[Cite as *Konstand v. Barberton* , 2003-Ohio-7187.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DEAN KONSTAND, Administrator of the Estate of Helen Reeves

Appellee

v.

CITY OF BARBERTON, et al.

Appellants
C.A. No. 21651

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2001-02-0787

DECISION AND JOURNAL ENTRY

Dated: December 31, 2003

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Presiding Judge.

{¶1} Appellants, the City of Barberton and Donald Kishton, appeal from the decision of the Summit County Court of Common Pleas which denied their

motion for summary judgment. For reasons stated below, we dismiss the appeal for lack of a final, appealable order.

{¶2} On February 20, 2001, Helen Reeves ("Reeves"), filed suit against Appellants. Shortly thereafter, Reeves passed away and the trial court substituted Appellee, Dean Konstand, the administrator of the Reeves estate, as plaintiff. Additionally, Appellee was permitted to amend the complaint so that a wrongful death action could be asserted. Discovery commenced. Appellants then filed a motion for summary judgment asserting immunity pursuant to R.C. 2744.02. Appellee responded in opposition and also filed a motion for summary judgment.

{¶3} The court denied Appellants' motion for summary judgment indicating that there were genuine issues of material fact relating to "whether [Appellant] the City of Barberton exercised its judgment in a wanton or reckless manner in the hiring, utilizing, training and scheduling of dispatchers" and whether "[Appellant] Kishton acted in a willful or wanton manner[.]" It is from this decision that Appellants have appealed.

{¶4} The Ohio Constitution limits an appellate court's jurisdiction to the review of final judgments of lower courts. Section 3(B)(2), Article IV. For a judgment to be final and appealable, the requirements of R.C. 2505.02 and Civ.R. 54(B), if applicable, must be satisfied. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88. Generally, the denial of a motion for summary judgment is not a final, appealable order. *Benson v. Akron* (Jan. 20, 1999), 9th

Dist. No. 19076, at 2; *State ex rel. Overmeyer v. Walinski* (1966), 8 Ohio St.2d 23, 23.

{¶5} In the present matter, Appellants have attempted to appeal the denial of summary judgment pursuant to R.C. 2744.02(C) which 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." (Emphasis added.)

{¶6} However, this Court has previously held 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. 2744.02(C)." *Benson*, supra, at 2-3, quoting *Brown v. Akron Bd. of Ed.* (1998), 129 Ohio App.3d 352, 358. Whether the Appellants acted in a wanton or reckless manner is a fact-related legal issue. Furthermore, the decision denying summary judgment was not an order denying Appellants immunity. Rather, the decision indicates that material issues of fact remain with respect to whether immunity exists. See *Burley v. Bibbo* (1999), 135 Ohio App.3d 527, 528-29. The court merely denied Appellants summary judgment on the immunity issue. See id. at 529. Thus, the appeal is dismissed for lack of final, appealable order. See *Benson*, supra, at 3.

Appeal dismissed.

LYNN C. SLABY
FOR THE COURT

BATCHELDER, J.
CONCURS

CARR. J.
DISSENTS SAYING:

{¶7} I respectfully dissent. As I stated in my dissenting opinion in *Schroeder v. Jones* (Dec. 20, 2000), 9th Dist. No. 19958, 4-5,

> "The plain and unambiguous language of R.C. 2744.02(C) allows immediate appellate review of a trial court's finding of a genuine issue of fact impacting the applicability of immunity. Therefore, the order appealed from is final and subject to review at this time.
>
> "Additionally, the conservation of fiscal resources of political subdivisions is one of the principal statutory purposes behind the immunities and liability limitations provided in R.C. 2744. 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 and their employees from devoting substantial time and resources to defend an action, only to have an appellate court determine after trial that they were immune from suit all along. Id. To proceed in the manner proposed by the majority would eliminate the very purpose behind R.C. 2744."

{¶8} For the foregoing reasons, I respectfully dissent.

APPEARANCES:

JOHN T. MCLANDRICH and FRANK H. SCIALDONE, Attorneys at Law, 100 Franklin's Row, 34305 Solon Road, Cleveland, Ohio 44139, for Appellants.

JAMES R. RECUPERO and DENISE K. HOUSTON, Attorneys at Law, 2500 First National Tower, 106 South Main Street, Akron, Ohio 44308, for Appellee.