

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

JAMES PIERCE, et al.,	:	Case No. 18CA1
Plaintiffs-Appellees,	:	
v.	:	<u>DECISION AND</u>
THE CITY OF GALLIPOLIS,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 02/27/2018

Hoover, A.J.

{¶1} Appellant-Defendant City of Gallipolis appeals an order denying its motion for a directed verdict made at the close of the Appellees-Plaintiffs Pierces' evidence. The Pierces moved to dismiss this appeal contending that the order denying a directed verdict is not a final appealable order. In response, the City contends that the order denies it the benefit of immunity and is immediately appealable under the applicable statute.

{¶2} We find that the order is not a final appealable order. The order does not deny the City the "benefits of immunity" but rather denies the City a directed verdict on the underlying issue of negligence. We lack jurisdiction and dismiss the appeal.

I. PROCEDURAL HISTORY

{¶3} This is the third appeal the City has filed from interlocutory orders in this action on the ground that it is entitled to immediate appeal under R.C. 2744.02(C) (governing orders that deny the benefit of an alleged governmental immunity). See *Pierce v. City of Gallipolis*, 2015-Ohio-2995, 39 N.E.3d 858 (4th Dist.) ("*Pierce I*") and *Pierce v. City of Gallipolis*, 4th Dist. Gallia No. 16CA7, 2017-Ohio-546 ("*Pierce II*"). James and Carol Pierce sued the City of Gallipolis in 2012 after raw sewage, erosion,

and land slippage caused personal injuries and property damage to them, their home and their personal belongings. The facts are more specifically set forth in *Pierce I* and *Pierce II* and are not repeated here.

{¶4} In *Pierce I*, the City appealed the trial court’s summary judgment decision which determined that the City was not entitled to immunity under R.C. Chapter 2744 for the claims the Pierces asserted. The trial court reviewed the immunity issue and determined that the City was not entitled to governmental immunity because the Pierces’ action “related to the negligent maintenance of the sewer lines, and that a political subdivision’s failure to maintain its sewer system is a proprietary act.” *Pierce I* at ¶ 11. Thus, the trial court determined as a matter of law that the Pierces could maintain a negligence action against the City.¹

{¶5} Although a decision denying a party’s motion for summary judgment is not a final, appealable order, we reviewed the City’s appeal based on R.C. 2733.02(C) as an order that denied the City the benefit of an alleged immunity. *Pierce I*, at ¶ 1, fn. 1. We analyzed the complaint and summary judgment and determined that the Pierces alleged that the City negligently failed to perform maintenance on the sewer lines running under and near their property that resulted in personal injury and property damage. R.C. 2744.02(B)(2) removes the cloak of governmental immunity with respect to “propriety functions” and subjects a political subdivision to liability for negligent acts in the performance of those functions. We found that the “maintenance, destruction,

¹ The City also sought summary judgment on the underlying negligence claim, arguing that the Pierces failed to show negligent conduct and causation and contending that a third party rather than the City caused Pierces’ alleged damages. *Pierce I* at ¶ 12 (second, third, fourth, and fifth assignments of error). The trial court denied summary judgment on those issues after determining that the summary judgment evidence created a genuine issue of material fact. *Pierce I* at ¶ 11. We reviewed those assignments of error as well and affirmed the trial court’s judgment.

operation and upkeep of a sewer system” is a “proprietary function” under R.C. 2744.01(G)(2)(d), therefore the Pierces could maintain a negligence action against the City. *Pierce I* at ¶ 20. We rejected the City’s argument that Pierces’ claim rests upon “a government function” and that the exception for “proprietary functions” did not apply. *Pierce I* at ¶ 22. The City did not have a defense under R.C. 2744.03(A) that would reinstate immunity. *Pierce I* at ¶ 18-19, fn. 2. We affirmed the judgment of the trial court. *Pierce I* at ¶ 41-42.

{¶6} In May 2016, six weeks before the scheduled trial, the City moved for judgment on the pleadings under Civ.R. 12(C), again arguing that it was entitled to governmental immunity. The City contended that the immunity exception under R.C. 2744.02(B) applied only to “acts” and did not apply to “omissions or failures.” The City argued that because the Pierces’ complaint alleged that the City failed to conduct maintenance, which is an “omission or failure,” the immunity exception did not apply. The trial court denied the motion on the grounds that this issue was resolved by our decision in *Pierce I* -- the law of the case was that the City was not entitled to the cloak of immunity. *Pierce II* at ¶ 5.

{¶7} The City appealed this interlocutory order. Although a denial of a motion for judgment on the pleadings is not a final appealable order, we reviewed the City’s appeal as an order that denies a political subdivision the benefit of an alleged immunity under R.C. 2744.02(C). See *Pierce II* at ¶ 1, fn. 1, citing *DiGiorgio v. Cleveland*, 196 Ohio App.3d 575, 2011-Ohio-5824, 964 N.E.2d 495, ¶ 4-11 (8th Dist.). We held that the law of the case doctrine applied, which provides that “ ‘the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent

proceedings in the case at both the trial and reviewing levels.’ ” *Pierce II* at ¶ 14, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). The law of the case doctrine ensures consistency of results in a case and avoids endless litigation by settling the issues. *Id.* We held that our decision in *Pierce I* fully resolved the legal question of whether the City was entitled to the benefits of governmental immunity. Therefore the trial court was required to deny the City’s motion, “Because this Court conclusively determined in the prior appeal that the R.C. 2744.02(B)(2) exception to immunity applied, the law of the case doctrine required that the trial court deny appellant’s motion for judgment on the pleadings.” *Pierce II* at ¶ 15.

{¶8} The Pierces presented their evidence on the underlying negligence claim to a jury in January 2018. At the close of the Pierces’ evidence, the City moved for a directed verdict under Civ.R. 50(A). The trial court denied the motion and the City immediately – on the same day the trial court denied it and prior to jury deliberations – appealed the order denying its motion for directed verdict. The trial court proceeded with the remainder of the trial, the jury deliberated, and returned a verdict in favor of James and Carol Pierce, awarding them \$350,000 in damages. The Pierces filed a motion for pre-judgment interest and attorney fees which is still pending.

{¶9} The Pierces filed a motion to dismiss this appeal because the trial court’s order denying the motion for a directed verdict is not a final appealable order. The City responded and argued that the trial court’s order can be immediately appealed because it is an order that denied the City the benefit of an alleged immunity under R.C. 2744.02(C).

{¶10} We find that the City confuses the legal issue of governmental immunity, which we fully determined in *Pierce I*, with the underlying issue of the negligence claim, which the City must stand and defend like a private party. The trial court's order did not deny the City the benefits of immunity because immunity was fully determined by summary judgment, therefore R.C. 2744.02(C) does not apply. The order denying a motion for a directed verdict is not a final, appealable order. We lack jurisdiction and dismiss this appeal.

II. LAW AND ANALYSIS

{¶11} Ohio law provides that appellate courts have jurisdiction to review only final orders or judgments. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. If an order is not final and appealable, an appellate court has no jurisdiction to review the matter and it must be dismissed. "An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met." *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002–Ohio–5315, 776 N.E.2d 101; see also, *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus (1989). The threshold requirement, therefore, is that the order satisfies the criteria of R.C. 2505.02. *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, ¶ 15.

{¶12} An order denying a motion for directed verdict is not a final, appealable order under R.C. 2505.02. See *Colvin v. Abbey's Restaurant, Inc.*, 85 Ohio St.3d 535, 539-540, 1999-Ohio-286, 709 N.E.2d 1156 ("the trial court's denials of the two directed verdict motions were not final appealable orders in their own right at the times of the denials. See R.C. 2505.02."). The City appears to concede that the order is

interlocutory, but argues that it is entitled to appeal it under R.C. 2744.02(C) as one that denies the benefits of immunity.

{¶13} Whether a political subdivision may invoke statutory immunity under R.C. Chapter 2744 presents a question of law that is properly determined by summary judgment. *Laries v. Athens*, 2015-Ohio-2750, 39 N.E.2d 788, ¶ 16, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 595 N.E.2d 862 (1992). We fully determined the issue of the City's immunity in *Pierce I*, finding that the City was not entitled to statutory immunity under R.C. Chapter 2744. The City's lack of immunity is the law of the case. As a result, the Pierces were entitled to bring their negligence action against the City and the City was required to be a party to the action the same as if it were a private party. See generally *Butler v. Jordan*, 92 Ohio St.3d 354, 361, 2001-Ohio-204, 750 N.E.2d 554 (surveying the history of political subdivision immunity and recognizing that absent governmental immunity "municipal corporations and individuals are equally responsible in tort").

{¶14} To establish actionable negligence, the Pierces must show that there was a duty, that the duty was breached, and that an injury resulted from the breach. *LGR Realty, Inc. v. Frank and London Ins. Agency*, ___ Ohio St.3d ___, 2018-Ohio-334, ___ N.E.3d ___, ¶ 27. Like a private-party defendant, the City's motion for a directed verdict could challenge the Pierces' evidence on the elements of their negligence claim, but it could not challenge or raise immunity, which was fully resolved in *Pierce I*.

{¶15} The City's motion for a directed verdict challenged the Pierce's negligence evidence, contending that they failed to: (1) present sufficient evidence that the City was negligent, (2) submit sufficient evidence that the City breached a duty, or (3) make the

proximate causal connection between the City's negligence and the Pierces' injuries. The City incorrectly contends it challenges governmental immunity under R.C. 2744.02(B)(2). It does not challenge immunity, it challenges the City's tort liability – elements of the Pierces' negligence claim. As a result, the trial court's order denying the City's motion for a directed verdict did not “deny the benefit of immunity,” but rather it determined that there was sufficient evidence on the negligence claim for a jury determination. Our immunity decision determined that the City can be held accountable for its actions in court; the Pierces' evidence proves whether those actions were negligent. The law of the case doctrine precluded the trial court from making any further determination on immunity. The City's mistaken references to the immunity statute in its motion are not magical incantations that transform the motion for directed verdict on the negligence claim into one on immunity.

{¶16} The City's motion for a directed verdict also argued that the Pierces failed to submit any evidence “that governmental immunity should not be reinstated pursuant to [R.C.] 2744.03(A)(5) given the particular facts in evidence.” However, the provision in R.C. 2744.03(A)(5) does not create a cause of action or establish liability. *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 32, 1998-Ohio-421, 697 N.E.2d 610. Instead R.C. 2744.03(A)(5) is a defense to liability and the City, not the Pierces, has the burden to assert and establish it. See generally *Hall v. Fort Frye Local School Dist. Bd. of Edn.*, 111 Ohio App.3d 690, 676 N.E.2d 1241 (4th Dist. 1996) (a party asserting immunity as an affirmative defense has the burden of proving it). We addressed this in *Pierce I*, acknowledging that the City made no contention that immunity should be reinstated under R.C. 2744.03(A). See *Pierce I* at ¶19, fn. 2; see also *Williams v. Glouster*, 4th

Dist. Athens No. 10CA58, 2012-Ohio-1283, ¶ 31 (“the proper maintenance of a sewer or in this case, a storm drainage system, is a proprietary act, which is mandatory and not discretionary. If proven, Appellant’s negligent performance of its proprietary function of maintaining its storm drainage system would expose it to liability under R.C.

2744.02(B)(2), and immunity could not be reinstated under R.C. 2744.03(A)(5).”).

{¶17} The trial court’s order denying the motion for a directed verdict did not deny the City the benefit of reinstatement of immunity under R.C. 2744.03(A)(5). Rather, assuming *arguendo* that immunity could be reinstated, the City deprived itself of this defense by failing to raise it in the context of *Pierce I*.

{¶18} The City cites *Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490 to support its contention that it is entitled to appeal the trial court’s order. In *Supportive Solutions*, the Court held that the denial of a motion for leave to file an amended answer raising political subdivision immunity as an affirmative defense was a final appealable order even though it did not fully resolve the immunity question. The Court emphasized the “effect” of the trial court’s order. The Court repeatedly stated that the proper focus is “on the effect of the trial court’s order on a party’s ability to claim immunity.” *Id.* at ¶ 13. “The right to appeal under R.C. 2744.02(C) hinges on the effect of the trial court’s order, and rightly or wrongly decided, the trial court’s denial of leave had the effect of depriving ECOT of its alleged immunity defense.” *Id.* at ¶ 20.

{¶19} The analysis in *Supportive Solutions* undermines the City’s argument. Here, as we explained in *Pierce II*, it was the summary judgment decision and our affirmation of it in *Pierce I* that fully determined the City’s immunity defense. Any other

subsequent decisions were governed by the law of the case doctrine and had no effect on the City's immunity defense. The Pierces' claims were not subject to that defense.² And, even if a reinstatement defense under R.C. 2744.03(A)(5) were available here, an order denying a motion for a directed verdict at the close of plaintiffs' evidence would not "effect" a political subdivision ability to establish a reinstatement defense in its case-in-chief. See generally *Gallaugh v. Holmes Surgical Assoc., Inc.*, 4th Dist. Ross No. 09CA3134, 2011-Ohio-1794, ¶ 28; *Blandford v. A-Best Products Co.*, 8th Dist. Cuyahoga Nos. 85710, 86214, 2006-Ohio-1332, ¶ 19 ("The party with the burden of proof on an issue must present such proof in that party's case in chief"). *Supportive Solutions* supports our determination that the order denying the City's motion for a directed verdict is not a final order under R.C. 2744.02(C) – the order had no effect on the City's ability to claim immunity as that was previously determined in *Pierce I*.

III. CONCLUSION

{¶20} The order denying a motion for a directed verdict is not a final appealable order under R.C. 2505.02. Where the City's immunity defense has been fully determined by summary judgment and reviewed and affirmed by the appellate court, the determination that the City is not entitled to immunity is the law of the case. The trial and appellate court are bound by it in all subsequent proceedings. As a result, an order denying the City's motion for a directed verdict at the close of plaintiffs' evidence does

² The law of the case doctrine denies governmental immunity to the City "for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan, supra*. Thus, the Pierces' negligence claim was not subject to a governmental immunity defense. Therefore the City's appeal of the order denying it a directed verdict did not deprive the trial court of jurisdiction to proceed with the remainder of the trial and jury deliberations and distinguishes this case from *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga County Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149 (trial court did not have jurisdiction to proceed with trial of any claims that might be subject to immunity defense).

not “deny the benefits of immunity” and is not a final order under R.C. 2744.02(C). We lack jurisdiction over this appeal.

{¶21} Accordingly, we **DISMISS** the appeal for lack of a final, appealable order.

MOTION GRANTED. APPEAL DISMISSED. COSTS TO APPELLANT.

{¶22} The clerk shall serve a copy of this order on all counsel of record and unrepresented parties at their last known addresses by ordinary mail and record service on the docket. **IT IS SO ORDERED.**

Harsha, J. & Abele, J.: Concur.

FOR THE COURT

Marie Hoover
Administrative Judge