunately, the court of appeals aggravated this error by not concluding that the trial court's order was immediately appealable pursuant to R.C. 2744.02(C) and not reviewing the trial court's determination of the immunity issue.

The court of appeals failed to conduct a *de novo* review or analysis of the trial court's decision because it denied jurisdiction altogether. As a result, the court failed to determine if the trial court's conclusion that there were issues of material fact precluding summary judgment in

Xenia's favor was correct. This review was of crucial importance to Xenia, because it could have meant the difference between continuing litigation at public expense, or an expedient dismissal of claims from which it had been immune all along.

R.C. 2744.02(C) expressly provides a necessary mechanism for the *de novo* review by appellate courts of trial court decisions that have the effect of denying political subdivision immunity. This interlocutory appeal prevents the needless waste of finite public dollars and overburdened judicial resources. The mandatory nature of this review was recognized by the Fourth District Court of Appeals in *Lutz*, when the court held that R.C. 2744.02(C) stands apart as a clear exception to the general rule that a trial court's denial of summary judgment is not a final appealable order. *Id.* at *4. In fact, the court accepted jurisdiction in *Lutz* for the express purpose of determining "whether the trial court erred in denying summary judgment based on R.C. Chapter 2744 immunity...." *Id.* at *5.

If the court of appeals' decision in this matter is affirmed, the consequence of this dual denial of statutory immunity and interlocutory appeal rights is that school districts and other political subdivisions throughout the state would be rendered defenseless against negligence claims from which they ultimately may be immune. Instead, political subdivisions will be forced to bear the time and expense of fully litigating countless claims without first having the courts resolve the threshold legal issue of immunity.

This interpretation unmistakably contradicts the express language of R.C. 2744.02(C) and frustrates the General Assembly's purpose in reenacting this provision. Rather than providing political subdivisions with a measure of relief, the court of appeals' decision threatens the budget of every political subdivision that happens to find itself defending claims of negligence, because it would force them to spend public monies in situations where they ought not be required to do so.

This outcome would be imprudent public policy at any time, but it would be especially burdensome to political subdivisions during the period of economic stagnation that Ohio currently faces.

The decision of the court of appeals in this matter would have the effect of rewriting R.C. Chapter 2744 to deprive political subdivisions of this right of interlocutory appeal. OSBA shares Xenia's concerns and is deeply alarmed about the prospect that all political subdivisions in Ohio, including over 700 school districts, would have the benefit of immediate appeal conferred to them by the General Assembly in R.C. 2744.02(C) eviscerated whenever a trial court denies a summary judgment motion asserting statutory political subdivision immunity because of perceived questions of fact that are irrelevant to the determination of the question of law presented to the court.

OSBA is alarmed because, as discussed above, R.C. Chapter 2744 provides a broad grant of immunity, subject to only a handful of express exceptions, to political subdivisions performing governmental and proprietary functions. R.C. 2744.02. A public school district is defined as a "political subdivision" (R.C. 2744.01(F)), and the provision of a system of public education is a "governmental function."[2] (R.C. 2744.01(C)(2)(c) Consequently, the appellate court's construction of R.C. 2744.02(C) in this matter is critically important to every public school district in Ohio.

More specifically, boards of education enjoy statutory tort immunity, unless the damage or injury arises from one of the following exceptions:

(1) negligent operation of a motor vehicle by an employee (R.C. 2744.02(B)(1));

(2) negligence of an employee with respect to a proprietary function (R.C. 2744.02(B)(2));

(3) negligent failure to keep roads in repair and free from obstruction (R.C. 2744.02(B)(3));

[2] This parallels the argument of Xenia in the court of appeals that, pursuant to R.C. 2744.01(C)(1), its provision of a response to a citizen's emergency call also is a governmental function. (See Appellant/Defendant Reply Brief, pp. 2-3.)

(4) negligence of an employee that occurs on school grounds and is due to physical defects on or in its property (R.C. 2744.02(B)(4)); or

(5) where liability is expressly imposed by statute (R.C. 2744.02(B)(5)).

Some questions about whether these exceptions apply to a school district tort claim will be resolved in a relatively straightforward matter. For example, the case law addressing political subdivision immunity uniformly recognizes the difference between governmental and proprietary functions, because of the specific exception created in R.C. 2744.02(B)(2). Very few school district functions are proprietary, because the provision of a system of public education has been defined as a governmental function.[3] As such, school districts seldom will face liability under this exception.

Other political subdivision immunity exceptions require a trial court to conduct further analysis. For many of the acts of negligence described above, R.C. 2744.03 provides clearly worded defenses that may permit a board of education to retain the benefit of immunity. One defense, of particular interest to OSBA, is the one at issue in the instant matter.

R.C. 2744.03(A)(5) provides political subdivisions with an absolute statutory defense to liability where an alleged act of negligence "arose from the exercise of judgment or discretion" by the political subdivision "in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources...." The instant appeal involves a dispute over the expenditure and direction of local government resources, specifically how and when municipal sewer equipment and personnel are used and engaged.

The sewage problem encountered by Plaintiff/Appellee was, indeed, unfortunate. That said, her allegation that Xenia was negligent in its use of equipment and personnel is an example of why the unique defense established in R.C. 2744.03(A)(5) exists. In essence, Plaintiff/Appellee claims

[3] There are but a few exceptions to this general rule. For instance, pursuant to R.C. 2744.02(G)(2)(e), "the operation of a public stadium" or auditorium by a board of education is a proprietary function. See *Hallet v. Stow Bd. of Educ.* (1993), 89 Ohio App.3d 309.

that Xenia was negligent because it expended and directed public resources for other purposes, rather than devoting those same finite resources to respond to her call sooner.

In the absence of the immunity conferred by R.C. 2744.03(A)(5), public officials and employees, whose purpose is to serve on behalf of their communities, would lose the discretionary authority to manage the budgets, equipment and personnel within their political subdivisions. This is precisely the authority that board of education members and other public officials are elected or appointed to exercise. See R.C. Sections 3313.20 ("The board of education of a school district... shall make any rules that are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises.") and 3313.47 ("Each... board of education shall have the management and control of all of the public schools of whatever name or character that it operates in its respective district.").

For these reasons, the defense granted to political subdivisions pursuant to R.C. 2744.03(A)(5) is both absolute in nature and works no injustice upon those alleging liability. It is crucial to our republican system of government that elected public officials and the employees appointed by political subdivisions be afforded broad judgment and discretion to implement fiscally responsible stewardship of scarce public resources. Otherwise, each individual tort claim against school districts and other governmental entities would subvert our political and judicial systems into a series of plaintiff plebiscites about the expenditure of public dollars. Such a system would create a compelling incentive for persons to litigate claims against their local officials and representatives and, inevitably, result in either increasingly higher taxes or deep reductions in public services.

Ultimately, there can be no genuine issue of material fact about whether ***statutory*** political subdivision immunity pursuant to R.C. 2744.03(A)(5) exists for functions such as those in dispute in this matter, because the determination of this issue is exclusively a question of law. *Hall,* 111

Ohio App. 3d at 698 (holding that a determination over whether a decision involves the type of judgment or discretion contemplated by R.C. 2744.03(A)(5) is "purely legal in nature").

The defense provided to boards of education in R.C. 2744.03(A)(5) has afforded school districts statutory protection from a wide variety of claims against the exercise of judgment or discretion by school officials, including the setup for a soccer goal (see *Gambill v. Lebanon City Bd. of Educ.* (May 21, 1990), Warren App. No. CA89-06-034, unreported); the purchase of padding for a basketball pole (see V*ance v. Jefferson Area Local School Dist. Bd. of Educ.* (Nov. 9, 1995), Ashtabula App. No. 94-A-0041, unreported); expenditures for outdoor lighting (see *Weimer v. Springfield Twp. School Dist. Bd. of Educ.* (May 11, 1994), Summit App. No. 16334, unreported); and the employment of persons to supervise a playground (see *Frederick v. Vinton Co. Bd. of Educ.*, Vinton App. No. 03CA357, 2004-Ohio-550) or a classroom (see *Marcum v. Talawanda City Schools* (1996), 108 Ohio App.3d 412).

As illustrated through this non-exhaustive list, the availability of immunity as a matter of law is crucial to school districts. In order to exercise the governmental functions with which they are charged, school officials are required exercise judgment and discretion regarding the allocation of resources, equipment, and personnel countless times every day. For this reason, school districts also benefit tremendously from the broad scope of protection provided by R.C. 2744.03(A)(5).

Claims against the judgment and discretion of school officials are seen by boards of education in Ohio every day and on every conceivable matter. As such, it is invaluable for school districts to enjoy the benefit of R.C. 2744.02(C), which clearly permits districts to ask a trial court to determine, as a matter of law, the application or existence of immunity ***before*** bearing the expense of fully litigating a claim of negligence at trial. This right to an interlocutory appeal permits school districts to spend their scant resources on education, instead of litigation.

This Court need only consider the unprecedented breadth of the federal No Child Left Behind Act ("NCLB"), 20 U.S.C. 6301, *et seq.*, to see that Ohio's school districts continuously have been given more and greater responsibilities when it comes to educating children, but these obligations have not been accompanied by a commensurate increase in revenue. See *DeRolph v. State of Ohio* (1997), 78 Ohio St.3d. 193, which was decided five years prior to the enactment of NCLB in 2002. Boards of education must be vigilant not to undertake unnecessary expenditures, because of the serious financial burdens that exist for school districts.

For-profit corporations and other private entities sometimes may find a strategic advantage in pursuing aggressive litigation tactics that include lengthy appeals. Conversely, political subdivisions face constant public pressure to conserve limited fiscal resources, and it would be self-defeating for a governmental entity to pursue an interlocutory appeal under R.C. 2744.02(C) unless there was a strong probability of success.

When a board of education, or other political subdivision, believes that a trial court has erred in making its determination about the application or existence of immunity, R.C. 2744.02(C) expressly provides the right to an immediate appeal to the political subdivision, not only where the immunity is proven, but also when it simply is "alleged." A commonsense approach to conserving public resources fully justifies and explains the General Assembly's enactment of this provision.

School districts are even more sensitive to electoral and budgetary pressures than most political subdivisions, because boards of education face the unique circumstance of being doubly accountable to the public. Not only do district residents elect board members, but local electorates also constantly are asked by boards to approve property tax levies or other revenue issues. In many communities, school district property taxes are the highest local taxes that residents pay. Yet, these ballot issues often merely renew or replace expiring levies and result in no little or no increased

revenue for the district. Pursuant to laws such as R.C. 5705.261, boards of education also face the additional burden of defending previously approved levies from reduction by their constituents.[4]

As a result of this extraordinary level of public accountability, not to mention the crucial governmental function boards of education fulfill by producing an educated citizenry, the actions of school districts are subject to tremendous scrutiny. Boards of education and their employees and students make newspaper headlines on an almost daily basis. There is an acute public awareness of school districts and their activities, both as a general matter and in relation to the lesser attention given to other political subdivisions.

Unfortunately, the heightened public consciousness of school districts also causes some individuals to view boards of education as "deep pocket" targets for claims often having no merit as a matter of law. Recognizing this reality, the General Assembly specifically has authorized boards to purchase liability insurance (see R.C. 3313.203). However, school districts continue to suffer lost financial resources and efficiency because of these lawsuits, and insurance costs will further increase due to greater litigation expenses if districts cannot assert an interlocutory appeal from the denial of a valid immunity defense before trial. If districts prevail after trial on an immunity defense, injured persons will not benefit from these added insurance premium and litigation costs in any way. Instead, these expenses merely will cover attorney fees and other litigation costs that are largely unnecessary and serve no cognizable public policy objective.

Some claims brought against boards of education ultimately will be meritorious and others will not, but in all cases the General Assembly has established a mechanism to expeditiously address the availability of statutory immunity defenses in a way that preserves as much of the public dollar as possible. Any construction of R.C. 2744.02(C) that would ***not*** permit immediate appeal of

[4] In *State ex rel. Choices for South-Western City Schools v. Anthony*, 108 OS3d 1, 2005-Ohio-5362 (2005), a case in which OSBA filed an amicus brief, this Court concluded that a tax reduction under this law generally is permissible unless it effects a *de facto* repeal by reducing a levy to zero mills.

a decision that effectively denies a political subdivision, or an employee of a political subdivision, immunity would eviscerate the entire purpose of this provision.

In cases where a board of education's exercise of judgment or discretion in allocating personnel is being challenged, the denial of interlocutory appeal rights often would cause such financial hardship that it would be more cost-effective for the board to abdicate its authority and undertake the expense of completing or funding the challenged function. This is not a logical way to conserve the resources of a political subdivision that this Court already has determined to be constitutionally under-funded. See *DeRolph* generally.[5]

For these reasons, and because of Ohio's present condition of economic stagnation, school districts are a primary beneficiary of the interlocutory appeal rights conferred by R.C. 2744.02(C) to obtain review of a trial court's denial of a statutory immunity, such as the defense afforded to exercises of a political subdivision's judgment and discretion by R.C. 2744.03(A)(5).

This Court has not determined the application of current R.C. 2744.02(C) to a denial of summary judgment based upon an assertion of statutory immunity.[6] However, the Third District Court of Appeals addressed former R.C. 2744.02(C), with its substantially similar language, in this context. Specifically, the court of appeals concluded:

---

[5] Also, just two years after the General Assembly restored R.C. 2744.02(C), it amended the school district reduction in force statutes in the 2005 biennial budget bill, Am.Sub. H.B. No. 66, to permit boards of education greater authority to exercise judgment and discretion in teaching and non-teaching employee layoffs. Specifically, layoffs now may be made for, *inter alia*, financial reasons. (See. R.C. Sections 3319.081, 3319.17, and 3319.172.) An interpretation of R.C. 2744.02(C) that deprives political subdivisions of the benefit of immediately appealing a denial of alleged statutory immunity would frustrate the purpose of these amendments, because boards could be deterred by the potential liability consequences of any reduction in force. These amendments also signal the legislature's intent that limited public education resources be used efficiently and effectively.

[6] This Court has addressed the availability of an immediate appeal under R.C. 2744.02(C), but only in the context of a motion to dismiss. See *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713. This case easily can be differentiated on its procedural history, because this Court held that the trial court's denial of immunity was not a final appealable order only after noting that the trial court had provided no explanation for its decision and that no discovery had occurred. *Id.* at 542. In that situation, this Court properly characterized the court of appeals' review of the issue of immunity as premature. *Id.* The instant matter is very different. Specifically, the trial court had before it a properly supported motion for summary judgment, on which it provided an eight (8) page written decision containing reasoning that could have been reviewed and, pursuant to R.C. 2744.02(C), should have been reviewed by the court of appeals.

> Generally, a trial court's denial of summary judgment is not a final appealable order.... However, effective January 27, 1997, the General Assembly amended R.C. 2744.02 to add paragraph (C), 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 Chapter 2744, or any other provision of the law, is a final order."
>
> 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. (Citations omitted.) R.C. 2744.02(C) furthers this legislative purpose by allowing political subdivisions (and their employees) to immediately appeal the denial of an immunity. (Citations omitted.) 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.

Lutz at *4. This reasoning is just as persuasive now as when it was written. Indeed, it is all the more compelling today because of the prolonged economic and public funding challenges faced by this State for the last several years.

In May of this year, the Eleventh District Court of Appeals applied the current version of R.C. 2744.02(C) to an interlocutory appeal from the trial court's denial of a school district's motion to dismiss based upon statutory immunity. The court of appeals stated:

> As an initial matter, we note that generally a denial of a motion to dismiss is not a final appealable order. (Citations omitted.) Nevertheless, an exception to this rule will lie when the denial is of a motion to dismiss alleging sovereign immunity under R.C. 2744.02. *Am. Site Contrs., Inc. v. Willowick,* Lake App. No. 2005-L-088, 2005-Ohio-4768, at ¶ 3. Such judgment is immediately appealable. Id.; R.C. 2744.02(C). Thus, the instant appeal is properly before this court.

Piispanen v. Carter, Lake App. No. 2005-L-133, 2006-Ohio-2382 at ¶ 9. After reaching this conclusion, the court of appeals considered the pleadings and determined that plaintiffs/appellees could plead no set of facts falling within an exception to the board of education's broad statutory immunity. *Id.* at ¶ 22. Although *Piispanen* was decided in the context of a motion to dismiss, it provides an analogous roadmap of reasoning for this Court to follow.

The rationale in *Lutz* and *Piispanen* supporting the immediate review of orders that deny immunity to political subdivisions and/or its employees is practical and both financially and judicially conservative.[7] These cases are in stark contrast to the court of appeals' decision in the instant matter that, if affirmed, would invite devastating fiscal consequences upon school districts and other political subdivisions.

The court of appeals in this matter erred in holding that a trial court's order denying a motion for summary judgment because of perceived issues of material fact as to a political subdivision's ***statutory*** immunity is not a final order. Instead, pursuant to the plain language of R.C. 2744.02(C), the appellate court should have exercised jurisdiction over the case and conducted a *de novo* review of the trial court's determination with respect to the political subdivision's immunity. The City of Xenia was entitled to, but did not receive, review of that question.

CONCLUSION

This Court has the opportunity to make meaningful the right held by a political subdivision to pursue an interlocutory appeal when a trial court denies a properly supported motion for summary judgment asserting statutory immunity granted under R.C. Chapter 2744. R.C. 2744.02(C) unambiguously provides that such an order denies a political subdivision or its employee "the benefit of an alleged [not necessarily 'proven'] immunity from liability," is a "final order," and therefore is immediately appealable.

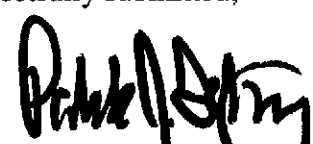
When political subdivisions, particularly school districts, are mandated to provide more services to the public, without a commensurate increase in revenue, the conservation of limited fiscal resources is of paramount concern to all Ohioans, particularly the more than 1.8 million

[7] Certainly, greater overall judicial economy would be realized by interpreting R.C.2744.02(C) to authorize the disposal of cases through the appellate process when political subdivisions are "immune from suit all along," (*Lutz* at *4) rather than compelling those public entities- and the trial courts- to endure the full litigation of these same matters. The courts of appeals would be able to promptly resolve statutory immunity issues that they would be asked to address in any event, and the trial courts would realize a considerable measure of docket relief.

children who are educated in our state's public schools. In response to this concern, the General Assembly wisely created a mechanism for interlocutory appeal from a court's denial of an "alleged immunity from liability." This Court should make this mechanism meaningful and effective by holding that a trial court's denial of a political subdivision's motion for summary judgment is a final order that may be appealed on an immediate basis.

For all of these reasons, OSBA respectfully urges this Court to reverse the decision of the Second District Court of Appeals and enter judgment in favor of the Defendant/Appellant, the City of Xenia.

Respectfully submitted,



Gregory B. Scott (0020248)
(COUNSEL OF RECORD)
Patrick J. Schmitz (0055729)
SCOTT, SCRIVEN & WAHOFF LLP
50 West Broad Street, Suite 2600
Columbus, Ohio 43215
Telephone: (614) 222-8686
Facsimile: (614) 222-8688
E-mail: Gregory@sswlaw.com
Pat@sswlaw.com

Attorney for Amicus Curiae,
Ohio School Boards Association

IV. PROOF OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Amicus Curiae, Ohio School Boards Association, was served upon the following by ordinary U.S. Mail, postage prepaid, on this 15th day of December 2006:

LYNETTE PISONE BALLATO
TABITHA JUSTICE
Subashi, Wildermuth & Ballato
The Oakwood Building
2305 Far Hills Ave.
Dayton, Ohio 45419
Attorneys for Defendant/Appellant, City of Xenia

MICHAEL P. MCNAMEE
GREGORY B. O'CONNOR
McNamee & McNamee, PLL
2625 Commons Blvd.
Beavercreek, Ohio 45431
Attorneys for Plaintiff/Appellee, Dottie Hubbell

Patrick J. Schmitz

COUNSEL FOR AMICUS CURIAE, THE
OHIO SCHOOL BOARDS ASSOCIATION