

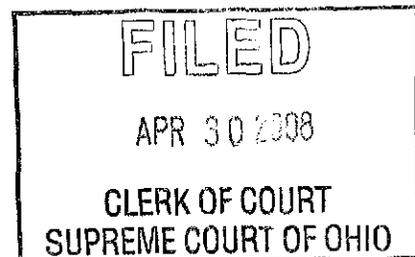
IN THE SUPREME COURT OF OHIO

GEORGE SULLIVAN, : Case No. 08-0817
Appellee, :
vs. : Notice of Certified Conflict from the
ANDERSON TOWNSHIP, *et al.*, : Hamilton County Court of Appeals,
Appellants. : First Appellate District, Entry Filed
April 23, 2008
Court of Appeals Case No. C-070253

NOTICE OF CERTIFIED CONFLICT

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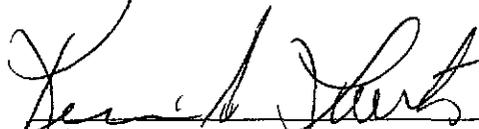
Appellant Anderson Township hereby gives notice of a certified conflict to the Supreme Court of Ohio, pursuant to S. Ct. Pract. R. IV, Sections 1 and 4(C), as certified by the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-070253 on April 23, 2008. The Court of Appeals framed the certified question as: "Whether an order that denies a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744 of the Ohio Revised Code or any other provision of the law is a final and appealable order when the subject order lacks a Civ.R. 54(B) certification."

In compliance with the aforementioned rule, Appellant attaches to this Notice the Entry of the Court of Appeals certifying a conflict, (Exhibit A), and the following conflicting Court of Appeals' decisions, as cited by the Hamilton County Court of Appeals:

1. *Sullivan v. Anderson Tp.*, 1st Dist. No. C-070253, 2008-Ohio-1438 (Exhibit B); and,
2. *Drew v. Laferty* (June 1, 1999), 4th Dist. No. 98CA522, 1999 WL 366532 (Exhibit C).

Respectfully submitted,

SURDYK, DOWD & TURNER CO., L.P.A.



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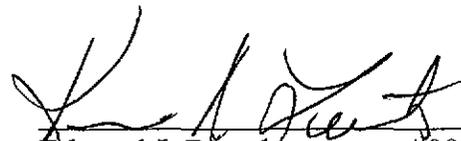
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by Regular Mail upon the following, this 29th day of April, 2008:

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

GEORGE SULLIVAN,

Appellee,

vs.

APPEAL NO. C-070253

TRIAL NO. A-0607640

ENTRY GRANTING APPELLANT'S
MOTION TO CERTIFY CONFLICT

ANDERSON TOWNSHIP, et al.,

Appellants.

This cause came on to be considered upon the motion of the appellant to certify the decision as being in conflict with *Drew v. Laferty*, (June 1, 1999), 4th Dist. No. 98CA522, 1999 WL 366532.

The Court finds that the motion is well taken and is granted.

It is the order of this Court that the within appeal is certified to the Ohio Supreme Court as being in conflict with the above case regarding the following issue:

Whether an order that denies a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744 of the Ohio Revised Code or any other provision of the law is a final and appealable order when the subject order lacks a Civ.R. 54(B) certification.

To The Clerk:

Enter upon the Journal of the Court on APR 23 2008 per order of the Court.

By: _____

Presiding Judge

(Copies sent to all counsel)

[Cite as *Sullivan v. Anderson Twp.*, 2008-Ohio-1438.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

GEORGE SULLIVAN,	:	APPEAL NO. C-070253
Plaintiff-Appellee,	:	TRIAL NO. A-0607640
vs.	:	<i>DECISION.</i>
ANDERSON TOWNSHIP,	:	
Defendant-Appellant,	:	
and	:	
TREND CONSTRUCTION, INC.,	:	
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Appeal Dismissed

Date of Judgment Entry on Appeal: March 28, 2008

A. Brian McIntosh, for Plaintiff-Appellee,

Edward J. Dowd and *Kevin A. Lantz*, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

OHIO FIRST DISTRICT COURT OF APPEALS

Per Curiam.

{¶1} Defendant-appellant, Anderson Township, Ohio, appeals from the trial court's order granting in part and denying in part its motion for judgment on the pleadings. Plaintiff-appellee George Sullivan had filed a complaint against the township and defendant Trend Construction, Inc.,¹ alleging damage to his property located on Eight Mile Road resulting from their "road widening" project. The township had argued that, as a political subdivision, it was immune under R.C. Chapter 2744 from Sullivan's claims. Even though the trial court's ruling was an "order that denie[d] a political subdivision * * * the benefit of an alleged immunity from liability,"² the order was not a final, appealable order because it did not fully dispose of all the claims of all the parties, and because it lacked a certification pursuant to Civ.R. 54(B). We therefore dismiss the township's appeal.

{¶2} In his amended complaint, Sullivan asserted the following causes of action against the township: (1) breach of contract for failing "to honor its promises made to [Sullivan] in exchange for his permission" to enter upon his property; (2) trespass on Sullivan's property to conduct unauthorized work; (3) negligence under the doctrine of respondeat superior for the negligent acts of "its sub-contractor" Trend; and (4) negligence for improperly supervising "its sub-contractor" Trend. Sullivan sought compensatory and punitive damages.

{¶3} Against Trend, Sullivan asserted these claims: (1) breach of contract for failing "to honor its promises made to [Sullivan] in exchange for his permission" to enter

¹ While the complaint and the trial court's order refer to "Trend Construction, Inc.," counsel for Trend maintains that The Ford Development Corporation, d.b.a. Trend Construction, is the proper party to this action. Trend has not filed an appellee's brief in this appeal.

² R.C. 2744.02(C).

OHIO FIRST DISTRICT COURT OF APPEALS

upon his property; (2) trespass on Sullivan's property to conduct unauthorized work; and (3) negligence in conducting the work.

{¶4} The township raised its immunity defense in its answer. On November 29, 2006, the township moved for judgment on the pleadings pursuant to Civ.R. 12(C), asserting that Sullivan could prove no set of facts to support his claims for relief.³ The township maintained that it was immune under R.C. Chapter 2744 from Sullivan's promissory-estoppel, trespass, vicarious-liability, negligent-supervision, and punitive-damages claims. The township also asserted that Sullivan had failed to plead an express contract.

{¶5} Although an active participant in several pretrial motions, Trend did not claim immunity in its answer, move for judgment on the pleadings, or file a memorandum in support of the township's motion. Nor did Sullivan file a response to the township's motion.

{¶6} On March 21, 2007, the trial court granted the township's motion in part and denied it in part. The trial court applied R.C. Chapter 2744 and found that the township was immune from Sullivan's trespass claim and from his request for punitive damages. But it concluded that the statute did not confer immunity from Sullivan's claim for breach of the oral contract, vicarious negligence, or negligent supervision of Trend. The record does not reflect that the township, or any other party, sought "an express determination" from the trial court that there was "no just reason for delay" of an immediate appeal of the order.⁴ And the order did not contain the Civ.R. 54(B) certification.

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³ See *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 1996-Ohio-459, 664 N.E.2d 931.

⁴ See Civ.R. 54(B).

OHIO FIRST DISTRICT COURT OF APPEALS

{¶7} Because an appellate court has jurisdiction to review only the final and appealable orders or judgments of the lower courts within its appellate district, it must determine its own jurisdiction to proceed before reaching the merits of any appeal.⁵ If the order being challenged is not final and appealable, then the court must dismiss the appeal.⁶ Because a challenge to jurisdiction is never waived, this court may evaluate its jurisdiction to proceed at any time, even on the consideration of a direct appeal.⁷

{¶8} Here, there is no doubt that the order being appealed is a final order. The plain text of R.C. 2744.02(C) provides that an “order that denies a political subdivision * * * the benefit of an alleged immunity from liability * * * is a final order.” The trial court’s order denied the township the benefit of immunity from some of Sullivan’s claims.

{¶9} In its recent decision in *Hubbell v. Xenia*, the Ohio Supreme Court restated that “[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.”⁸ To achieve this purpose, the court stated that determining “whether a political subdivision is immune from liability is usually pivotal to the outcome of a lawsuit,” and it forcefully urged “[e]arly resolution of the issue of * * * liability.”⁹

{¶10} Following the clear legislative and judicial intent to resolve governmental-immunity issues at the earliest opportunity, the *Hubbell* court admonished the court of appeals “not to avoid deciding difficult questions of immunity by pointing to the trial court’s use of the language ‘genuine issue of

⁵ See Section 3(B)(2), Article IV, Ohio Constitution; see, also, R.C. 2505.03(A); *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 1997-Ohio-366, 684 N.E.2d 72.

⁶ See *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, at ¶19, citing *Gen. Acc. Ins. Co. v. Ins. Co. of North America* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266.

⁷ See *Internatl. Lottery v. Kerouac* (1995), 102 Ohio App.3d 660, 670, 657 N.E.2d 820; see, also, Civ.R. 12(H)(3).

⁸ *Hubbell v. Xenia*, 2007-Ohio-4839, at ¶23, quoting *Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450, 453, 1994-Ohio-394, 639 N.E.2d 105.

⁹ *Id.* at ¶25, quoting *Burger v. Cleveland Hts.*, 87 Ohio St.3d 188, 199-200, 1999-Ohio-319, 718 N.E.2d 912 (Lundberg Stratton, J., dissenting).

OHIO FIRST DISTRICT COURT OF APPEALS

material fact.’ ”¹⁰ It held that “[w]hen a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C).”¹¹ The court therefore reversed the lower court’s dismissal of the political subdivision’s appeal challenging the denial of its summary-judgment motion.¹²

{¶11} But here the case involves multiple claims and multiple parties. Civ.R. 54(B) authorizes a trial court to “enter final judgment as to one or more but fewer than all of the * * * parties[, but] only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, * * *.” The question is whether, in the absence of a Civ.R. 54(B) certification, the trial court’s order denying immunity in this case may be regarded as both final and appealable.

{¶12} In *Carlson v. Woolpert Consultants*, a pre-*Hubbell* case, the Second Appellate District granted a motion to dismiss appeals from an order denying summary judgment based on immunity claims of township and county employees.¹³ The appellate court acknowledged its precedent, recently ratified in *Hubbell v. Xenia*, that “a denial of summary judgment in immunity situations is a final order under * * * R.C. 2744.02(C).”¹⁴ But because the action was against multiple parties and the order denying summary judgment applied to only a few of the parties, unresolved claims remained in the

¹⁰ Id. at ¶20.

¹¹ Id., syllabus.

¹² See id. at ¶3 and ¶27.

¹³ (Nov. 25, 1998), 2nd Dist. Nos. 17292 and 17303.

¹⁴ Id.

OHIO FIRST DISTRICT COURT OF APPEALS

trial court against additional parties. The court held that the order was not immediately appealable without a Civ.R. 54(B) certification by the trial court.¹⁵ The Eighth Appellate District also concluded, albeit before *Hubbell*, that even if an order denying immunity was final, it was not immediately appealable where the order did not resolve all claims among all parties or contain an express certification of “no just reason for delay” of an appeal under Civ.R. 54(B).¹⁶

{¶13} In *Hubbell*, however, a sole plaintiff had brought a simple negligence action against a single political subdivision.¹⁷ The city of Xenia was the only defendant that had a claim pending against it at the time of its appeal, and there was no need for the court to consider the application of Civ.R. 54(B).¹⁸ Thus, we conclude that *Hubbell v. Xenia* is distinguishable from this case.¹⁹

{¶14} Therefore, we follow the reasoning of the *Carlson* and *Malloy* courts. We hold that even when the challenged governmental-immunity order is clearly final, this court has no jurisdiction to entertain an appeal from a judgment as to fewer than all the claims or all the parties in a multi-claim, multi-party case in the absence of the trial court’s determination, pursuant to Civ.R. 54(B), “that there is no just reason for delay.”²⁰ In so

¹⁵ See *id.* Cf. *Kagy v. Toledo-Lucas County Port Authority* (1998), 126 Ohio App.3d 675, 711 N.E.2d 256 (holding that because the political subdivision was the only defendant remaining at the time of appeal, the court had no reason to consider the application of Civ.R. 54[B]); see, also, *Rucker v. Newburgh Heights*, 8th Dist. No. 89487, 2008-Ohio-910 (post-*Hubbell* case permitting an interlocutory appeal from the denial of a motion for judgment on the pleadings where the only remaining defendant was a political subdivision).

¹⁶ See *Malloy v. Brennan* (Mar. 25, 1999), 8th Dist. No. 75183; see, also, *Drum v. Washlock* (Aug. 24, 2000), 8th Dist. Nos. 74816 and 74817.

¹⁷ See 2007-Ohio-4839, at ¶3.

¹⁸ See, e.g., *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 2000-Ohio-486, 733 N.E.2d 1141, fn. 2 (noting that a trial court’s entry of summary judgment based on immunity under R.C. Chapter 2744 was final and appealable and included Civ.R. 54[B] certification).

¹⁹ See S.Ct.R.Rep.Op. 1(B)(1) (“The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes.”).

²⁰ See *Internatl. Managed Care Strategies, Inc. v. Franciscan Health Partnership, Inc.*, 1st Dist. No. C-01634, 2002-Ohio-4801, at ¶8; see, also, *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 1993-Ohio-120, 617 N.E.2d 1136; *Whitacker-Merrel v. Guepel Constr. Co.* (1972), 29 Ohio St.2d 184, 280 N.E.2d 922, syllabus; *Phillips v. Conrad*, 1st Dist. No. C-020302, 2002-Ohio-7080, at ¶14.

OHIO FIRST DISTRICT COURT OF APPEALS

holding, we adhere to the rule that “Civ.R. 54(B) must be followed when a case involves multiple claims and/or multiple parties,”²¹ and we advance the underlying policy of avoiding piecemeal litigation.²²

{¶15} Absent the certification required by Civ.R. 54(B), an order that denies a political subdivision’s immunity defense but that leaves pending for disposition other claims against multiple parties is not immediately appealable. Here, the trial court’s order denied in part the township’s governmental-immunity claim under R.C. 2744.02. But the order, while final pursuant to R.C. 2744.02(C), was not immediately appealable.

{¶16} Therefore, we dismiss the appeal. And the case is returned to the jurisdiction of the trial court for further proceedings, including, if the trial court sees fit, a certification under Civ.R. 54(B) that there is no just reason to delay an appeal by the township.

Appeal dismissed.

SUNDERMANN, P.J., CUNNINGHAM and DINKELACKER, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

²¹ *State ex rel. A & D Ltd. Partnership v. Keefe*, 77 Ohio St.3d 50, 56, 1996-Ohio-956, 71 N.E.2d 13, citing *State ex rel. Wright v. Ohio Adult Parole Auth.* (1996), 75 Ohio St.3d 82, 85, 661 N.E.2d 728.

²² See *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96, 540 N.E.2d 1381.

Not Reported in N.E.2d
 Not Reported in N.E.2d, 1999 WL 366532 (Ohio App. 4 Dist.)
 (Cite as: Not Reported in N.E.2d, 1999 WL 366532)

Page 1

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Drew v. Laferty
 Ohio App. 4 Dist., 1999.
 Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT
 RULES FOR REPORTING OF OPINIONS
 AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District,
 Vinton County,
 Joseph DREW, Plaintiff,
 v.
 Harlis Ray LAFERTY, et. al, Defendants/
 Third Party Plaintiffs-Appellee,
 v.
 Village of McArthur, Third Party Defendant-Appellant.
 No. 98CA522.

June 1, 1999.

William S. Cole, Jackson, Ohio, for appellant.
 John P. Lavelle, Athens, Ohio, for appellee.

DECISION AND JUDGMENT ENTRY

KLINE, J.

*1 The Village of McArthur ("the Village") appeals the Vinton County Court of Common Pleas' denial of its motion for summary judgment in a tort action brought by Harlis Ray Laferty. The Village contends that R.C. 2744.03(A) grants it immunity from liability for its alleged negligence in hiring and supervising McArthur Police Chief Joseph Drew. We agree. Because the hiring and supervision of Chief Drew constitute discretionary functions in acquiring and determining how to use personnel, and because Laferty did not allege

that the Village acted maliciously or recklessly, the Village is immune from liability for its actions pursuant to R.C. 2744.03(A)(5).

The Village also cites R.C. 2744.03(A)(3) in support of its claim that it is immune from liability. Additionally, the Village asserts that the trial court erred in denying its motion for summary judgment as to Laferty's Title 42, Section 1983, U.S.Code ("Section 1983") claim. We dismiss the appeal insofar as it relates to R.C. 2744.03(A)(3) and Section 1983, because the trial court has not issued a final, appealable order regarding those issues.

Accordingly, we reverse the judgment of the trial court, dismiss the remainder of the Village's appeal that involves R.C. 2744.03(A)(3) and Section 1983, and remand this cause to the trial court for further proceedings consistent with this opinion.

I.

Chief Drew initiated the underlying lawsuit in this case by filing claims against Laferty and others for intentional infliction of emotional distress, assault, fraud, and conspiracy to maliciously prosecute. Laferty counterclaimed, and filed a third party complaint against the Village and against Chief Drew, both in his individual capacity and in his capacity as a representative of the Village.

Laferty alleged in his counterclaim and third party complaint that Chief Drew arrested Laferty on two occasions without having probable cause or a warrant. In the course of these arrests, Chief Drew allegedly committed the torts of assault, battery, false imprisonment, false arrest, and

intentional infliction of emotional distress. Laferty asserted that in committing these torts, Chief Drew acted under color of state law, hence in violation of his Section 1983 civil rights. Finally, Laferty alleged that Chief Drew acted with malice, ill will, a spirit of revenge, and a reckless disregard of Laferty's rights.

In his third party complaint, Laferty alleged that the Village "negligently hired Joseph Drew, negligently supervised him, [and] negligently permitted him to wear a badge, uniform, and carry a gun." Laferty further charged that the Village "knew or should have known of the reckless tendencies" of Chief Drew, and that, through its negligence, the Village caused him compensable harm. Finally, Laferty asserted that the Village violated Laferty's civil rights in contravention of Section 1983.

The Village filed a motion for summary judgment and asserted that it is immune from liability for negligence in its discretionary acquisition and use of personnel, facilities and other resources. The trial court denied the Village's motion, finding that in hiring, supervising, and permitting Chief Drew to hold himself out as a police officer, the Village engaged in the implementation of discretionary decisions rather than in making discretionary decisions. The Village's motion for summary judgment did not address Laferty's intentional tort claims against Chief Drew in his capacity as a representative of the Village or Laferty's Section 1983 claim against the Village.

*2 As authorized by R.C. 2744.02(C), the Village appealed the trial court's finding that it is not immune from liability on Laferty's claims. The Village asserts the following assignments of error:

I. THE VILLAGE OF McARTHUR IS IMMUNE FROM SUIT FOR ITS DECISION TO HIRE CHIEF JOSEPH DREW.

II. THE COURT OF COMMON PLEAS ERRONEOUSLY RELIED UPON *HOWELL V. THE UNION TOWNSHIP TRUSTEES*, AN INAPPLICABLE CASE, IN REACHING ITS DECISION.

III. THE VINTON COUNTY COURT OF COMMON PLEAS ERRED IN FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF THE APPELLANT VILLAGE OF McARTHUR AS TO APPELLEE'S SECTION 1983 CLAIM.

IV. THE VINTON COUNTY COURT OF COMMON PLEAS' FAILURE TO GRANT SUMMARY JUDGMENT IN FAVOR OF APPELLANT WAS AN ERROR AND IGNORED THE APPLICABLE STANDARD FOR SUCH MOTIONS.

II.

The Village asserts in its first, second and fourth assignments of error that the trial court erred by failing to recognize that it is immune from liability for the negligent hiring and supervision of Chief Drew. Specifically, the Village asserts that its discretionary decisions are protected, that hiring a police chief is discretionary, and that the trial court erroneously relied upon a case which involved only non-discretionary decisions. Additionally, the Village asserts that the trial court erred by failing to recognize that, because Laferty merely alleged that the Village was negligent, not reckless or wanton, in its hiring and supervision of Chief Drew, Laferty did not meet his burden to survive summary judgment. Laferty asserts that the trial court correctly ruled

that the Village is not entitled to immunity because hiring, supervising, searching and arresting are not discretionary activities, and because genuine issues of material fact remain for trial.

Summary judgment is appropriate only when it has been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(A). See *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411, 599 N.E.2d 786. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 535, 629 N.E.2d 402.

In reviewing whether an entry of summary judgment is appropriate, an appellate court must independently review the record and the inferences which can be drawn from it to determine if the opposing party can possibly prevail. *Morehead*, 75 Ohio App.3d at 411-12, 599 N.E.2d 786. "Accordingly, we afford no deference to the trial court's decision in answering that legal question." *Id.* See, also, *Schwartz v. Bank-One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 809, 619 N.E.2d 10.

*3 The Village asserts that it is immune from liability for its decisions in hiring and supervising Chief Drew. R.C. 2744.03(A)(5) provides that a subdivision is immune from liability if the plaintiff's alleged loss "resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, * * * 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." *Doe v. Jefferson Area School Dist.* (1994), 97 Ohio App.3d 11, 13, 646 N.E.2d 187.

Political subdivision immunity only extends to activities which involve weighing alternatives or making decisions involving a high degree of official judgment or discretion. *Enghauser Mfg. Co. v. Eriksson Engineering Ltd.* (1983), 6 Ohio St.3d 31, 451 N.E.2d 228, paragraph two of the syllabus. A discretionary activity is one which involves more than simple day-to-day decision making. *Winwood v. Dayton.* (1988), 37 Ohio St.3d 282, 284, 525 N.E.2d 808. To qualify for immunity, the subdivision's function must require it to weigh multiple considerations, "not merely to 'rubber stamp' [a proposal] found to be in compliance with all requisite technical requirements." *Id.* at 284, 525 N.E.2d 808.

As the trial court noted, while political subdivisions are immune from liability stemming from their discretionary decisions, they are not immune from liability arising from negligence in implementing those discretionary decisions. *Howell v. Union Township Trustees* (March 18, 1997), Scioto App. No. 96CA2430, unreported, citing *Reynolds v. State* (1984), 14 Ohio St.3d 68, 471 N.E.2d 776. In *Howell*, this court determined that the Union Township Trustees exercised their discretion in deciding to use oil, rather than another substance, to control dust on the roads. However, where standards governing the proper amount of oil and method of application existed, the trustees were liable for negligence in the application of the oil to the road. *Id.*

The Village's acts challenged in this case are: (1) determining who would best serve the Village as police chief, (2) supervising

the police chief, and (3) permitting the police chief to wear or carry a uniform, badge, and gun. The Village asserts that these activities involve weighing alternatives and making decisions requiring a high degree of official judgment. Further, the Village asserts that these activities are unlike those challenged in *Howell*, because they require the Village to do more than merely rubber stamp decisions governed by established standards. Finally, the Village notes that it cannot be held liable for its discretionary acts unless a plaintiff alleges it acted recklessly or wantonly.

*4 The decision to hire or promote one individual over another, particularly to a post conferring the high degree of power held by a police chief, involves considering strengths and weaknesses of each individual candidate and requires a high degree of official judgment in selecting the best qualified candidate. A police chief is permitted to wear a uniform and badge and carry a gun by virtue of his position as police chief, and therefore the activity is encompassed within the discretionary hiring decision. By selecting an individual to hold the highest law enforcement position in the subdivision, the subdivision implicitly grants that individual a high degree of discretion, review of which we find requires an equally high degree of discretion.

Because the hiring and supervision of Chief Drew are activities which involve the Village's exercise of discretion in the acquisition and use of personnel, the Village is immune from liability for those actions, unless the Village exercised its discretion with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 2744.03(A)(5); *Doe v. Jefferson Area School Dist.*, 97 Ohio App.3d at 13, 646 N.E.2d 187. In his complaint, Laferty spe-

cifically alleged that the Village acted negligently. Thus, even when construing the facts in the light most favorable to Laferty, we cannot find that the Village acted maliciously or recklessly. See *Id.* at 15, 646 N.E.2d 187.

Accordingly, we find that the Village is entitled to summary judgment on Laferty's claims that it negligently hired and supervised Chief Drew.

III.

The Village also cites R.C. 2744.03(A)(3) to support its contention that it is immune from liability for its decision to hire Chief Drew. Additionally, the Village asserts that Laferty failed to allege sufficient facts to support a Section 1983 claim. We dismiss the appeal as to each of these issues for lack of a final, appealable order.

It is axiomatic that appellate courts do not address errors which were assigned and briefed but which were never raised in the trial court. See *In re Adoption of Lassiter* (1995), 101 Ohio App.3d 367, 372, 655 N.E.2d 781, citing *Republic Steel Corp. v. Cuyahoga Cty. Bd. of Revision* (1963), 175 Ohio St. 179, 192 N.E.2d 47. Appellate courts in Ohio have jurisdiction to review the "final orders" or judgments of inferior courts within their district. Section 3(B)(2), Article IV of the Ohio Constitution, R.C. 2501.02 and 2505.03. If an order is not final and appealable, an appellate court lacks jurisdiction to decide the appeal. *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, 540 N.E.2d 1381. We are required to raise jurisdictional issues *sua sponte* and dismiss an appeal which is not taken from a final appealable order. *Whitaker Merrill v. Geupel Co.* (1972), 29 Ohio St.2d 184, 186, 280 N.E.2d 922.

*5 A “final order” is defined as one that affects a substantial right and either determines the action or is entered in a special proceeding. R.C. 2505.02. Generally, if a trial court has rendered a judgment with respect to fewer than all of the parties or fewer than all of the claims in an action, the order must comply with Civ.R. 54(B) and include the “no just reason for delay” language in order to be deemed a “final order.” *Noble, supra*, at syllabus. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64. However, an exception arises when the issue before the court involves political subdivision immunity. Pursuant to R.C. 2744.02(C), “[a]n order that denies a political subdivision * * * the benefit of an alleged immunity as provided in Chapter 2744 * * * is a final order.”

A.

The Village cited R.C. 2744.03(A)(3) in support of its contention that it is immune from liability on Laferty's negligence claim. R.C. 2744.03(A)(3) provides that a political subdivision is immune from liability “if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee * * *.” By its plain language, R.C. 2744.03(A)(3) applies to claims stemming from the actions of subdivision employees, not to claims stemming from the actions of the subdivision itself. See, also, *Nungester v. Cincinnati* (1995), 100 Ohio App.3d 561, 566, 654 N.E.2d 423. Thus, R.C. 2744.03(A)(3) does not apply to the Village's hiring decision.

We recognize that Laferty sued Chief Drew both personally and in his official capacity as a representative of the Village. However, while the Village cited R.C.

2744.03(A)(3) in its motion for summary judgment, it did not assert that it is immune from liability for Chief Drew's actions. Further, the trial court did not address R.C. 2744.03(A)(3) in denying the Village's motion for summary judgment. On appeal, the Village again cited R.C. 2744.03(A)(3) in its brief, but failed to state an assignment of error or argue the viability of an immunity defense to Laferty's claims against Chief Drew in his representative capacity.

Pursuant to App.R. 12(A)(2), we need not address an assignment of error which the appellant failed to specifically set forth or argue separately. However, even if the Village had properly raised R.C. 2744.03(A)(3) immunity on appeal, we would decline to consider the issue for lack of a final, appealable order.

In this case, we possess jurisdiction to review the trial court's denial of the Village's motion for summary judgment on Laferty's negligence claim because the trial court denied the Village's alleged immunity from liability on that claim. See R.C. 2744.02. However, the Village never alleged that it is immune from liability on Laferty's claim for the allegedly malicious actions Chief Drew took in his capacity as an agent of the Village. Thus, the trial court did not address the Village's immunity from such a claim in its entry. Because no order exists regarding the Village's immunity from such a claim, there is no final order upon which we can base our jurisdiction. Therefore, we must dismiss the Village's appeal to the extent that it encompasses a claim of immunity under R.C. 2744.03(A)(3).

B.

*6 In its third assignment of error, the Village asserts that the trial court erred by

failing to grant the Village summary judgment on Laferty's Section 1983 claim. However, in its motion for summary judgment and supporting memorandum, the Village did not mention Laferty's Section 1983 claim. Instead, the Village devoted its entire argument to its claim that it is immune from liability pursuant to R.C. 2744.03(A)(5). Ohio's sovereign immunity statute, including R.C. 2744.03, does not bar actions brought under federal civil rights laws such as Section 1983. *Brewer v. Cleveland City Schools* (1997), 122 Ohio App.3d 378, 383, 701 N.E.2d 1023, citing *Wohl v. Cleveland Bd. of Educ.* (1990), 741 F.Supp. 688. The Village asserts on appeal that Laferty failed to allege sufficient facts to establish a Section 1983 claim.

Because neither the Village nor the trial court raised or addressed any issues concerning Laferty's Section 1983 claim in the trial court, we find that no final, appealable order exists upon which we may base our jurisdiction. Accordingly, we dismiss this appeal as to the Village's claim that the trial court erred by failing to dismiss Laferty's Section 1983 claim against the Village.

IV.

In conclusion, we find that the trial court erred as a matter of law by denying the Village's motion for summary judgment for negligent hiring and supervision. We dismiss the appeal regarding the Village's immunity from Laferty's claims brought against Chief Drew in his capacity as a representative of the Village for lack of a final, appealable order on the matter. Likewise, we dismiss the appeal regarding the Village's defenses of immunity or failure to state a claim on Laferty's Section 1983 claim for lack of a final, appealable order.

Accordingly, we reverse the judgment of the trial court, dismiss the appeal that involves R.C. 2744.03(A)(3) and Section 1983, and remand this cause for further proceedings consistent with this opinion on all remaining issues.

**JUDGMENT REVERSED IN PART,
APPEAL DISMISSED IN PART, AND
CAUSE REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED, that the APPEAL BE DISMISSED IN PART, and the cause remanded to the trial court for further proceedings consistent with this opinion, costs herein taxed to appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Vinton County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

GREY, J.^{FN*}: Concurs in Judgment and Opinion.

FN* Lawrence Grey is a retired judge from the Fourth District Court of Appeals, sitting by assignment. HARSHA, J., Concurring.

I agree we have no final appealable order and thus, no jurisdiction to review the issues relating to appellees 42 U.S.Code

1983 claims. However, while the principal opinion reaches the correct result concerning the state law causes of action, I believe we need only apply R.C.2744.02(A) and (B) to properly dispose of the rest of this case. Because R.C. 2744.03(A) should not control our disposition, I concur in judgment only.

NOTICE TO COUNSEL

Ohio App. 4 Dist.,1999.
Drew v. Laferty
Not Reported in N.E.2d, 1999 WL 366532
(Ohio App. 4 Dist.)

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