

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.

REPLY BRIEF OF APPELLANT, CITY OF XENIA, OHIO

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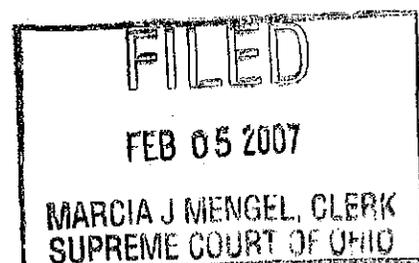


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INTRODUCTION TO REPLY

Before the Second District decided it would no longer review certain decisions under R.C. § 2744.02(C), it was widely accepted that the purpose of that section was to give political subdivisions an opportunity to appeal interlocutory orders that denied immunity, including summary judgment decisions. As this Court has explained, immunity is a question of law that should be decided before trial and, preferably, upon summary judgment. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292, 595 N.E.2d 862. The legislative purpose underlying Section 2744.02(C) and the very statute itself are now being nullified by the Second District's revised interpretation – an interpretation which is quickly being adopted by other courts under the guise of “judicial economy.”

To avoid reversal in this case, Appellee, Dottie Hubbell, also argues that 2744.02(C) should be interpreted in favor of judicial economy. (Merit Brief of Plaintiff-Appellee, pgs. 23-24) She contends that the interpretation of R.C. § 2744.02(C) urged by Xenia creates ambiguous and contradictory guidelines for appealability. (*Id.* at pg. 24) That is not correct. If the appellate courts would simply accept jurisdiction over every order that denies a political subdivision the benefit of immunity, *as the legislature has mandated*, there would be no confusion. Should the appellate court, after review, agree with the trial judge that there is a question of fact, it will have the authority to affirm the trial court's decision and remand the case for trial. Indeed, the appellate courts have authority and a duty to review those decisions that the legislature has deemed final and appealable. They do not have authority to re-interpret statutes and legislative intent in such a manner as to reject jurisdiction for purposes of “judicial economy,” as the Second District has done here.

The City of Xenia reasonably concluded it was entitled to judgment as a matter of law for the underlying claims in this case. It was undisputed that Xenia had no prior notice of problems with the Xenia municipal sewer system. Appellee presented no evidence in the trial court that Xenia was negligent in actually performing maintenance on the sewer system. Appellee presented no evidence that Xenia was negligent in actually operating the sewer system. Instead, in her Merit Brief, just as in response to Xenia's motion for summary judgment in this case more than 19 months ago; Appellee contends only that Xenia was negligent in responding to her call for emergency service on the day of the backup incident.¹ And, to overcome immunity for such a claim, Appellee argues there is no difference between maintaining a sewer system and responding to emergency calls about flooding under 2744.01(F). (Merit Brief of Plaintiff-Appellee, pg. 4) Certainly, whether there is a difference between the two is a question of law to be resolved by the court and, in fact, was resolved against Xenia by the trial court in this case.

In her Merit Brief, Appellee again argues that the City breached its duty under common law by failing to respond to "reasonable notice of a clog," i.e. her call for service on the day of the incident (*Id.* at pg. 5) First, Appellee's call to the City that water or sewage was coming into her basement and house certainly did not provide Xenia with "reasonable notice" that its sewer lines were blocked. In fact, the testimony clearly demonstrated that city employees believed that this call was the same as several calls the City had received that week about flooding caused by inordinate rainwater. This was not disputed. It was not until city employees received a second call and actually went out to the site that they decided the slow moving sewer line *might* be

¹ Appellee, now, also contends Xenia employees negligently cleaned up her property and disposed of her personal items without her knowledge. (Merit Brief, pg. 3) This latter fact was not an issue earlier in this case because Hubbell admitted later in her deposition that Xenia had informed her son before disposing of any of her possessions and that the items were properly removed because of contamination. (Hubbell Depo., pg. 39-40)

blocked and *might* be some way connected to Appellee's backup problem. Again, this was not disputed.

Second, contrary to Appellee's argument, maintenance of sewer system and responding to calls for service are not one and the same under 2744.02(F). In fact, no court has concluded that municipalities have a common law duty to immediately respond to every citizen call about water backups or flooding. Certainly, there would be no need for private companies who deal with flooded basements or clogged sewer lines if municipalities who operate public sewer systems have a legal obligation to respond to all such calls on the public dollar. In fact, the Second District Court of Appeals had already rejected such a duty. *See Bingham v. The City of Fairborn* (Apr. 17, 1980), 2nd App. No. CA 1121, 1980 WL 352391. Based upon its own precedent, the Second District would have been obligated to reverse the trial court's finding that Xenia had a duty to immediately respond on the day of the incident as part of its sewer maintenance responsibilities. Absent a duty to immediately respond to Appellee's call, the trial court had no grounds upon which to conclude that the 2744.02(B)(2) exception applied in this case.

When trying to explain to the trial court the difference between the duty to maintain sewer systems and the duty to respond to Appellee's call, Xenia also relied upon this Court's decision in *Doud v. City of Cincinnati* (1949), 152 Ohio St. 132, 87 N.E.2d 243, holding that political subdivisions that operate proprietary sewer lines are responsible in the same manner and to the same extent as a private person under the same circumstances. The fact is that private entities that operate utilities do not generally have a common law duty to respond to customer calls for service. *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 543 N.E.2d 1188. That is because the utility cannot be expected to know what appliances its customers have

installed or to inspect them. *Id.* The same is true for a municipal sewer department. Xenia cannot be expected to know what facilities Mrs. Hubbell had in her home, the use of those facilities, the maintenance of her lateral sewer lines, etc.

In *Commerce & Industry Ins. Co.*, the Court said that a duty *could* arise to that customer once the utility is aware or should have been aware that its failure to act could result in an unreasonable risk of harm to the customer. *Id.* at 98. In that case, the Court said a duty arose only when the utility company affirmatively responded to the gas emergency. *Id.* See also, *Smith v. Cincinnati Gas & Elec. Co.* (1991), 75 Ohio App.3d 567, 569, 600 N.E.2d 325. It is that affirmative acceptance of a duty that distinguished the current case from the one cited by Appellant. (*Brown v. City of Akron* (Ohio App. 9 Dist.), 1992 WL 48505). Thus, in this case, no duty arose until city employees responded to Appellee's house and determined there might be a sewer blockage. At which point, Appellee admitted that the city immediately alleviated any problem. Thus, Xenia was entitled to judgment as a matter of law based upon the undisputed facts. Absent a duty, there could be no negligence. Thus, even if responding to Appellee's emergency call constitutes a "proprietary function," the 2744.02(B)(2) exception to immunity was never triggered.

Moreover, Xenia argued that, to the extent that Xenia had any duty to respond to Appellee's emergency call, such a duty could only have arisen in its governmental capacity. Therefore, there would be no exception to immunity for that response. Incredibly, Appellee now contends Xenia maintained a "sewer emergency telephone number" that she used on the day of the incident. (Merit Brief of Plaintiff-Appellee, pg. 7) She believes this demonstrates that "emergency response" was "simply one aspect of its proprietary operation of a municipal sewer system." This new allegation is not supported by the record. Indeed, Appellee specifically

testified that she called the police department, *not* some sewer emergency response number. (Hubbell Depo., pg. 24-25) Thus, even Appellee's mistaken argument would seem to support a finding that she was relying on the City in its governmental capacity. Any duty that could have arisen for the City of Xenia to respond to Hubbell's call could only have arisen in its governmental capacity, not in its proprietary capacity since this Court has already concluded that private entities have no such duty.

The trial court in this case failed to recognize that there was no common law duty for Xenia to respond to Appellee's emergency call. The trial court ignored the foregoing precedent or perhaps simply did not get a chance to read Xenia's Reply and held, without support, that Xenia and, thus, all other municipalities, have a duty to respond to emergency calls such as Appellee's. The trial court, like Appellee, failed to recognize any difference between responding to a call about an in-home backup and the actual maintenance or operation of public sewer lines under 2744.01(F).

As Appellee points out, the trial court also "found that the testimony of Xenia's own employees presents a genuine issue of material fact regarding the clog that was in the Monroe Street sewer main, and thus whether Xenia owed a duty to Ms. Hubbell. (Merit Brief of Plaintiff-Appellee, pg. 8) The trial court entirely ignored legal precedent holding the mere existence of a clog is insufficient to demonstrate that a municipality was negligent in maintaining its sewer lines. *City of Portsmouth v. Mitchell MFG. Co.* (1925), 113 Ohio St. 250, 148 N.E. 846, syllabus. Again, absent "negligence," the 2744.02(B)(2) exception to immunity cannot possibly be triggered. Yet, the only findings made by the Court with respect to negligence of the city was that there might have been a clog and the City might have waited too long to respond.

Neither of these findings, together or alone, were sufficient to overcome immunity as a matter of law.

The implications of the trial court's decision are clear. Regardless of the maintenance program used by a municipality, regardless of the complete lack of notice to the city of any problems with the sewer system, regardless of cost or burden, and regardless of personal responsibility, municipalities will now have a duty to respond to all citizen calls about flooding or backups. The proprietary function exception to immunity will be expanded to impose an actual duty on municipalities not otherwise imposed on private entities operating in a similar capacity. Because these new duties were not supported by the law, Xenia properly filed an appeal under R.C. § 2744.02(C).

REPLY ARGUMENT

While Appellee emphasizes that the conflict certified by the Second District Court of Appeals in the current case has been invalidated by subsequent case law, she does not dispute that there is an important legal issue that needs to be resolved by this Court. She also does not entirely dispute that there is a conflict amongst the courts of appeals in the method used for determining what is a final and appealable order under R.C. § 2744.02(C). In fact, she argues in favor of the Second District's interpretation over that of the Fifth District.

Appellee notes that a number of appellate courts have recently adopted the reasoning of the Second District. (Merit Brief of Plaintiff-Appellee, pg. 11) She explains that the trend among Ohio courts of appeal is to follow Second District's direction in rejecting jurisdiction of immunity issues. (*Id.* at pg. 13) Appellant does not dispute that trend. In fact, as Xenia previously explained in earlier pleadings before this Court, it was the potential for such a trend

that encouraged Xenia to file this appeal. This dangerous trend will eliminate the right of political subdivisions to an immediate appeal of immunity decisions. It will force political subdivisions, such as the City of Xenia, to try or settle cases for which they are clearly entitled to immunity as a matter of law.

Currently, there are at least three different ways the appellate courts are handling appeals under R.C. § 2744.02(C). Some courts are properly reviewing summary judgment decisions under 2744.02(C) on the merits²; others review the merits and decline jurisdiction only after determining that the question of immunity turns on a question of fact³; and others, like the Second District, are declining jurisdiction any time the trial court uses the magic words “question of fact.” Thus, Xenia asked this Court to resolve whether “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).”

Appellee supports her argument that there is a “trend” by noting that the Fourth District reversed its own decision in *Lutz v. Hocking Technical College* (May 18, 1999), 4th App. No. 98CA12 in favor of the Second District’s interpretation of 2744.02(C). She explains that in reversing its prior rule, the Fourth District also relied on *Vaughn v. Cleveland Municipal School Dist.* (May 25, 2006), Cuyahoga App. No. 86848, 2006-Ohio-2572 and *Alden v. Kovar*, Trumbull App. Nos. 2006-T-0050, and 2006-T-0051, 2006-Ohio-3400. Drawing from these additional decisions and *Rasmussen v. Hancock County Commrs.* (December 8, 2006), Hancock App. No. 5-06-54, Appellee concludes that the Second, Fourth, Eighth and Eleventh Districts

² See *Tomlin v. Pleban* (Dec. 14, 2006), 8th App. Dist. No. 87699, 2006-Ohio-6589.

³ *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.

have all recently decided that summary judgment decisions denying political subdivisions immunity based upon some alleged question of fact are not appealable under R.C. § 2744.02(C).

Yet, two months ago, the Eighth District expressly concluded that an appeal by the City of Cleveland from a common pleas court order overruling its motion for summary judgment on its immunity defense was final and appealable under 2744.02(C). See *Tomlin v. Pleban* (Dec. 14, 2006), 8th App. Dist. No. 87699, 2006-Ohio-6589. Thus, under Appellee's argument, there is not even consistency within the various courts of appeals. Additionally, the decision in *Vaughn, supra*, 2006-Ohio-2572, does not support Appellee's or the Second District's interpretation of 2744.02(C).

In *Vaughn*, the Court expressly looked to the decision in *State Automobile Mut. Ins. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, in an effort to extrapolate from this Court's own words when an immunity decision would be appealable under 2744.02(C). The Court explained:

The court held the trial court's order in *Titanium Metals* lacked finality because it: 1) provided "no explanation for its decision to deny the motion to dismiss," 2) made "no determination as to whether immunity applied," 3) failed to state whether there was an exception to immunity," and, further, 4) failed to determine whether R.C. 2744.05(B)(1) applied to another issue raised. *Id.* at ¶ 10. Under these circumstances, this court's consideration of the "issue of immunity" was "premature."

The same problem exists in the instant case. The trial court's order neither provides an explanation nor refers at all to the immunity provided by R.C. 2744.02(A), the exceptions to that immunity, or any of the potential defenses to an exception. In spite of the fact that, unlike the record in *Titanium Metals*, the record in this case was further "developed" because the parties presented evidence in conjunction with the motion for summary judgment, the trial court failed to evaluate that evidence.

Vaughn v. Cleveland Mun. School Dist., 2006-Ohio-2572, ¶¶ 21-22.

Unlike the decisions in *Vaughn* and *Titanium Metals*, there is no dispute in this case that the record was fully developed. This case was on appeal from the denial of summary judgment, not a motion to dismiss. The trial court expressly addressed and rejected Xenia's immunity argument. The Court concluded that an exception to immunity applied under 2744.02(B) and that none of the defenses to that exception operated to reinstate immunity under 2744.03. Certainly, these legal questions, i.e, whether there was an exception to immunity and whether the defenses applied, were resolved by the trial court and capable of appellate review without any need for the resolution of a factual issue.

Appellee also acknowledges that the Ninth District in *Bays, supra*, fn. 3, reviewed the underlying merits of the appeal to find that the political subdivision was entitled to immunity as a matter of law, yet somehow Appellee contends the Court did not conduct the same *de novo* review sought by the current appellants. (Merit Brief of Plaintiff-Appellee, pgs. 15-16) But, the "review" of the trial court's findings of law that the Ninth District did perform was *exactly* what the current Appellant sought when it appealed to the Second District Court of Appeals. Xenia specifically contends it is entitled to immunity *as a matter of law*, not fact. Whether Xenia owed Appellee a *duty* to respond to her emergency call for service is a question of law, not fact. Whether the 2744.02(B)(2) exception applies in the context of responding to emergency calls, is a question of law, not fact. Either such a response is a "proprietary function" under 2744.02(B)(2) or it is not. Additionally, whether the 2744.03 defenses apply to reinstate immunity are questions of law, not fact.

Remarkably, Appellee contends the immunity analysis is never simply a question of law and appellate courts would necessarily have to make findings of fact in reviewing any summary judgment decision on the question of immunity. (Merit Brief of Plaintiff-Appellee, pg. 23)

First, nothing in the case law surrounding immunity supports this theory. More importantly, Appellee has failed to point this Court to a single question of fact that must be resolved before the Second District would have been able to review the questions of law that Xenia appealed in this case. Indeed, had Appellee's lawsuit gone to trial and all factual questions were resolved in her favor and had a jury even concluded that Xenia employees were negligent in taking too long to respond to the call for service on the day of the incident, the exact same legal issues would have been before the Court of Appeals to resolve (*only* after the parties would have unnecessarily expended substantial money and time).

Appellee claims Xenia improperly relied upon *Burley v. Bibbo* because the Seventh District ultimately declined jurisdiction over a similar appeal. (Merit Brief of Plaintiff-Appellee, pg. 18) However, the Court in *Burley* expressly adopted the Ninth District's approach to determining jurisdiction, which is to conduct a review of the merits prior to declining jurisdiction. *Burley v. Bibbo* (1999), 135 Ohio App.3d 527, 529, 734 N.E.2d 880. The court noted that the question of immunity in the lower court turned on whether the employee was acting within the course and scope of his employment, which was a question of fact that a court of appeals could not properly resolve. Rather, "[i]f this was a case in which, as to the immunities claims, no questions of fact existed *and we were asked to review the matter on the basis of the law alone*, an immediate review under R.C. 2744.02(C) would be possible even with other outstanding non-immunity issues unresolved." *Id.* (emphasis added) Certainly, this approach is different from that of the Second District, which flatly rejected any review of the immunity issues regardless of whether the review is on the basis of law alone. Again, the current Appellant did not ask that the Second District to review issues that actually turned on

questions of fact. It asked the Second District to “review the matter on the basis of the law alone.”

Nonetheless, Appellee contends the “bright-line” test established by the Second District is preferable to the *de novo* jurisdictional review in *Cunningham v. Allender*, 5th App. No. 2004CA00337, 2005-Ohio-1935. (Merit Brief of Plaintiff-Appellee, pg. 17) Xenia agrees that simply declining appellate jurisdiction would likely be preferable for courts of appeals, whose obligation to review complicated immunity decisions would be virtually eliminated. Such a test may also be preferable to the trial courts who can avoid appellate review by using the magic words “question of fact.” However, the Second District’s decision is clearly not preferable to the political subdivisions that will be forced to try claims for which they are legally entitled to immunity. Such a test is not preferable to a legislature whose reaffirmed goal to give political subdivisions the right to an immediate appeal will be thwarted. Such a test should not be preferable to plaintiffs who may expend substantial funds and emotional capital in order to convince juries of political subdivision negligence only to have a court of appeals later determine the political subdivision was entitled to immunity all along. Rather, immunity “is a purely legal issue, properly determined by the court prior to trial and preferably on a motion for summary judgment.” *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292, 595 N.E.2d 862.

In *Burger v. Cleveland Hts.*, Justice Stratton carefully explained the concerns raised in this case:

From a practical perspective, determination of whether a political subdivision is immune from liability is usually pivotal to the ultimate outcome of a lawsuit. Early resolution of the issue of whether a political subdivision is immune from liability pursuant to R.C. Chapter 2744 is beneficial to both of the parties. If the appellate court holds that the political subdivision is immune, the litigation can come to an early end, with the same outcome that otherwise would have been reached only after trial, resulting in a savings to all parties of costs and attorney

fees. Alternatively, if the appellate court holds that immunity does *not* apply, that early finding will encourage the political subdivision to settle promptly with the victim rather than pursue a lengthy trial and appeals. Under either scenario, both the plaintiff and the political subdivision may save the time, effort, and expense of a trial and appeal, which could take years.

Without the benefit of immediate appealability of this issue, these cases are more likely to proceed through a lengthy trial, as well as subsequent appeals, only to have the appellate court nullify the holding of the trial court on the issue of immunity. As the General Assembly envisioned, the determination of immunity could be made prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses pursuant to amendments made to R.C. 2744.02(C) and 2501.02. Because of this court's wholesale dismantling of Am.Sub.H.B. No. 350, the benefits of the immediate appealability of the denial of immunity to a political subdivision will not be realized, even though neither section was challenged on a constitutional basis by the parties in this case. We have thrown out the baby with the bath water.

Burger v. Cleveland Hts. (1999), 87 Ohio St.3d 188, 199-200, 718 N.E.2d 912 (Justices Stratton and Cook *dissenting*).⁴

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

⁴ Justice Stratton was addressing this Court's one-line ruling that, "The judgment of the court of appeals dismissing the appeal for lack of a final appealable order is affirmed on the authority of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062."

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.

Appellee adopts the position of the Second District that the denial of summary judgment does not deny a political subdivision an “immunity from liability.” (Merit Brief of Plaintiff-Appellee, pg. 20) She argues that, in Section 2744.02(C), the words “denies a political subdivision the benefit of an alleged immunity from liability” actually means “denies a political subdivision immunity from liability.” According to her, the plain meaning of the statute demonstrates that the “benefit” intended by the legislature is solely “immunity from liability.” (Merit Brief of Plaintiff-Appellee, pg. 21) Thus, according to Appellee, both “benefit” and “alleged” have no real significance.

She points to numerous sections of 2744 that provide that political subdivisions are “immune from liability” to support the Second District’s interpretation of 2744.02(C) that only decisions ultimately denying political subdivisions “immunity from liability” are appealable. (Merit Brief of Plaintiff-Appellee, pg. 20, referencing 2744.02(A) and 2744.05(A)(5)) Appellee failed to address or even recognize that no other provision of Chapter 2744 states that political subdivisions are entitled to “the *benefit* of an *alleged* immunity from liability.” Thus, if the legislature intended the same meaning in 2744.02(C) as provided throughout the remainder of the statute, why did it add two words that, according to Appellee, have no substantive meaning? In fact, if the legislature intended that “liability” must be finally decided before a political subdivision can file an appeal of immunity decisions, why would it have it enacted 2744.02(C) at all? A reasonable interpretation of R.C. § 2505.02 would lead to the conclusion that final decisions on the question of liability are already appealable.

Appellee also claims that the numerous cases cited by Xenia in which courts of appeals overturned trial court immunity decisions as a matter of law do not discredit the “judicial economy” justification relied upon by the Second District. According to her, “the inherently macro-economic consideration of judicial economy will always have exceptions.” (Merit Brief of Plaintiff-Appellee, pg. 23) Yet, it is fairly apparent from the examples provided by Xenia that the Second District’s claim that such decisions would be reversed only in rare circumstances is not exactly supported by precedent. And, the fact that such “exceptions” exist to the court’s judicial economy justification further demonstrates that appellate courts should be very hesitant to use that as an excuse to misinterpret otherwise unambiguous legislative intent.

Finally, Appellee insists the federal court’s approach for reviewing the denial of qualified immunity decisions has no application and provides no practical guidance to this Court in interpreting R.C. § 2744.02(C). (Merit Brief of Plaintiff-Appellee, pg. 29) The City of Xenia disagrees, as does the Amici writing on behalf of Xenia. To begin with, the struggle the federal courts of appeals went through after the Supreme Court gave public officials the right to immediately appeal the denial of immunity is strikingly similar to the confusion underlying the current appeal. *See Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (*per curiam*) and *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Like qualified immunity, sovereign immunity for political subdivisions should be decided before trial. However, the interpretation given by Appellee and the Second District of 2744.02(C) would routinely place the question of immunity in the hands of the jury. Like qualified immunity, the right to an immediate appeal of sovereign immunity prevents political subdivisions and their employees from devoting substantial time and resources to defend an

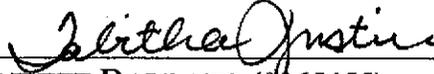
action, only to have an appellate court determine after trial they were immune from suit all along. *See Burger v. Cleveland Hts., supra*, 87 Ohio St.3d at 199.

Ultimately, Appellee is correct that the federal procedure for evaluating interlocutory immunity decisions is not determinative of the issue currently before the Court. That is because, in Ohio, it is the legislature that determines the jurisdiction of state courts. In fact, state political subdivisions are entitled to a statutory *presumption* of immunity that is not accorded public officials under federal law. *See* R.C. § 2744.02(A). And, for purposes of this appeal, the legislature has enacted a statute that specifically gives state political subdivisions the right to immediately appeal interlocutory decisions on the question of immunity. Unlike federal law, there is no qualification in Section 2744.02(C) that allows courts of appeal to decline jurisdiction when immunity turns on a question fact. Rather, *any* order that denies a political subdivision the benefit of an alleged immunity under Chapter 2744 or any other provision of the law is immediately appealable. In this case, there can be no dispute that the trial court's order overruling Xenia's motion for summary judgment on its immunity defense denied Xenia the benefit of an alleged immunity under 2744.02(C). Therefore, Xenia was statutorily entitled to appeal that order.

CONCLUSION

For the reasons set forth in the City of Xenia's Merit Brief and herein, Appellant 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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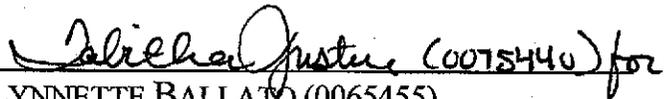
I certify that a copy of this "Reply Brief of Appellant, City of Xenia, Ohio" was sent by ordinary U.S. mail to the following counsel on 5th day of February, 2007.

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