

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
SECOND APPELLATE DISTRICT
GREENE COUNTY, OHIO
CASE NO. 2005 CA 0099

DOTTIE HUBBELL,
Plaintiff-Appellee,

v.

CITY OF XENIA, OHIO
Defendant-Appellant.

MERIT BRIEF OF APPELLANT, CITY OF XENIA, OHIO

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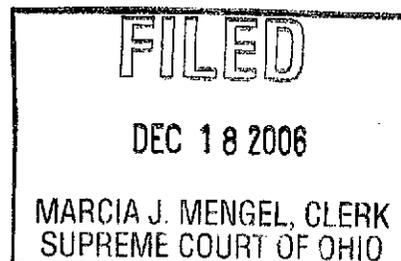


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STATEMENT OF THE CASE AND FACTS

I. INTRODUCTION

The claims of Appellee, Dottie Hubbell, against the City of Xenia are not sophisticated or complicated. She essentially wants the City of Xenia to pay for a sewer backup into her house. (*See generally*, Plaintiff's Complaint). She presented no evidence to the trial court that Xenia was negligent in maintaining the sewer lines near her house. In fact, Xenia demonstrated that it had a very reasonable policy in place for inspecting and maintaining those lines. In the twenty years that Ms. Hubbell lived in her house in Xenia, she never had a single problem before the incident leading to the current lawsuit. Thus, in response to Ms. Hubbell's complaint, Xenia filed a motion for summary judgment, requesting statutory immunity from all claims. Afterwards, Ms. Hubbell raised a new allegation claiming the City simply took too long to respond to her call for emergency service, another claim barred by immunity.

The facts of this case are very typical of lawsuits filed against municipalities and other state political subdivisions. For better or worse, our lives are undeniably intertwined with and affected by government services. On occasion, an emergency will arise that is in some manner connected to those services; water mains break, ambulances crash and sidewalks crack. And, on occasion, individuals sustain injury connected in some way to a government service that they feel they should be compensated for by the taxpayers. In each instance, the plaintiff contends the facts of his or her case distinguish it from other cases in which liability for the government has been barred either by case law or statute. To protect against a total breakdown of government services as a result of such claims, the Ohio General Assembly enacted Chapter 2744 of the Ohio Revised Code to create a presumption of immunity from civil liability and to ensure that a great

many of these fact-based allegations against Ohio's political subdivisions and their employees are decided as a matter of law.

II. DAY OF THE INCIDENT

Ms. Hubbell is a resident of the City of Xenia, Ohio. (Complaint, ¶ 1) She owns a parcel of property in the city located on the corner of Home Avenue and South Monroe Street. (*Id.* at ¶ 5) At the time of the incident alleged in her complaint, Ms. Hubbell maintained the first floor of this property as her personal residence. (Hubbell Depo., pg. 7) On June 12, 2003, Ms. Hubbell was doing dishes in her kitchen sink when she noticed dirty water coming up from the drain. (*Id.* at 19) Upon further inspection, Ms. Hubbell found water and sewage flowing into the first floor of the house through the shower, the bathroom sink, and the toilet. (*Id.*)

According to her testimony, Ms. Hubbell called the City of Xenia Public Service Department at approximately 4:30 p.m., which is after business hours for the City of Xenia. (*Id.* at 25) She was referred to the police department. (*Id.*) Hubbell's ex-husband Ken, who also resided in the first floor of the house, was present at the time this occurred and immediately went to the basement/crawl-space to shut off the water supply. (*Id.* at 20) When no one from the City of Xenia had responded, she again called for emergency assistance. (*Id.* at 25) According to Bill Buckwalter, who was the first city employee to arrive at the scene, he informed dispatch after the first call that there had been a number of area basements flooded due to heavy rainfall that week. (Ed. Quinlan Depo., Ex. 1, Tab 5) He requested dispatch to page him if Ms. Hubbell called back and he could determine whether it was the type of emergency to which the city could respond. (*Id.*)

Mr. Buckwalter responded to the scene at approximately 7:00 p.m. (*Id.*). Hubbell claims the water stopped coming into her house when the city employees lifted the manhole cover. (*Id.*)

However, near this time, Ms. Hubbell's son-in-law had gone down into the basement and opened up a "cleanout." (*Id.* at 28) Ms. Hubbell claimed the water and sewage then stopped coming in through the upstairs inlets and quickly began to fill the basement. (*Id.*) She recalls an individual from the city had argued with her son-in-law about doing this and about whether the underlying cause was a sewer backup. (*Id.* at 29)

When city employees lifted the manhole cover at South Monroe, they discovered that the water in the sewer main was flowing at a slower rate, but it had not stopped. (See Quinlan Depo., Ex. 1, Tab 5) They also checked the manholes located near Ms. Hubbell's property on Home Avenue. (*Id.*) The Home Avenue line was flowing freely. (*Id.*) Because the Monroe Street line was flowing more slowly and on the chance that this was somehow related to Ms. Hubbell's troubles, an equipment operator was called to the scene with a truck containing a pressurized "jet rodder." (*Id.* at Tabs 4-6) This is a piece of equipment that uses high-pressure water to clear blockages in sewer lines. (*Id.* at pg. 12) In this instance, the jet rodder was sent through the line between the manholes on Home Avenue and Monroe Street. (*Id.* at Tab 5) The jet rodder relieved whatever partial blockage may have existed. (*Id.* at Tab 4)

City employees later arranged for Hubbell and her family to be lodged with the Red Cross. (Hubbell Depo., pgs. at 35-36) She refused on the grounds that she preferred to stay with her son. (*Id.*) The following day, Xenia workers met Hubbell at her home to assist her in cleaning up the water. (*Id.* at 34) Workers cleaned, sanitized, and removed property Hubbell or her son-in-law expressed a desire to no longer keep due to contamination. (*Id.* at 37, 39) Xenia also arranged for a company known as "ServPro" to dry out the walls and remove any remaining moisture in the home. (*Id.* at 38). City employees also inspected the water main on Monroe Street to determine if there were problems with the main. (Quinlan Depo., pg. 33) While

examining the sewer, a camera used by Xenia overturned in the main and a backhoe was brought in to dig the camera up. (*Id.*) Later, city employees used root cutters to remove any tree roots in the line. (*Id.* at 24)

III. COMPLAINT

Ms. Hubbell filed this action claiming negligence on the part of Xenia. (Complaint, 70). She relied solely on the fact that city employees responded to the scene and the fact that water stopped flowing into her house once the manhole cover on Monroe Street was lifted to support her claim that Xenia was negligent. (Complaint, ¶ 19-24; Hubbell Depo., pgs. 27,30) She testified in her deposition that one of the Xenia employees told her son-in-law that one of the lines near her house was partially blocked by tree roots. (Hubbell Depo., pg. 29) She presented no evidence that the city had notice of or was negligent in inspecting for tree roots. During discovery, she did not name an expert to support her claims that the backup into her house had anything to do with the city sewer lines or that Xenia could have done anything to prevent the backup.

IV. MOTION FOR SUMMARY JUDGMENT

On June 25, 2005, the City of Xenia moved for summary judgment of all claims on the grounds that there was no evidence of negligence and the City was otherwise entitled to immunity under R.C. § 2744.02(A)(1) and § 2744.03. Xenia argued that, absent some evidence of negligence, there could be no exception to political subdivision immunity under Chapter 2744. Additionally, regardless of whether there was some question of fact as to negligence, Xenia was entitled to immunity under R.C. § 2744.03(A)(5) because any such negligence would have “resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities.”

The City of Xenia Public Service Department has an unwritten program in place to monitor and maintain the sewer system. (Quinlan Depo., pgs. 8-19). This program was created based upon the budgetary constraints of the city. (*Id.*) And, decisions on how assign personnel must be made to achieve the most efficient and effective use of limited public resources. (*Id.* at ¶ 8) City employees maintain the sewer system on a daily basis. (*Id.* at 13) Multiple inspections are conducted each week on areas in which problems have been reported, which are otherwise known as “high points.” (*Id.* at 10) Non-problem lines are inspected and repaired as needed. (*Id.* at 8) Additionally, the city has a crew out everyday using a “vac truck” to clean all lines in the city on a rotational basis. (*Id.* at 12) This process takes approximately two to three years to complete every line in the city, after which, the process starts all over again on a daily basis. (*Id.*)

Xenia further relied upon the fact that this court has established the rule that a municipality must exercise “reasonable diligence and care” in keeping public sewer systems in repair and free from conditions that may cause damage to adjacent private property. *Doud v. City of Cincinnati* (1949), 152 Ohio St. 132, 87 N.E.2d 243, paragraph two of the syllabus. The *Doud* Court concluded that a municipality is charged with knowledge of defects that would have been revealed by a reasonable inspection of the sewer system. *Id.* at 137. In this case, there was no evidence that the City had notice that the Monroe Street line was subject to potential blockage. There is no evidence that the City’s inspection and maintenance program was not reasonably diligent under the leading precedent.

In response, Ms. Hubbell presented no evidence that Xenia’s inspection policy was unreasonable or failed to meet the appropriate standard of care. In fact, she acknowledged in her response to the summary judgment motion that she had no such evidence. Ms. Hubbell

acknowledges, in the nearly twenty years she has lived at that property, she has had no prior sewer backups or problems related to the City's sewer lines. (Hubbell Depo., pg. 42) The only sewer problems she can remember involved the lateral line running from her property and, Ms. Hubell acknowledges that line is her own responsibility to maintain. (*Id.* at 42-43) Ms. Hubbell also remembers it had been raining the week of the alleged backup. (*Id.* at 32)

With no evidence, it became Ms. Hubbell's contention that the Xenia employee's decision not to immediately respond to her emergency call was negligent. By not responding more quickly, she alleged the city exacerbated the flooding. However, Ms. Hubbell did not allege this claim in her complaint. It is a black-letter rule of law in Ohio that, if the complaint specifies particular acts and conduct amounting to negligence, the court may only regard the specific allegations and plaintiff cannot recover for other acts of negligence. *See* 70 Ohio Jur.3d § 161, citing *Winzeler v. Knox* (1924), 109 Ohio St. 503, 143 N.E. 24. Nowhere in Plaintiff's complaint is there an allegation that Xenia employees negligently responded to the incident. The claims of negligence specifically delineated in the first and second causes of action were for the failure to inspect, repair, and maintain public sewer lines. Because Xenia had no obligation to move for summary judgment on non-existent causes of action and, because Plaintiff has conceded that she has no cause of action for negligence against Xenia for maintenance and repair of the public sewer system, Xenia moved for immunity and summary judgment as a matter of law.

Ms. Hubbell also presented no evidence that Xenia had a duty to respond to every emergency call of flooding. Her call was after hours and there was no emergency response team in place to respond to all calls for flooding in Xenia. Rather, there was one man with a pager who had to make a choice whether every call he received was a matter of dire emergency or

another person with a basement flooding because of the rain. In response to her new allegation, Xenia relied upon a Second District Court of Appeals decision stating, "We do not believe there is a duty upon the city to maintain complete stand-by emergency service every time a householder phones that he has an overflow in the sewer system on his premises." *Bingham v. The City of Fairborn* (Apr. 17, 1980), 2nd App. No. CA 1121, 1980 WL 352391.

The City also explained that it was otherwise immune from liability for any alleged failure to respond to Hubbell's emergency call. Under *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, the City has no duty to alleviate emergencies inside a customer's home in its proprietary capacity until such point as it affirmatively responds. At which time, Ms. Hubbell admitted the flooding in her home stopped. (Hubbell depo, p. 30) Therefore, any duty owed by Xenia to respond to Hubbell's call for service could only be in the City's governmental capacity to protect persons or property. R.C. § 2744.01(C)(2)(b).

Thus, there were no applicable exceptions to governmental immunity for Hubbell's claim that the City was negligent in responding to her emergency call at the time of the incident. However, both she and the trial court failed to distinguish between Xenia's proprietary functions of operating and maintaining sewer systems and its governmental function of providing emergency response to protect persons and property. Because there is no exception to political subdivision immunity under 2744.02(B) for such an emergency response, Xenia was entitled to summary judgment. Therefore, even had Hubbell pleaded a cause of action for negligent failure to respond, the City of Xenia would be entitled to immunity and summary judgment under R.C. § 2744.02(A).

V. TRIAL COURT DECISION

On August 24, 2005, the trial court issued a decision denying Xenia summary judgment on the basis there was a question of fact as to whether Xenia was entitled to political subdivision immunity under R.C. § 2744. *Hubbell v. City of Xenia* (August 24, 2005), Greene Cty. Ct. Case No. 2004CV0507, Appendix at App-1. The court incorrectly came to the legal conclusion that both the claim of negligent maintenance and the claim of negligent response fell under the 2744.02(B)(2) “proprietary function” exception to political subdivision immunity. Even though the plaintiff presented no evidence that the city was negligent in the maintenance or upkeep of the city sewer system, the court erred as a matter of pure law by concluding that the proprietary function exception to immunity applied. And, it erred as a matter of law in sole reliance upon the allegedly negligent response to Hubbell’s call for service, a claim not even plead in the Complaint. In making this faulty legal conclusion, the trial court failed to explain how responding to a citizen’s emergency call for service was a proprietary function rather than a governmental function – as the law clearly provides it is.

Upon concluding that all actions complained of were proprietary in nature, the trial court found there was a question of fact as to whether the City was negligent in responding to Hubbell’s call. In so concluding, the court ignored Second District and Supreme Court precedent to the contrary. The trial court also concluded “Hubbell [h]as alleged negligence attributable to the City of Xenia that is not covered by a 2744.03(A)(5) defense.” According to the court, 2744.03(A)(5) immunity does not shield a political subdivision from the negligent action of an employee. The trial court then immediately ordered the case to mediation.

VI. APPEAL TO THE SECOND DISTRICT COURT OF APPEALS

The City of Xenia properly appealed the trial court's erroneous decision on immunity to the Second District Court of Appeals pursuant to R.C. § 2744.02(C). On June 29, 2006, however, the Second District dismissed the appeal for lack of a final appealable order. *Hubbell v. Xenia*, 167 Ohio App.3d 294, 854 N.E.2d 1133, 2006 -Ohio- 3369, Appendix at App-7. While the trial court had made a number of incorrect legal conclusions on the application of immunity to this case, including that all actions complained of were "proprietary" in nature and that the defenses under 2744.03 did not apply to this case, the appellate court, nonetheless, declined jurisdiction. The court reasoned that there is no "final" decision on the question of immunity where the trial court concludes there are genuine issues of fact. Without a final decision on this purported question of fact, the Second District claimed it could not accept jurisdiction to hear or review the appeal under R.C. § 2744.02(C) because, in its view, trial courts rarely make mistakes when deciding if a question of material fact precludes the legal application of immunity.

Because the implications of this decision affect all political subdivisions in the State of Ohio, including the City of Xenia in future litigation, Xenia chose to appeal to this Court to clarify the law surrounding interlocutory appeals of immunity under 2744.02(C).

ARGUMENT

Proposition of Law Accepted as a Conflict: “Is the denial of a governmental entity's motion for summary judgment on the issue of sovereign immunity due to the existence of genuine issues of material fact a final appealable order, pursuant to R.C. 2744.02(C)?”

Proposition of Law Accepted for Discretionary Review: A trial court decision overruling a Rule 56(C) 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).

I. THE DISTRICTS COURTS OF APPEAL HAVE HAD A DIFFICULT TIME DETERMINING THE APPEALABILITY OF ORDERS DENYING IMMUNITY UNDER R.C. 2744.02(C) AND HAVE CREATED A BODY OF CASE LAW THAT LENDS ITSELF TO ABUSE BY BOTH THE TRIAL AND APPELLATE COURTS.

This appeal has been accepted for discretionary review pursuant to Sup.Ct. Prac. R. III and as a conflict certified to it by a court of appeals in accordance with Sup.Ct. Prac. R. IV. *See Hubbell v. Xenia*, 111 Ohio St.3d 1467 & 1468, 855 N.E.2d 1258 (Table), 2006-Ohio-5625. Because both propositions of law involve the same general subject of inquiry, the argument below has been combined into a single analysis.

Initially, the Court should note changes in the conflict upon which this case was certified for review. On August 14, 2006, the Second District certified that its decision was in conflict with the Fourth District's decision in *Lutz v. Hocking Technical College* (May 18, 1999), 4th App. No. 98CA12. *See* Appendix at App-16. Despite the certified conflict in this Court, on December 7, 2006, the Fourth District Court of Appeals overruled its decision in *Lutz*, finding the Second District's analysis in the current case to be persuasive. *See Estate of Graves v. City of Circleville* (Dec. 7, 2006), 4th App. No. 06CA002900, 2006-Ohio-6626.

The Fourth District, recognizing that procedural posture of that case was clearly different from that in *State Automobile Mut. Ins. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, nevertheless decided that it would no longer review decisions denying immunity to

political subdivisions based upon some alleged question of fact. *Estate of Graves*, 2006-Ohio-6626. The court changed its position despite the fact that just three days before the *Hubbell* decision, the Fourth District had expressly relied upon 2744.02(C) to address the merits of the denial of summary judgment to the City of Chillicothe. *Malone v. Chillicothe* (June 26, 2006), 4th App. No. 05CA2869, 2006-Ohio-3268. Both the Second and Fourth Districts recognized that they had previously interpreted 2744.02(C) to allow for the kind of appeals at issue in this case. *Hubbell*, 2006 -Ohio- 3369, ¶ 8; *Estate of Graves*, 2006-Ohio-6626. Neither provided any clear reason for interpreting the statute differently today than it has been interpreted in the past, but for a change in their own policies.

Regardless of the Fourth District's "change of heart," other district courts of appeals continue to review denials of summary judgment under R.C. § 2744.02(C), and the conflict amongst the courts on the certified issue still clearly exists. *See Tomlin v. Pleban* (Dec. 14, 2006), 8th App. Dist. No. 87699, 2006-Ohio-6589 (where the Eighth District Court of Appeals reviewed the merits of a trial court decision finding genuine issues of material fact precluded summary judgment for the City of Cleveland).

Moreover, the courts that seemingly agree with the Second District that they are without jurisdiction to review questions of fact, have disagreed on how to apply that principal to interlocutory appeals under R.C. § 2744.02(C). The new position of the Second and Fourth Districts is that they will no longer engage in any review of the merits of the trial court's finding. While the Second District purportedly relies upon the Ninth District's analysis in *Brown v. Akron Bd. of Edn.* (1998), 129 Ohio App.3d 352, 356, 717 N.E.2d 1115, it failed to recognize that the Ninth District does not simply refuse to accept jurisdiction of any case turning on a question of fact. *See Bays v. Northwestern Local School Dist.* (July 21, 1999), 9th App. No. 98CA0027,

1999 WL 514029. *See also, Cunningham v. Allender*, 5th App. No. 2004CA00337, 2005-Ohio-1935, and *Burley v. Bibbo* (1999), 135 Ohio App.3d 527, 734 N.E.2d 880. Rather, these districts have decided that a *de novo* review must be conducted of the underlying decision before they can determine whether they actually have jurisdiction over the appeal. *Id.* The Fifth District explained that courts “must review *de novo* those matters before the trial court to determine the applicability of sovereign immunity to the facts involved before the question as to the appropriateness of this appeal can be resolved.” *Cunningham, supra.* In reviewing the legal question of immunity, these districts will decline jurisdiction under 2744.02(C) only if they first find, upon a review of the record, that the trial court was correct in finding that immunity turned on a question of fact. There is a vast difference between these different applications of the statutory right to an immediate appeal in circumstances very similar to those in the current case.

The confusion created by the lower courts in accepting or declining appeals under Chapter 2744 breeds uncertainty and concern for the integrity of the judicial system and, moreover, concern for the system of checks and balances intended by the doctrine of separation of powers. Appellate courts are setting standards and exceptions to Chapter 2744.02(C) with very little or no regard for the legislature’s authority to set the limits of appellate jurisdiction.

The Second District has invented a way for the trial and appellate courts to avoid deciding difficult questions of immunity. Trial courts need only use the magic language “material question of fact” to avoid appellate review. And, despite the fact that all appellate courts have previously interpreted 2744.02(C) in a manner that would have mandated a review of the current case, they are now encouraged to overrule their own precedent and ignore the plain language of the statute. What is to prevent the appellate courts from simply reversing their position again when there is an issue that strikes their fancy? Accordingly, this court has been

requested to clarify not only whether 2744.02(C) provides for an immediate appeal from summary judgment decisions denying immunity, but also whether courts should conduct a *de novo* review of the record before they declining jurisdiction. This Court should conclude, based upon the plain language of the statute, legislative intent and public policy that a trial court decision overruling a Rule 56(C) 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).

II. XENIA HAS THE RIGHT TO AN IMMEDIATE APPEAL UNDER THE PLAIN LANGUAGE OF SECTION 2744.02(C)

Ultimately, this case comes down to an interpretation of the language of Section 2744.02(C). Courts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of statutory interpretation, but must give effect to the words used. *State ex rel. Fenley v. Ohio Historical Soc.* (1992), 64 Ohio St.3d 509, 511, 597 N.E.2d 120. In construing a statute, a court's paramount concern must be the legislative intent in enacting the statute, which intent is to be determined from the words employed by the General Assembly as well as the purpose to be accomplished by the statute. *State v. Elam* (1994), 68 Ohio St.3d 585, 587, 629 N.E.2d 442; *State v. S.R.* (1992), 63 Ohio St.3d 590, 594, 589 N.E.2d 1319. Specifically, courts cannot ignore words used nor add words not included to reach a desired result and must give effect to each of the words utilized. *E. Ohio Gas Co. v. Limbach* (1991), 61 Ohio St.3d 363, 365, 575 N.E.2d 132.

Generally, the denial of summary judgment is not a final appealable order. *See e.g., State ex rel. Overmeyer v. Walinski* (1966), 8 Ohio St.2d 23, 37 O.O.2d 358, 222 N.E.2d 312. As is within its constitutional authority, however, the Ohio General Assembly amended Chapter 2744 to include a provision expressly granting political subdivisions and their employees the

right to an immediate appeal. See Am.Sub. H.B. No. 350, 146 Ohio Laws, Part II, 3867. That amendment designates as “final” any order that denies political subdivisions and its employees the benefit of sovereign immunity and subjects such order to immediate appellate review. R.C. § 2744.02(C). More specifically, that section provides:

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.

R.C. § 2744.02(C).

In interpreting this provision, the Second District construed this section as providing appellate jurisdiction only over orders that finally determine whether a political subdivision is entitled to immunity from liability. *Hubbell*, 2006 -Ohio- 3369. Accordingly, an order that defers the question of immunity until after the trier of fact has resolved all factual issues in the case is not a final decision on the question of immunity. *Id.* Thus, the Second District concluded that, when a trial court decision asserts there is a genuine issue of material fact, the Court has no jurisdiction to review the legal question of immunity. *Id.* This is true even if the material facts had been undisputed by the parties for purposes of summary judgment motions and appeal. Instead, the mere utterance by the trial court of the words “genuine issue of material fact” will always preclude appellate review under 2744.02(C). In essence, the courts of appeals would have jurisdiction in most instances only after a jury trial.

The Second District’s interpretation of the statutory language, specifically the words “denies [] the benefit of an alleged immunity from liability” narrows the ability of a political subdivision to obtain immediate appellate review to only those situations where the trial court makes a final decision on the question of immunity and plainly ignores the legislature’s use of the words “benefit” and “alleged.” The use of the words “benefit” and “alleged” demonstrate

that the scope of this provision is not limited to only orders delineating a “final” denial of immunity, as incorrectly suggested by the Second District. The legislature chose, as it is entitled to do, appropriate language to include the denial of “alleged” immunities, not ones that have been finally decided. Section 2744.02(C) also is written to include the denial of the “benefit” of an alleged immunity, not just specifically the denial of only “immunity from liability.” Thus, it is not necessary, under 2744.02(C), for there to be an absolute denial of immunity before the city has the right to an interlocutory appeal.

The General Assembly further demonstrated its intent that this provision be interpreted broadly by including the right to an immediate appeal from the denial of immunity provided to political subdivisions under “any other provision of the law.” Presumably, this would include statutory immunity provisions such as the recreational user statute. In this case, however, Xenia sought review of the trial court’s finding that it was not entitled to governmental immunity under Chapter 2744.

Whether a political subdivision is entitled to immunity under Chapter 2744 is purely a question of law to be determined by the court. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292, 595 N.E.2d 862. In moving for summary judgment, the City of Xenia sought a legal determination that it was entitled to immunity. Because immunity is a question of law to be determined by the court, summary judgment is the appropriate forum for a political subdivision to address that question. *See Nagel v. Horner*, 4th App. No. 04CA2975, 2005-Ohio-3574. In fact, Rule 56(C) motions are specifically designed to test the strength of the case as a matter of law, not fact. Political subdivisions frequently invoke the legal question of immunity at that stage of litigation to avoid the burden of going to trial on a question that should be determined by

the court. And, frankly, the taxpayers should expect their tax dollars to be protected in this manner.

To avoid summary judgment, the opposing side must be able to demonstrate that there is a genuine issue of material fact and that the case cannot be decided as a matter of law. Civ.R. 56(C). In most instances, before a court can deny summary judgment, it must conclude there are material questions of fact. Under the Second District's interpretation of 2744.02(C), an immediate appeal of a summary judgment decision denying immunity would rarely, if ever, be appropriate, because summary judgment decisions denying immunity are almost always based upon a question of fact. Thus, political subdivisions would be forced to go to trial in order to obtain a final judgment on the question of immunity without ever having the option of appeal. Of course, if there were a final judgment at the pre-trial motion stage of the litigation, the political subdivision would already have a final and appealable order and would not need to invoke Section 2744.02(C) to protect its right to immunity. Not only would such an interpretation essentially defeat the purpose of 2744.02(C), it would be a substantial waste of valuable public resources to go to trial on issues that already should have been decided as questions of law.

Importantly, Section 2744.02(C) does not expressly require that there be a final determination of immunity before a political subdivision has the right to appeal. Section 2744.02(C) plainly provides that the denial of the "benefit" of immunity is immediately appealable. "Benefit" has been defined as an advantage or privilege. Black's Law Dict. 122 (7th Ed. 2000). This court has concluded that one of the key benefits of immunity is the conservation of the limited financial resources of state political subdivisions. *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d, 27, 29, 550 N.E.2d 181. In fact, "[t]he primary purpose of

governmental immunity is to conserve the fiscal integrity of political subdivisions.” *Wilson v. Stark Cty. Dept. of Human Services* (1994), 70 Ohio St.3d 450, 543, 639 N.E.2d 105, citing *Menefee*.

In finding a right to appeal summary judgment decisions under 2744.02(C), the Eighth District explained, “We find that R.C. 2744.02(C) serves a similar legitimate governmental purpose in that it conserves the fiscal resources of political subdivisions by allowing them to appeal a decision that they are not immune from suit as soon as such a decision is made instead of having to spend the time and financial resources defending themselves at trial only to appeal after trial and have it determined by an appellate court that they were immune from suit all along.” *Kagy v. Toledo--Lucas Cty. Port Auth.* (1997), 121 Ohio App.3d 239, 244, 699 N.E.2d 566. The court later elucidated, “We would ignore this precept were we to force the city to be haled into court and spend time and public money engaging in discovery so that plaintiff could try to establish the existence of an exception to the non-liability attaching to the city’s operation of the recreation center.” *Sciulli v. City of Rocky River* (July 23, 1998), 8th App. No. 73716, 1998 WL 414928.

In interpreting Section 2744.02(C), the Second District and, now, the Fourth District have ignored the broad language used therein and have taken it upon themselves to narrowly redefine when an immediate appeal is available to political subdivisions. This redefinition essentially relegates the statute to a position of virtual non-existence. Only in certain rare circumstances, presumably, where a trial court expressly holds that there is no immunity available for the political subdivision, would the statute have any value. And, those instances are likely to become more infrequent now when the trial court can avoid appellate review by simply using the magic words. Additionally, the efforts to redefine 2744.02(C) according to the policy decisions

of the particular court of appeals violates the basic principle of separation of powers in utter disregard for the General Assembly's authority to pass such a statute under Article IV, Section 3(B)(2) of the Ohio Constitution.

In interpreting Section 2744.02(C) in light of the plain language, constitutional checks and balances, and legislative intent, this Court must conclude Xenia was deprived a benefit of immunity when the trial court denied its motion for summary judgment. Xenia was immediately shuffled into the county's mediation process and given the option of settling the case or going to trial. Neither option protected Xenia's right to immunity. For a municipality, settlement is often not an option. For instance, in this case, settlement would essentially be a waiver of the immunity defense and would set up claims against the city any time one of its citizens got some water in his or her basement. However, trial was an equally poor option. The cost of trying cases such as this could be greater than the potential for damages, particularly where questions of immunity remain intertwined with the underlying causes of action. Even if the city were to ultimately be granted immunity after trial, the expenditure of resources and time would result in a net loss for the city and its taxpayers. No matter how the Court looks at it, the only benefit of immunity from liability in a case such as this would be the ability to rely upon that doctrine for purposes of summary judgment or other pre-trial dispositive motion and to avoid the burden and expense of trial. Thus, when the Greene County Court of Common Pleas denied Xenia's summary judgment motion, it effectively and erroneously denied Xenia a key benefit of immunity.

III. THE COURT OF APPEALS DOES NOT HAVE AUTHORITY TO LIMIT THE SCOPE OF A STATUTORY RIGHT TO APPEAL OR ITS OWN JURISDICTION FOR PURPOSES OF JUDICIAL ECONOMY.

To justify its decision to strictly construe the language of 2744.02(C), the Second District explained that a strict interpretation better suits the goals of judicial economy and clarity. *Hubbell v. Xenia*, 2006 -Ohio- 3369, ¶¶ 14-15. In doing so, the Second District blatantly and unlawfully ignored the constitutional separation of powers doctrine. The court recognized that one “benefit” of immunity was the preservation of public resources, but determined that immediate appeals from summary judgment decisions under 2744.02(C) would not serve to protect that benefit.¹ *Id.* at ¶¶ 11, 14. Specifically, the court said, “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 [] an immediate appeal would merely add an unnecessary appeal—with its attendant delay—to the litigation.” *Id.* at ¶ 14. Despite its insistence that only in the rare circumstances would a court of appeals overrule the trial court’s finding of a genuine issue of fact, the Court recognized that it had previously overturned a summary judgment decision that denied Springfield Township and its employee the benefit of immunity. *Id.* at ¶ 7, citing *Weber v. Haley* (May 1, 1998), 2nd App. No. 97CA108, 1998 WL 211832 (trial court erred in denying immunity appellants where there was no evidence of willful, wanton, or malicious misconduct).

In fact, that is not the only case in which the Second District has overturned the denial of immunity to a political subdivision on summary judgment. In *Wiant v. City of Springfield* (May 15, 1998), 2nd App. No. 97-CA-0069, 1998 WL 309834, *6, the Second District reversed the decision of the trial court, which had denied immunity to the City of Springfield. The Court concluded, “Because of the immunity afforded the City by R.C. 2744.02(A)(1), and because on

¹ The tax dollars funding Ohio’s appellate courts are not entitled to more protection than the tax dollars funding Ohio’s political subdivisions, like Xenia.

this record R.C. 2744.02(B)(3) does not provide an exception to that immunity, the trial court erred in denying the City's motion for summary judgment.”

The Second District's claim that trial court decisions on immunity will rarely be overturned is also not supported by the case law in other districts. In the late 1990's, Section 2744.02(C) remained viable for only a little more than two years under House Bill 350, at which time the amended statute fell victim to this court's decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062, 1999-Ohio-123. However, during those two years, several other courts overturned trial court decisions denying immunity to political subdivisions. See, e.g., *Bays v. Northwestern Local School Dist.* (July 21, 1999), 9th App. No. 98CA0027, 1999 WL 514029; *Infante v. City of Akron* (Feb. 25, 1998), 9th App. No. 18493, 1998 WL 103331; and *Pequignot v. Adams Tp. Bd. of Trustees* (Sept. 28, 1998), 3rd App. No. 17-98-5, 1998 WL 667640. See also *Sciulli, supra*, 1998 WL 414928; and *Drew v. Laferty* (June 1, 1999), 4th App. No. 98CA522, 1999 WL 366532, *2. As these cases demonstrate, immunity presents many difficult questions of law that are often more suited for the studied judgment of the appellate courts. Understanding this, the General Assembly decided to reenact Section 2744.02(C) in 2003. See 2002 Senate Bill 106, eff. 4-9-03.

In *Bays*, the court reversed the trial court's denial of immunity to the board of education and its employees, holding that an alleged statement by the employee did not amount to negligent conduct as a matter of law. *Bays*, 1999 WL 514029. In *Infante*, the Court concluded that the trial court erred in denying a municipality summary judgment where the plaintiff could not produce evidence sufficient to raise a genuine issue of material fact as to every necessary element of her claim. *Infante*, 1998 WL 103331, *2. In *Pequignot*, the trial court had denied the township's motion for summary judgment based upon a perceived question of fact. *Pequignot*,

1998 WL 667640. The court of appeals concluded there was no genuine fact dispute as to the township's immunity pursuant to R.C. § 2744.03(A)(5). *Id.*

Statutory immunity for political subdivisions raises some of the most complicated legal questions facing trial court judges. Judge Mark Painter, a well respected Ohio judge, legal scholar, and author, explained that, "The issue of governmental immunity from liability is not, and never has been, easy in Ohio." *Hacker v. Cincinnati* (1998), 130 Ohio App.3d 764, 767, 721 N.E.2d 416. Judge Painter never hesitates to express his belief that the whole concept of immunity may have arisen in common law as a mistaken interpretation of the English model of "the king can do no wrong." *Id.* See also *Thorp v. Strigari* (2003), 155 Ohio App.3d 245, 257, 800 N.E.2d 392. Nevertheless, he has also recognized that, mistake or not, immunity for political subdivisions has since been codified, which he believes has created additional confusion in its application. *Hacker*, 130 Ohio App.3d at 767. This confusion is multiplied when the underlying case involves equally law intensive questions, such as whether a municipality has a public duty that extends to all citizens to respond to emergency calls or the extent to which municipalities can be held liable for sewer backups, icy roads, cracked sidewalks, etc.

We cannot expect every trial judge to be an expert in all areas of the law. This is particularly true when the bulk of his or her caseload will continue to revolve around criminal and basic personal injury claims, all of which are highly fact intensive. Thus, it is reasonable to have immunity decisions, which are inherently questions of law, reviewed by appeals courts, whose key purpose is to evaluate the decisions of law made by the lower courts. In fact, the more the appellate courts develop the law on immunity, the easier it will be for the trial courts to understand and apply that law.

Xenia recognizes that there are some instances in which a trial court will properly decide that there are material questions of fact that must be resolved before the legal question of immunity can be addressed. However, this does not negate the statutory obligation of the appellate courts under 2744.02(C) to evaluate whether the trial court's finding of fact was genuine and material to the determination of the legal questions before it.

The current case is a perfect example of one in which the court of appeals should have at least conducted a review of the record before rejecting jurisdiction over the appeal. Had it done so, it would have found that the trial court erred in addressing key questions of law. The trial court erred in finding the an exception to immunity applied under 2744.02(B)(2) when the plaintiff presented no evidence of "negligence" (as is required by that exception) in maintaining the sewer systems and even acknowledged she had no such evidence. The trial court erred in denying immunity to the city under 2744.03(A)(5) when the policy for inspecting and cleaning the sewer system was set forth and demonstrated to be the "exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources." The trial court also erred in applying the proprietary function exception to instances in which city employees respond to emergency calls. In fact, under the trial court's decision, a municipality would be forced to undergo a trial on the merits for every sewer backup regardless of whether there was any evidence of negligence and regardless of the protected, discretionary choices of the municipality.

Importantly, the City of Xenia did not ask the court of appeals to resolve questions of fact. Rather, Xenia simply asked the court to determine if it should have been granted summary judgment *as a matter of law*. The court was never asked to weigh the evidence or determine the truth of a matter. Therefore, the appellate court's burden in reviewing this case would have been

no different than had Xenia been granted summary judgment; at which point, the court would have independently reviewed the record to determine if summary judgment was appropriate. *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786.

In reviewing decisions on summary judgment, the scope of review is already limited to determining whether sufficient evidence was presented to make an issue of fact a proper jury question. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202. The sole question before the Second District was, when taking the facts in a light most favorable to the plaintiff, should Xenia have been granted immunity and summary judgment as a matter of law. There is no ambiguity in this standard of review that the Second District should have felt itself compelled to resolve by limiting the scope of 2744.02(C).

IV. THE COURT OF APPEALS DOES NOT HAVE AUTHORITY TO LIMIT THE SCOPE OF A STATUTORY RIGHT TO APPEAL OR ITS OWN JURISDICTION FOR PURPOSES OF EASE AND CLARITY.

The Second District, below, also concluded that its decision would provide a simple, easily applied test for determining whether an order is immediately appealable. *Hubbell*, 2006 - Ohio- 3369, ¶ 15. The court explained, “By limiting appeals under 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.” *Id.*

First, the legislature has constitutional authority “to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals. *See* Section 3(b)(2), Article IV, Ohio Constitution. For purposes of this case, the legislature expressly defined as “final” any order denying a political subdivision the benefit of an alleged immunity.

The court of appeals does not have authority to usurp the constitutional authority of the legislature by adding to or divesting itself of its jurisdiction.

Additionally, in finding that its rule would make determining jurisdiction under 2744.02(C) more easy, the Second District did not address the methods used by the Third, Fifth and Ninth Districts or explain how they were any less clear than the policy it had adopted for simply not reviewing the question of immunity until there was a final decision on the question of immunity. In fact, for years, the federal courts have used the same process used by the Fifth District to determine jurisdiction over questions of immunity, as explained by Amicus, the City of Circleville, in its compelling brief to seek reversal on behalf of the City of Xenia. *See also, Saucier v. Katz* (2001), 533 U.S. 194, 201; *Hoover v. Radabaugh* (6th Cir.2002), 307 F.3d 460, 464; and *Christophel v. Kukulinsky* (6th Cir.1995), 61 F.3d 479, 484.

Federal courts acknowledge that denials of immunity cannot be reviewed on appeal if the determination of immunity actually turns on a genuine issue of material fact that must be decided by the jury. *Johnson v. Jones* (1995), 515 U.S. 304. However, it is the job of the appellate court to evaluate the legal question of immunity to determine whether the trial court was correct in finding a material issue of fact on that issue. *Saucier*, 533 U.S. at 201.

In *Saucier*, the Supreme Court carefully explained that an approach that rejects an appeal simply on the basis that the trial court used the magic question-of-fact language “could undermine the goal of [] immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.” *Id.* (quotations omitted) This is no less true in state immunity cases, especially in light of the existence of a state statute that requires the appellate courts to conduct such review.

Accordingly, this Court should hold that Section 2744.02(C) expressly grants jurisdiction to the courts of appeals to review the legal question of immunity in the context of summary judgment motions. The Second District did not have the constitutional or statutory authority to decline jurisdiction based upon its own redefinition of the Ohio Revised Code.

In dismissing the current appeal, the Second District also cited this Court's decision in *State Automobile Mut. Ins. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713. In *Titanium Metals*, this court declined jurisdiction over an interlocutory appeal on the question of immunity under 2744.02(C). *Id.* at ¶ 1. In that case, the trial court had provided no explanation for its decision denying immunity on a motion to dismiss. *Id.* at ¶ 5. Additionally, the court had made no determination whether immunity applied or whether there was some exception to immunity. *Id.* at ¶ 10. Noting that no fact finding or discovery had occurred in that case, the court concluded that the record needed to be developed before the court could reach the issue of immunity. *Id.* at ¶¶ 11-12.

The Second District recognized that the current case is clearly distinguishable both because the trial court addressed immunity and because the record was developed, nevertheless decided, "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." *Hubbell*, 2006 -Ohio- 3369, ¶ 21.

Despite the fact that the appellate court found *Titanium Metals* to be clearly distinguishable from the case at bar, by citing it, the Second District, insinuated that the case provided support for how this court would likely rule on the current issue. Xenia disagrees with this hypothesis. A plain reading of *Titanium Metals* demonstrates that this court was interested

in whether it was possible for a legal determination on the question of immunity could be made. In the current case, Xenia contends that based upon the record, when taken in a light most favorable to the plaintiff, it was entitled to immunity as a matter of law. Xenia's position is that the record has been fully developed and there are no material questions of fact to be resolved by the trier of fact before the legal question of immunity can be resolved. Therefore, unlike in *Titanium Metals*, it was clearly possible for the appellate court to make a legal determination on the question of immunity under 2744.02(C). But, the Second District decided not to even bother with a review of the merits of that position claiming a need to protect its own judicial resources, thereby forcing Xenia and all other political subdivisions in that District to face an unnecessary trial even in circumstances where the error below was one of law, not fact.

Xenia also disagrees with the idea that the *Titanium Metals* decision demonstrates a movement by this court in the direction of strictly limiting appeals under 2744.02(C). In fact, in *Stevens v. Ackman*, 91 Ohio St.3d 182, 743 N.E.2d 901, 2001-Ohio-249, the appellees had specifically moved to dismiss the appeal of a summary judgment decision on the grounds that there was no final and appealable order, but this Court nevertheless reviewed the appeal, basing its decision instead on the constitutionality of 2744.02(C) at that time. Based upon the plain language of the statute, this Court should conclude that Xenia was denied a benefit of immunity when the trial court denied its motion for summary judgment. Therefore, Xenia was entitled to an immediate appeal of that decision.

CONCLUSION

The right of political subdivisions to immediately appeal certain interlocutory decisions is an issue that affects all such entities and their employees. The courts of appeals have struggled in defining the right to appeal under R.C. § 2744.02(C) for a variety of reasons. And, their

struggle has resulted in confusion, error of application, a violation of the separation of powers doctrine, and prejudice to the State's political subdivisions. Appellant, the City of Xenia, respectfully requests that this Court reverse the decision of the Second District Court of Appeals by finding that an order overruling a Rule 56(C) motion in which a political subdivision or its employee had sought immunity is, in fact, an order denying the benefit of an alleged immunity and is, therefore, a final and appealable order under R.C. § 2744.02(C).

Respectfully submitted,



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Proof of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to the following counsel on 18th day of December, 2006.

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APPENDIX

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IN THE COURT OF COMMON PLEAS OF GREENE COUNTY, OHIO
2005 AUG 24 10 03 AM
CIVIL DIVISION

DOTTIE HUBBELL

Plaintiff,

vs.

CITY OF XENIA, OHIO

Defendant

FERRIS MADDA CLERK
COMMON PLEAS COURT
GREENE COUNTY, OHIO

CASE NO. 2004CV0507

JUDGE: WOLAVER

JUDGMENT ENTRY

This matter is before the Court on Defendant City of Xenia, Ohio's Motion for Summary Judgment, filed June 24, 2005. The Court has also received Plaintiff Dottie Hubbell's Memorandum in Opposition to Motion For Summary Judgment, filed July 11, 2005.

Summary judgment may not be granted unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St.3d 108, syllabus; Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-30.

An adverse party may not rest upon the mere allegation or denial of their pleadings, but must set forth specific facts showing that there are genuine issues for trial. Siegler v. Siegler, (1979), 63 Ohio App. 2d 76. A moving party need not support its Motion for Summary Judgment with Affidavits negating every claim of a non-moving party; the moving party must only specifically delineate the basis upon which summary judgment is

sought in order to allow the opposing party a meaningful opportunity to respond. State ex. rel Coulverson v. Ohio Adult Parole Authority, (1991) 62 Ohio St. 3d 12.

In its Motion for Summary Judgment, Defendant City of Xenia, Ohio ("City of Xenia") makes four arguments. The City of Xenia first argues that they do not have a duty to maintain private sewer lines. Plaintiff Dottie Hubbell ("Hubbell") claims that the City of Xenia breached a duty owed to her when her home flooded with sewage. The flooding, allegedly, ceased when Xenia employees entered the flood site and lifted the manhole cover. The City of Xenia argues that this allegation is based on a mere inference that the blockage causing the flooding occurred on the City of Xenia's line. The City of Xenia further argues that the Home Avenue line, on the City of Xenia's property, was free flowing at the time of the flooding. In this sense Xenia argues that the City of Xenia cannot be liable in negligence as municipalities have no duty to maintain the private lines that run from an individual's residence and connect with the main sewer system. Pfile v. City of Circleville (Dec. 24, 2003), 2003-Ohio-7165, 2003 WL 23094871 4th App. No. 03CA11; Bibbs v. Cinergy Corp. (Apr. 12, 2002), 2002-Ohio-1851, 2002 WL 537628, 1st App. No. C-010390; Kaczor v. City of Bellaire (July 13, 1998), 7th App. No. 96 BA 60, 1998 WL 404189.

The testimony of the City of Xenia's employees, however, presents a genuine issue of material fact whether the blockage was located in the lateral line or the sewer main, and thus whether the City of Xenia owed a duty to Hubbell. The City of Xenia testified repeatedly that the Monroe Street sewer main was at least partially blocked, and that, allegedly, the main was not flowing normally. (Buckwalter Deposition at 10; Answer to interrogatory number 12). Further, the City of Xenia stated that an "unknown,

partial blockage" had been cleared from the Monroe Street sewer main the evening of the flooding, and also that roots had been subsequently removed from the main as well, which the City of Xenia conceded "could have been the possible problem." (Interrogatory number 13). There is a genuine issue of fact as to whether Hubbell's lateral line is connected to the Home Avenue or the Monroe Street main sewer lines. In a motion for summary judgment, "{A}ll inferences must be construed in favor of the nonmoving party." Falls v. Central Mutual Insurance Agency (10 Dist. 1995), 107 Ohio App.3d 846, 848, 669 N.E.2d 560, 562 (citing Hounshell v. Am. States Ins. Co. (1981), 67 Ohio St.2d 427, 21 O.O.3d 267, 424 N.E.2d 311).

Secondly, the City of Xenia argues that they did not breach a duty to maintain the public sewer system. The City of Xenia operates an established inspection and maintenance program wherein they inspect trouble spots several times a week, with all other areas subject to an extensive cleaning process on an ongoing basis. A municipality must exercise "reasonable diligence and care" in maintaining public sewer systems in repair and free from conditions that may cause damage to adjacent private property. Doud v. City of Cincinnati (1949), 152 Ohio St. 132, 87 N.E.2d 243. The Doud Court concluded that a municipality is charged with knowledge of defects that would have been revealed by a reasonable inspection of the sewer system. Id. at 137.

Plaintiff Hubbell's Memorandum In Opposition, however, alleges that the City of Xenia failed to address the negligence of its employees in responding to the flooding incident on Hubbell's property. The breach, allegedly, occurred when a City maintenance employee, on-call *emergencies only* employee William Buckwalter,

received a call from the dispatcher concerning Hubbell's original call at approximately 4:30 p.m. but, allegedly, did not arrive at the flooding property until approximately 7:30 p.m. Hubbell argues that for three hours the City of Xenia failed to respond, which resulted, allegedly, in a sewer backup for three full hours. In this regard, a genuine issue of material fact remains as to whether the City of Xenia breached a duty to provide adequate maintenance and/or to respond in a timely fashion within the three-hour flooding period.

Thirdly, the City of Xenia argues immunity pursuant to Chapter 2744 of the Ohio Revised Code. As set forth in R.C. 2744.03, a three-tier analysis is used to determine whether a political subdivision is entitled to immunity. Specifically, under R.C. Section 2744.03(A)(5) "The political subdivision is immune from liability if the injury, death, or loss to person or property 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." The City of Xenia argues that the assignment of personnel to inspect and foam high points is an exercise of the City's judgment in how to utilize equipment, supplies and personnel. (Affidavit of Ed Quilan, attached as Exhibit F). The City of Xenia further argues that the inspection policies of the City of Xenia was not created or executed with a malicious purpose, in bad faith, or in a wanton or reckless manner and therefore the City of Xenia is immune from liability.

Under the third-tier of the analysis once the moving party contesting immunity demonstrates that an exception exists, the political subdivision must then show that they

are entitled to one of the defenses against that exception. Cater v. Cleveland (1998), 83 Ohio St.3d, 24, 28, 697 N.E.2d 610. In Cater, there was no evidence that some affirmative act of a city employee caused the alleged backup. The City of Xenia argues that the Xenia Public Service Department has an established program for inspecting and maintaining the City's sewer system, which includes multiple inspections of problem areas implemented by maintenance crews two to three times per week. Xenia argues that Hubbell must be able to provide evidence that some affirmative act of a City of Xenia employee caused the alleged backup and that Hubbell must be able to prove that the inspection and cleaning regimen was somehow negligent.

However, under R.C. 2744.03(A)(5) immunity does not shield a political subdivision from the negligent action of an employee. 2744.03(A)(5) applies to the decisions of the political subdivision and not its individual employees. Kier v. City of Hamilton, (Ohio App. 12 Dist.), 1997 WL 264236, 4-5. As such there remain genuine issues of material fact regarding Mr. Buckwalter's alleged negligence, and, possibly, the negligence of another Xenia employee, Mr. Quinlan, Xenia Public Service Maintenance Supervisor. Hubbell was alleged negligence attributable to the City of Xenia that is not covered by a 2744.03(A)(5) defense and genuine issues of material fact exist as to whether the actions of Buckwalter and Quinlan were negligent.

Fourthly, the City of Xenia argues they are entitled to Summary Judgment for Hubbell's second cause of action for nuisance. (Complaint, Paragraph 73-79). Hubbell alleges "carelessness and negligence resulted in the creation of a nuisance." (Hubbell Complaint, Paragraph 76). The City of Xenia argues that this is a claim for qualified nuisance, wherein allegations of nuisance merge to become a negligence action.

Common law nuisance is considered a "wrongful invasion of a legal right or interest."

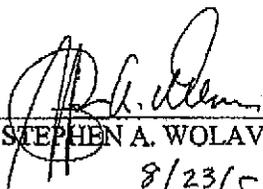
Taylor v. City of Cincinnati (1944), 143 Ohio St. 426, 432, 55 N.E.2d 724.

The Ohio Supreme Court has divided nuisances into two categories: absolute nuisance and qualified nuisance. Id. at 440-445. Absolute nuisance stems from intentional conduct, while qualified nuisance is "anything lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm." Id. At 445. As such, allegations of qualified nuisance are dependant on a finding of negligence. Hubbell's second cause of action for nuisance merges with her first cause of action for negligence.

The City of Xenia is correct in their analysis that Hubbell's second cause of action for nuisance is inextricably tied to her first cause of action for negligence. However, since genuine issues of material fact remain regarding the City of Xenia's duty to Hubbell, the second claim of nuisance must also survive summary judgment.

Accordingly, Defendant City of Xenia's Motion for Summary Judgment is **HEREBY DENIED.**

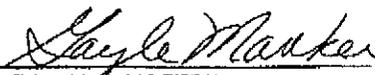
IT IS SO ORDERED.



JUDGE STEPHEN A. WOLAVER
8/23/15

SERVICE OF COPY:

Michael McNamee, Esq. (FAX # 937-427-1369)
Lynette Ballato, Esq. (FAX # 937-534-0505)



GAYLE MANKER
Assignment Commissioner

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

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

DECISION AND ENTRY

Rendered on the 29th day of June, 2006.

MICHAEL P. MCNAMEE, Atty. Reg. No. 0043861 and GREGORY B. O'CONNOR, Atty. Reg. No. 0077901, 2625 Commons Blvd., Beaver creek, Ohio 45431
Attorneys for Plaintiff-Appellee

LYNNETTE PISONE BALLATO, Atty. Reg. No. 0065455 and TABITHA JUSTICE, Atty. Reg. No. 0075440, The Oakwood Building, 2305 Far Hills Avenue, Dayton, Ohio 45419
Attorneys for Defendant-Appellant

PER CURIAM:

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.

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, 1293-1294; *Shump v. First Continental-Robinwood Assoc.* (2000), 138 Ohio App.3d 353, 741 N.E.2d 232.

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.

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. Rather,

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 Educ.* (1998), 129 Ohio App.3d 352, 717 N.E.2d 1115, and the cases which follow its reasoning. See, e.g., *Thomas Vending, Inc. v. Slagle*, Marion App. No. 9-99-16, 2000-Ohio-1623.

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. 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 the 1997 version.

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, 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.)

Likewise, in *Weber v. Haley* (May 1, 1998), Clark App. No. 97CA108, we addressed the denial of the Springfield Township Board of Trustee's 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 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.

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.

Contrary to our past approach, the Ninth District and others 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*, supra; see also *Burley v. Bibbo* (1999), 135 Ohio App.3d 527, 529, 734 N.E.2d 880.

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:

“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.*”

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.

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.

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 where 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 the unusual case would an immediate appeal conserve judicial resources by avoiding an ultimately unnecessary trial.

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 where 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.

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 Automobile Mut. Ins. 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.

On appeal to the supreme court, the 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:

"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.

"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."

**** The court of appeals considered the issue of immunity prematurely. The record below must be developed in order to reach this issue."

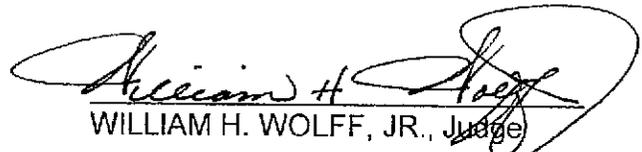
Titanium Metals Corp. at ¶10-12.

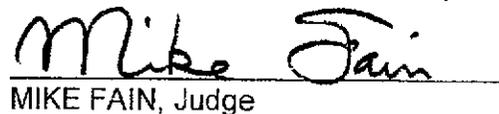
Although the procedural posture of the present case makes it readily distinguishable

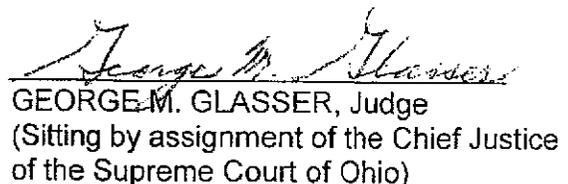
from *Titanium Metals Corp.*, *Titanium Metals Corp.* is instructive that an order is not immediately appealable merely because the trial court denied a request for immunity. Although the trial court's order herein discussed whether the City of Xenia is entitled to immunity and the court made that determination 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 oppose 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.

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.

IT IS SO ORDERED.


WILLIAM H. WOLFF, JR., Judge


MIKE FAIN, Judge


GEORGE M. GLASSER, Judge
(Sitting by assignment of the Chief Justice
of the Supreme Court of Ohio)

Copies mailed to:

Michael P. McNamee
Gregory B. O'Connor
Lynnette Pisone Ballato
Tabitha Justice
Hon. Stephen A. Wolaver

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

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

.....
DECISION AND ENTRY

Rendered on the 14th day of August, 2006.

.....
MICHAEL P. MCNAMEE, Atty. Reg. No. 0043861 and GREGORY B. O'CONNOR, Atty.
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Attorneys for Plaintiff-Appellee

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No. 0075440, The Oakwood Building, 2305 Far Hills Avenue, Dayton, Ohio 45419
Attorneys for Defendant-Appellant

.....
PER CURIAM:

This matter comes before the court on the City of Xenia's App.R. 25 motion to certify that our decision in this case, rendered on June 29, 2006, is in conflict with the Fourth District Court of Appeals' decision in *Lutz v. Hocking Technical College* (May 18, 1999),

Athens App. No. 98CA12.

As an initial matter, we note that our decision addressed the current version of 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." Although *Lutz* concerned an earlier version of the statute, the language of the current version of R.C. 2744.02(C) is identical to the 1997 version that was addressed in *Lutz*. Accordingly, the fact that the *Lutz* court addressed a prior version is immaterial.

As we stated in our prior decision, the *Lutz* court found the denial of summary judgment on immunity due to presence of a genuine issue of material fact to be a final order under R.C. 2744.02(C). The Fourth District reasoned:

"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.*"

In the present case, we held that the denial of motion for summary judgment on immunity does not constitute a final appealable order under R.C. 2744.02(C). We reasoned that 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.

In her opposition brief, Dottie Hubbell asserts that *Lutz* is factually and procedurally distinguishable from the present case in that it presented the unusual situation where an appellate court determined that no genuine issue of material fact existed despite a trial court finding to the contrary. Although the outcome of the *Lutz* appeal was unusual, the Fourth District's resolution of the immunity issue is immaterial to the issue of whether a conflict exists between this case and *Lutz*. Rather, the critical aspect of the *Lutz* opinion is its resolution of the threshold question of whether, under R.C. 2744.02(C), the trial court's denial of summary judgment on immunity was a final order. In that respect, we agree with the City of Xenia that the Fourth District's determination is in direct conflict with our decision in this case.

In its motion, the City also asserts that, contrary to the Fifth and Ninth District Courts of Appeals, we "declined to conduct a *de novo* review of the trial court's decision in order to determine whether the trial court was correct in finding that there was a question of fact or to determine whether the case could have, in fact, been resolved as a matter of law." The City cites to *Cunningham v. Allender*, Stark App. No. 2004CA337, 2005-Ohio-1935, and *Bays v. Northwestern Local Sch. Dist.* (July 21, 1999), Wayne App. No. 98CA27.

In *Cunningham*, the Fifth District stated that it "must review *de novo* those matters before the trial court to determine the applicability of sovereign immunity to the facts involved before the question as to the appropriateness of this appeal can be resolved." *Id.* at ¶12. The court then considered the three-tiered analysis for determining sovereign immunity for political subdivisions and concluded, "after examining those matters specified by Civ.R. 56 *de novo*, *** that, if Appellee is able to establish the facts, proximate cause, liability and

damages alleged, immunity would not be applicable under the exception stated in R.C. 2744.02(B)(3)."

In *Bays*, the Ninth District stated that "a decision dealing solely 'with the fact-related legal issues that underlie [a] plaintiff's claim on the merits' is not a final appealable order within the meaning of R.C. 2501.02 and 2744.02(C)." In the instant case, we conclude that appellants were immune from the alleged intentional torts and that the alleged statement by Grueser does not amount to negligent conduct as a matter of law. Accordingly, the trial court's denial of the motion for summary judgment denied appellants their immunity pursuant to R.C. Chapter 2744 and, as such, is a final appealable order." (Internal citation omitted).

The cases cited by the City indicate that, where summary judgment on immunity was denied due to a question of fact, a preliminary review of the merits of the appeal should be undertaken to determine whether the trial court's order was final. In both cases, however, the appellate court treated the trial court's order as if it were final and appealable and resolved the appeal on the merits. In other words, neither declined to address the trial court's order on jurisdictional grounds.

As noted by Hubbell, our prior decision did not expressly address the case law concerning whether an appellate court should conduct any threshold inquiry into whether the immunity issue could have been resolved as a matter of law prior to determining whether the trial court's judgment was a final order. Our decision, however, clearly rejects such an approach. In our view, when the trial court has concluded that summary judgment is improper due to the existence of genuine issues of material fact, there has been no denial of the benefit of immunity and the decision is not a final order under R.C. 2744.02(C). No

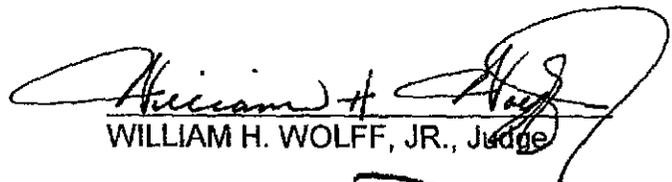
further inquiry should be undertaken.

Although we disagree with the de novo review suggested in *Bays and Cunningham*, we do not believe that our disagreement over this issue constitutes a certifiable issue. Although those cases suggest a procedure for determining whether an order satisfies R.C. 2744.02(C), our central disagreement is with the ultimate determination that the trial court's order denying summary judgment due to a question of material fact was final.

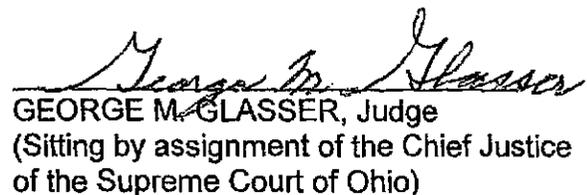
In sum, we agree with the City of Xenia that our decision in this case is in conflict with the decision of the Fourth District Court of Appeals as to whether a denial of summary judgment sought on sovereign immunity grounds due to genuine issues of material fact was a final appealable order. We therefore certify the following question to the Supreme Court of Ohio for review:

"Is the denial of a governmental entity's motion for summary judgment on the issue of sovereign immunity due to the existence of genuine issues of material fact a final appealable order, pursuant to R.C. 2744.02(C)?"

IT IS SO ORDERED.


WILLIAM H. WOLFF, JR., Judge


MIKE FAIN, Judge


GEORGE M. GLASSER, Judge
(Sitting by assignment of the Chief Justice
of the Supreme Court of Ohio)

Copies mailed to:

Michael P. McNamee
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Hon. Stephen A. Wolaver



Not Reported in F.Supp.

Page 1

Not Reported in F.Supp., 1990 WL 299806 (S.D.Ohio), 55 Fair Empl.Prac.Cas. (BNA) 765, 60 Empl. Prac. Dec. P 42,012

(Cite as: Not Reported in F.Supp.)

H

Briefs and Other Related Documents

Beard v. Coca-Cola Bottling Co. of Ohio S.D.Ohio, 1990.

United States District Court, S.D. Ohio, Eastern Division.

Eleanor R. BEARD, Plaintiff,

v.

COCA-COLA BOTTLING COMPANY OF OHIO, Defendant.

No. C2-88-1248.

March 30, 1990.

Larry R. Zingarelli, Columbus, Ohio, for plaintiff.
Earl F. Morris, Columbus, Ohio, for defendants.

MEMORANDUM, OPINION AND ORDER

GRAHAM, District Judge.

*1 Plaintiff Eleanor R. Beard filed the instant action pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* against her former employer, the Coca-Cola Bottling Company of Ohio. Plaintiff alleges that she was harassed and ultimately discharged from her employment on March 30, 1987 due to her age. This matter is now before the court for a decision on defendant's motion for summary judgment.

The procedure for granting summary judgment is found in Fed.R.Civ.P. 56(c), which provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Summary

judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Plaintiff claims that she was discriminated against on the basis of her age in violation of the ADEA. In order to establish a prima facie case under the ADEA, plaintiff must produce evidence showing that she was adversely affected by an employment decision "under circumstances which give rise to an inference of unlawful discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Under the four criteria in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff in an ADEA case must demonstrate as a threshold matter: 1) that she was a member of the protected class; 2) that she was subjected to an adverse employment action; 3) that she was qualified for the particular position; and 4) that she was replaced by a person not a member of the protected class. *Gagne v. Northwestern National Insurance Co.*, 881 F.2d 309, 313 (6th Cir.1989).

Proof of the four *McDonnell Douglas* elements raises a rebuttable presumption of discrimination, and the burden of production then shifts to the employer to provide a legitimate nondiscriminatory reason for the action taken. *Texas Department of Community Affairs v. Burdine, supra*. When the employer advances a legitimate reason for the employment action, the plaintiff must demonstrate that the proffered reason was not the true reason for the employment decision. *Burdine*, 450 U.S. at 256. The plaintiff bears the burden of disproving an

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employer's assertion that the adverse employment action was based solely on a legitimate neutral consideration. *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989). The ultimate burden of proving that discrimination against a protected group was caused by a specific employment practice remains with the plaintiff at all times. *Id.* at 2126.

*2 Even if plaintiff can satisfy the *McDonnell Douglas* test, she must also produce direct, indirect or circumstantial evidence that her age was a factor in the decision to terminate her and that "but for" this factor she would not have been terminated. *Gagne*, 881 F.2d at 314. "Unless the plaintiff introduces counter-affidavits and argumentation that demonstrate that there is reason to disbelieve this particular explanation, there is no genuine issue of material fact." *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1216 (3d Cir.1988). *Accord Boddy v. Dean*, 821 F.2d 346 (6th Cir.1987).

Defendant does not dispute that plaintiff has established the first, second and fourth elements of the prima facie test. However, defendant argues that plaintiff was not qualified for her position, thus not satisfying the third element, and that her unsatisfactory job performance further constituted a legitimate basis for her termination. To be "qualified" for a position means that the person "was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir.1979); *Wilkins v. Eaton Corp.*, 790 F.2d 515, 521 (6th Cir.1986). In other words, a plaintiff must prove that "he was performing his job at a level that met his employer's legitimate expectations." *Loeb*, 600 F.2d at 1014; *Chappell v. GTE Products Corp.*, 803 F.2d 261 (6th Cir.1986).

The record reveals that plaintiff began her employment with defendant on January 7, 1965 as a payroll clerk. Plaintiff's personnel file contains a memorandum dated February 10, 1981 and signed by David Keck, plaintiff's supervisor, and B.W. Hartman. This memorandum notes that plaintiff had difficulty getting things done, that she needed

to be more cooperative, and that there was concern about her being outspoken, her tone of voice and her language. The memo further indicates that plaintiff was warned that she would be given a position "which will not deal with people" if these problems were not cleared up. At some point in 1981, plaintiff was transferred to the position of accounts payable clerk.

Randall Wegener became plaintiff's supervisor in 1981. At that time, plaintiff was still an accounts payable clerk. Mr. Wegener indicated in his affidavit that when a vacancy arose in the payroll department, he decided to transfer plaintiff back to her previous position as payroll clerk. In December of 1981, Mr. Wegener received a copy of a memorandum from Jim McLane, production manager, to Roger DeMaagd, general manager, regarding plaintiff's performance. In the memorandum, Mr. McLane complained about plaintiff's use of foul language, her tardiness and lack of thoroughness in completing tasks, and her failure to cooperate with other employees. Mr. McLane related the following:

As the position of Payroll Clerk has been returned to Ellie Beard so also have the day to day problems returned of dealing with this stubborn foul mouthed woman. Except for the principle of the thing I would gladly complete the daily report on allocation of hours in the Production Department totally myself. I, however, believe that this is Ellie's goal and reasons for her actions and I refuse to be coerced into anything.

*3 This woman operates always under the pretense of being very busy and excuses all late reports or anything else due to her busyness, yet just in my own infrequent visits to her office, I find her frequently on the phone on personal calls and those who have done her job in her absence have done it just as competently in a friendly manner and with the reports on time.

I resent having to daily endure the foul tongue, bad attitude, and stubbornness of this employee. I

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recommend that a warning or disciplinary action be taken with this employee to prevent future problems of this kind.

Mr. Wegener rated plaintiff's job performance in 1982, and advised plaintiff to control her verbal outbursts to management and to work on her attitude toward other employees.

According to Mr. Wegener, plaintiff's performance deteriorated following the 1982 review. He stated in his affidavit that plaintiff was hostile and uncooperative to management and co-workers, that she complained incessantly, and that she would disturb her co-workers with loud, tuneless singing, talking out loud to herself, slamming doors and telephone receivers, and swearing. She also questioned instructions or assignments and was reluctant to accept new assignments.

Mr. Wegener further related in his affidavit that because of the problems with plaintiff's performance, she was placed on ninety-day probation on October 16, 1986. She had shown no improvement by the end of this period, but due to the fact that plaintiff was a long-time employee, he extended the probationary period for an additional sixty days and gave plaintiff a memorandum outlining the conditions of her probation and advising her that substantial improvement in certain areas would be required. These areas included knowledge of the job (payroll analysis); quality of work (errors); quantity of work (timeliness and accuracy); punctuality in arriving at work; attitude (including vulgar language, inappropriate behavior, and lack of cooperativeness); judgment (effective utilization of time); reliability (completion of weekly and monthly reports); and flexibility (ability to adapt to change).

On March 30, 1987, Mr. Wegener gave plaintiff notice of her termination. The memorandum advised plaintiff:

On January 30, 1987 Coca-Cola Bottling Company of Ohio, Columbus extended a ninety (90) day probationary period for another sixty (60) days. At this time we stated that you needed to make a

concentrated effort on your part to substantially improve and correct your work performance. We have not observed this improvement in your work. Numerous reports have been issued with errors from your desk. The quality of work does not meet our standards.

Plaintiff was terminated on March 30, 1987 and was given twenty-six weeks severance pay. Mr. Wegener indicated that after plaintiff was terminated, the payroll function has run much more smoothly, and "the atmosphere of the office has improved dramatically with an associated increase in productivity." (Wegener Aff., para. 10).

*4 Plaintiff has submitted various documents in response to defendant's motion. Plaintiff first points to the fact that she was awarded an 8.1% merit increase in salary in 1982, and a 6.9% merit increase in salary in 1984. Plaintiff argues that these increases are inconsistent with defendant's position that her performance deteriorated steadily after 1982. However, the record also shows that in 1985, plaintiff was given only a 4.7% increase in salary, and that in 1986, plaintiff was given no increase and was placed on probation. These figures do not demonstrate that defendant acted in a manner inconsistent with its stated evaluation of plaintiff's performance.

Plaintiff has offered the affidavits of Charles Yoakum, plaintiff's supervisor from 1970 to 1975, and Scott Gallentine, plaintiff's supervisor from 1977 to 1980. These individuals stated that plaintiff was respectful and thorough in her work. However, it is plaintiff's performance at the time of her termination which is relevant. *Smith v. Chamber of Commerce*, 645 F.Supp. 604, 607 (D.D.C.1986). Plaintiff has also submitted the affidavit of Donna Swayne, who states that in her opinion plaintiff was a diligent and thorough worker. According to the affidavit of Owen Segall, defendant's division sales manager, Donna Swayne was terminated in 1986 for poor performance. In addition, Ms. Swayne's affidavit does not reveal how, as a telephone operator, she would be qualified to express an opinion on the quality of plaintiff's work. The basis for her statement that

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everyone got their paychecks on time and that plaintiff worked well with her peers is not demonstrated. Likewise, her broad unspecific assertions that she never witnessed plaintiff engaging in hostile conversations or other annoying conduct does not refute defendant's claim that plaintiff engaged in such conduct when it is not apparent from Ms. Swayne's affidavit that she was in a position to constantly monitor plaintiff's activities. The above affidavits do not demonstrate that the affiants possessed the requisite personal knowledge or experience to testify as to appellant's work proficiencies at the time of her termination. Therefore, these affidavits do not raise genuine issues of material fact. *Gagne*, 881 F.2d at 316; *Menard v. First Security Services Corp.*, 848 F.2d 281 (1st Cir.1988).

Plaintiff has also submitted her own affidavit, in which she states that she competently and professionally performed all her duties as payroll clerk. She denies in broad terms that her job performance was inadequate, that she was difficult to work with, that she slammed doors or telephone receivers or sang out loud, or that she was disrespectful to her supervisors. She states that she was informed that her successor spent fifty or more hours to complete the amount of work she performed in forty hours. However, this statement is inconclusive, and could just as easily be construed as a comment reflecting adversely on the quality of plaintiff's work. Plaintiff's affidavit contains general, conclusory expressions of opinion and does not specifically refute much of the evidence of plaintiff's poor performance offered by defendant. Further, it has been held that evidence contesting the factual underpinnings of the reasons for discharge is insufficient in itself to present a jury question, nor is it enough to show that the employer made an unwise business decision. *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251 (1st Cir.1986).

*5 The court concludes that plaintiff has not shown the existence of a genuine issue of material fact on the issue of her qualification to perform the job, that is, that she was performing her job at a level that met her employer's legitimate expectations.

However, even if it is assumed that plaintiff could satisfy all of the elements of a prima facie case under the ADEA, defendant has proffered legitimate, nondiscriminatory reasons for her discharge. The inference of discrimination created by the prima facie case is dispelled once the employer's reasons are stated, unless and until the employer's reasons are shown by plaintiff to be pretextual. *Loeb*, 600 F.2d at 1015. The court must focus not on the soundness of a defendant's business judgment, but rather on whether plaintiff has demonstrated a genuine issue of material fact as to whether defendant discriminated against her on the basis of age. *Wilkins*, 790 F.2d at 521.

As discussed above, plaintiff has submitted various evidence in an effort to establish that she was qualified to perform the job and therefore the reasons stated for her discharge must be pretextual. The court concludes that much of this evidence fails to rebut the validity of defendant's reasons for her discharge. The remaining evidence constitutes in large part broad statements of personal beliefs and conjecture on the part of plaintiff. Such statements are insufficient to support an inference of age discrimination. *Chappell*, 803 F.2d at 268.

Plaintiff advances other arguments to support her claim of pretext. Plaintiff notes that in 1986, the defendant was acquired by Coca-Cola Enterprises, and that following this take-over, many long-term employees were terminated. Defendant has submitted statistics through the affidavit of Owen Segall indicating that prior to the Coca-Cola Enterprises take-over, approximately thirty-five out of seventy-four non-union employees employed by defendant (about 47%) were over the age of forty. In 1988, two years later, approximately twenty-one out of forty-eight non-union employees (about 44%) were over the age of forty. Thus, although there has been a reduction in the total number of employees, the percentage of employees in the protected class has not significantly decreased. These statistics do not create an inference of age discrimination.

Defendant has also produced evidence which indicates that plaintiff's performance problems

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predated the formation of Coca-Cola Enterprises by approximately six years. Complaints similar to those discussed by Mr. Wegener were related to Mr. DeMaagd in 1981 and are contained in a memorandum addressed to plaintiff in February of 1981. This evidence tends to refute any inference that defendant's criticisms were invented in 1987 as a pretext for plaintiff's termination based on age.

Plaintiff has submitted the affidavits of Charles Yoakum, Donald Morehart, and Robert Renspie, former employees of defendant who claim that they were terminated or demoted because of their age. Plaintiff has also filed a copy of a complaint filed by Calvin Higgins, wherein Mr. Higgins claims that he was terminated by defendant because of his age. In response, defendant has submitted the affidavit of Owen Segall, who states that Mr. Morehart was discharged for poor sales performance, that Mr. Renspie voluntarily resigned rather than accept a demotion with no reduction in pay due to his poor performance, that Mr. Yoakum was terminated as part of a reduction in force and has not been replaced, and that Mr. Higgins was discharged due to dishonesty.

*6 The affidavits of Charles Yoakum, Donald Morehart and Robert Renspie contain unsupported, conclusory allegations of age discrimination in regard to their own situations. The affidavits fail to demonstrate that all the elements necessary for an age discrimination claim were present in those cases, specifically, that the affiant was qualified for the job and/or that the affiant was replaced by a person outside the protected class, and defendant has offered nondiscriminatory reasons for why those individuals were terminated. Additionally, plaintiff has not demonstrated how the circumstances of any of the above individuals were analogous to her own discharge.

In their affidavits, Mr. Yoakum, Mr. Morehart, Mr. Renspie and plaintiff allege that they were terminated so that defendant would not have to pay them certain pension benefits. These opinions have been offered without any proffered underlying factual basis, aside from plaintiff's statement that as a result of her termination, she received a lesser

amount in pension benefits than she would have if she had continued in defendant's employ. In regard to the three gentlemen, Mr. Segall states in his affidavit that these employees were several years away from being entitled to draw pension benefits at the time of their leaving the company. However, even considering the above opinions concerning the vesting of pension benefits, plaintiff has failed to produce any evidence to suggest that any reduction in her pension benefits was anything more than a consequence of her termination. The court notes that any discharge may potentially have an impact on the employee's eligibility to receive pension benefits, regardless of the age of the employee. Plaintiff has not demonstrated that her age was a factor in her eligibility for benefits, nor has she shown that any reduction in benefits was motivated by or raises a reasonable influence of age discrimination.

The mere fact that plaintiff was replaced by a younger person is not sufficient to prove that defendant discharged her on the basis of her age. *Haas v. Montgomery Ward & Co.*, 812 F.2d 1015 (6th Cir.1987). Mr. Wegener testified that when plaintiff was terminated, he offered plaintiff's job to an employee who was approximately fifty years of age. It was only when this employee declined to accept the job that the job was given to a person under forty years of age.

Plaintiff argues that certain other employees who were under forty were not terminated for certain one-time job errors, whereas she was terminated. Plaintiff has not demonstrated, however, that the nature of her job deficiencies, which apparently existed as early as 1981, were comparable to those of the younger individuals who were not fired. Further, defendant has produced evidence that two persons under the age of forty were discharged in 1986 due to poor performance.

Plaintiff also states in her affidavit that she "was told my supervisor did not like long term employees." Aside from the fact that there is some question at this point as to whether plaintiff claims that Mr. Wegener made this statement directly to her, the statement is not such as would raise a reasonable

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inference of age discrimination. The statement is ambiguous since long-term employees are not necessarily employees over forty years of age. Isolated and ambiguous statements of this nature are too abstract to support a finding of age discrimination. *Chappell*, 803 F.2d at 268 n. 2; *Gagne*, 881 F.2d at 314. Similarly, Mr. Wegener's alleged statements to plaintiff that she could quit if she didn't like the job, even if they were made, are not such as to invoke an inference of age discrimination. In addition, plaintiff in her deposition was unable to point to any facts which would indicate that any of the statements made to her by Mr. Wegener or any of the alleged acts of harassment were motivated by her age. (Plaintiff's Depo., pp. 50-51, 55-56).

*7 The court concludes that the evidence submitted by plaintiff is insufficient to create a genuine issue of material fact on the issue of pretext. Plaintiff has not produced any evidence, direct, indirect or circumstantial, from which it could reasonably be inferred that she was terminated because of her age. Plaintiff's conclusory allegations expressing her opinion that she was terminated because of her age are likewise insufficient to prove intentional discrimination based upon age, *Simpson v. Midland-Ross Corporation*, 823 F.2d 937, 941 (6th Cir.1987), or to withstand a motion for summary judgment, *Jones v. Lewis*, 874 F.2d 1125, 1128 (6th Cir.1989).

The Supreme Court stated in *Celotex*, 477 U.S. at 322-323:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a

sufficient showing of an essential element of her case with respect to which she has the burden of proof.

Plaintiff has not met her burden of rebutting the legitimate, nondiscriminatory explanation offered by defendant, nor has she shown that those reasons were a pretext for discrimination. In accordance with the foregoing, defendant's motion for summary judgment is hereby granted. The clerk shall enter judgment for defendant.

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