

[Cite as *Essman v. Portsmouth*, 2009-Ohio-3367.]

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

LARRY ESSMAN, et al., :
 :
Plaintiffs-Appellees, : Case No. 08CA3244
 :
vs. :
 :
CITY OF PORTSMOUTH, : DECISION AND JUDGMENT ENTRY
 :
Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Lawrence E. Barbieri and Robert S. Hiller, 11935
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COUNSEL FOR APPELLEES: D. Joe Griffith, P.O. Box 667, Lancaster, Ohio 43130

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-26-09

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court summary judgment that denied the City of Portsmouth, defendant below and appellant herein, the benefit of an alleged immunity regarding Larry Essman's and several other property owners' (plaintiffs below and appellees herein) negligent maintenance claim. The trial court also denied appellant's summary judgment motion regarding its statute of limitations defense.

{¶ 2} Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DETERMINING PORTSMOUTH WAS NOT ENTITLED TO GOVERNMENTAL IMMUNITY PURSUANT TO CHAPTER 2744 OF THE REVISED CODE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DETERMINING PORTSMOUTH WAS NOT ENTITLED TO GOVERNMENTAL IMMUNITY AS TO SOME PLAINTIFFS PURSUANT TO THE STATUTE OF LIMITATIONS OF CHAPTER 2744.04 OF THE REVISED CODE."

{¶ 3} A group of nineteen Portsmouth property owners, plaintiffs below and appellees herein, instituted the present action against appellant for damages allegedly sustained from overflowing sewers. Their amended complaint asserts, in essence, that: (1) appellant negligently maintained and operated the sewer system; and (2) appellant's negligence constitutes a qualified nuisance. Appellees alternatively sought a writ of mandamus to compel appellant to institute appropriation proceedings because the sewage intrusion amounted to a governmental taking of their properties.

{¶ 4} Appellant had requested summary judgment before appellees filed their amended complaint, which added the negligent operation claim. In its first summary judgment motion, appellant argued that it is immune from liability with respect to appellees' negligent maintenance claim under R.C. Chapter 2744. Appellant further asserted that the applicable statute of limitations barred some of the property owners' claims and that appellees' mandamus claim is not proper.

{¶ 5} Appellees memorandum contra contended that appellee is not entitled to

sovereign immunity and that they filed the complaint within the applicable statute of limitations. Appellees argued that genuine issues of material fact remained regarding whether appellant negligently failed to maintain the sewer system.

{¶ 6} After appellees filed their amended complaint, which added the negligent operation claim, appellant filed a "supplement" to its summary judgment motion. This supplementary motion argued that no genuine issues of material fact remained as to whether it is entitled to immunity regarding appellees' negligent operation claim. Appellant relied primarily upon an EPA permit that, appellant alleges, prohibits it from polluting the Ohio River. Appellant asserted that its operation of the sewer system constitutes a discretionary function for which it is entitled to immunity.

{¶ 7} Appellees' memorandum contra appellant's supplemental summary judgment motion contended that appellant is not entitled to sovereign immunity with respect to appellees' negligent operation claim. Appellees argued that the operation of a sewer system is a ministerial act for which appellant has no immunity.

{¶ 8} On July 18, 2008, the trial court concluded that genuine issues of material fact remained regarding appellees' claim that appellant negligently maintained the sewer system. The court stated: "Because a failure to maintain sewer systems is a proprietary function from which [appellant] is not afforded immunity under R.C. 2744, [appellant's] motion for Summary Judgment is not well taken." The court further rejected appellant's claim that the statute of limitations bars appellees' claims and that appellees failed to properly plead their mandamus action. This appeal followed.

{¶ 9} Before we review the merits of appellant's assignments of error, we first must determine whether we have jurisdiction to do so. Appellate courts have jurisdiction to review the final orders of inferior courts within their districts. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2501.02. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed. See General Acc. Ins. Co. v. Ins. Co. of N. America (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266. In the event that the parties involved in the appeal do not raise this jurisdictional issue, an appellate court must raise it sua sponte. See Chef Italiano Corp. v. Kent State Univ. (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus; Whitaker-Merrell v. Geupel Co. (1972), 29 Ohio St.2d 184, 186, 280 N.E.2d 922.

{¶ 10} Ordinarily, a decision to deny a summary judgment motion is not a final order. See Celebrezze v. Netzley (1990), 51 Ohio St.3d 89, 90, 554 N.E.2d 1292. A trial court's order to deny a summary judgment motion on the basis of sovereign immunity, however, does constitute a final order. See R.C. 2744.02(C); Sullivan v. Anderson Twp., - Ohio St.3d -, 2009-Ohio-1971, - N.E.2d -, syllabus;¹ Hubbell v. Xenia,

¹ Although Sullivan unequivocally states that an order that denies a political subdivision the benefit of an alleged immunity is a final, appealable order without regard to compliance with Civ.R. 54(B), we question whether that holding should apply in a situation when multiple, intertwined immunity issues are involved and the trial court's order resolves only one. For example, in the case at bar appellant has two separate immunity arguments: (1) it is immune from liability regarding appellees' negligent maintenance claim; and (2) it is immune from liability regarding appellees' negligent operation claim. The trial court did not resolve both issues. If we read Sullivan literally, we are required to consider the one issue, even though the other remains unresolved. We are uncertain whether this is the intended result of Sullivan. It would seem to make better use of judicial, political subdivision, and litigant resources to consider all intertwined immunity issues at the same time, rather than in piecemeal appeals. The Ohio Supreme Court may have the opportunity in the future to clarify whether Sullivan applies to cases that involve multiple immunity issues.

115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, syllabus; CAC Bldg. Properties v. Cleveland, Cuyahoga App. No. 91991, 2009-Ohio-1786, at fn.1. R.C. 2744.02(C) explicitly states that an order denying "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." In the case sub judice, we first note that because the trial court's decision to deny appellant summary judgment on its statute of limitations defense does not deny appellant the benefit of R.C. Chapter 2744 immunity, there is no exception to the general rule that a denial of summary judgment is a non-final appealable order. Accordingly, we lack jurisdiction to consider the trial court's denial of summary judgment on the basis of appellant's statute of limitations defense. See CAC Bldg.; Carter v. Complete Gen. Constr. Co., Franklin App. No. 08AP-309, 2008-Ohio-6308, at ¶8 (concluding that denial of summary judgment on bases other than sovereign immunity not a final, appealable order).

{¶ 11} Second, although the trial court's summary judgment decision adjudicated appellees' negligent maintenance claim and mandamus claim, it did not adjudicate the negligent operation claim. Appellant argued that it was entitled to sovereign immunity regarding both the negligent maintenance claim and the negligent operation claim. The trial court's failure to adjudicate the negligent operation claim means that the trial court did not deny appellant immunity with respect to this claim. Without an order resolving the immunity issue on this claim, there can be no "final order" under R.C. 2744.02(C) for us to review. Accordingly, we lack jurisdiction to consider this argument.²

²At oral argument, appellee recognized that the trial court had not ruled on the negligent operation claim, but nevertheless requested that this court exercise its

{¶ 12} Third, with respect to appellees' negligent maintenance claim, we note that the trial court denied appellant immunity and we have jurisdiction to review the decision to deny appellant's summary judgment motion. Under R.C. 2744.02(C), therefore, this part of the trial court's order constitutes a final order that we may review.

At oral argument, however, both parties agreed that the trial court improperly focused upon and decided appellant's immunity regarding the negligent maintenance claim. Therefore, on this basis, we reverse the trial court's judgment and remand for further consideration of this issue along with the other issues heretofore mentioned.

{¶ 13} Accordingly, based upon the foregoing reasons, we hereby reverse the trial court's judgment and remand this matter for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND
CAUSE REMANDED FOR
FURTHER PROCEEDINGS.

authority to review summary judgments de novo and issue a judgment on that specific issue. Although we sympathize with the plight of the appellee landowners and appreciate their interest in resolving this controversy as quickly as practicable, we decline appellees' invitation to rule on the summary judgment in the first instance. In view of Murphy v. Reynoldsburg (1992), 65 Ohio St.3d 356, 360, 604 N.E.2d 138, the appellate courts should not be the first court to consider the summary judgment request. In Murphy the court stated: "A reviewing court, even though it must conduct its own examination of the record, has a different focus than the trial court. If the trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but, in effect, becomes a trial court." *Id.* Thus, if we, an appellate court, choose to decide the summary judgment motion rather than remand the matter to the trial court so that it may first consider and then rule on the issues, would mean that we would, in effect, be sitting as the trial court rather than a court reviewing the trial court's decision. See Bohl v. Travelers Ins. Group, Washington App. No. 03CA68, 2005-Ohio-963 (declining to consider issues raised in cross assignments of error when trial court had not addressed them); Farley v. Chamberlain, Washington App. No. 03CA48, 2004-Ohio-2771 (remanding matter to the trial court so that it, not appellate court, would first consider the issue). Thus, we believe that a remand on this issue is necessary.

JUDGMENT ENTRY

It is ordered that the judgment is hereby reversed and the cause remanded for further proceedings consistent with this opinion. Appellees and appellant shall equally share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Kline, P.J. & *Klatt, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

*Judge William A. Klatt, sitting by assignment of the Ohio Supreme Court in the Fourth Appellate District.