

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

James Pierce, et al., : Case Nos. 18CA4 & 18CA7
Plaintiffs-Appellees, :
v. : DECISION AND
The City of Gallipolis, : JUDGMENT ENTRY
Defendant-Appellant. : **RELEASED 9/23/2019**

APPEARANCES:

Adam R. Salisbury, Esq., Gallipolis City Solicitor, Gallipolis, Ohio, for appellant.

D. Joe Griffith and Brian W. Kelso, Dagger, Johnston, Miller, Ogilvie & Hampson, Lancaster, Ohio, for appellees.

Hess, J.

{¶1} This is the fourth appeal by the city of Gallipolis (the “City”) in connection with claims for negligence and nuisance asserted by James and Carol Pierce regarding the maintenance of a sewer line on their property. The first and second appeals involved decisions on pre-trial motions that denied the City the benefit of an alleged immunity from liability as provided in R.C. Chapter 2744 and were therefore subject to immediate appeal pursuant to R.C. 2744.02(C). *Pierce v. Gallipolis*, 2015-Ohio-2995, 39 N.E.3d 858, ¶ 1, fn. 1 (4th Dist.) (“*Pierce I*”); *Pierce v. Gallipolis*, 4th Dist. Gallia No. 16CA7, 2017-Ohio-546, ¶ 1, fn. 1 (“*Pierce II*”). During trial, the City filed its third appeal from an entry denying a motion for directed verdict it made at the close of the Pierces’ evidence, relying on R.C. 2744.02(C). The trial court concluded the entry was not a final, appealable order, continued with the trial, and consistent with the jury’s verdict,

issued a Judgment Entry on Verdict awarding the Pierces \$350,000. Subsequently, we dismissed the City's third appeal for lack of a final, appealable order. *Pierce v. Gallipolis*, 4th Dist. Gallia No. 18CA1, 2018-Ohio-1030, ¶ 2. ("*Pierce III*"). The trial court then issued a Judgment Entry on Post-Trial Motions. The City now appeals from the Judgment Entry on Verdict and Judgment Entry on Post-Trial Motions.

{¶2} At oral argument, we sua sponte raised the issue whether the trial court had jurisdiction to continue with the trial during the pendency of *Pierce III*. Having reviewed the parties' supplemental briefs on this issue, we conclude, in accordance with *State ex rel. Elec. Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149 ("*State ex rel. ECOT*"), that after the City perfected its third appeal, the trial court was divested of jurisdiction to continue with the trial during the pendency of the appeal, and its resultant orders are void. Accordingly, we vacate the Judgment Entry on Verdict and Judgment Entry on Post-Trial Motions, dismiss the present appeals for lack of a final, appealable order, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

{¶3} The Pierces filed a complaint against the City asserting claims for negligence and nuisance.¹ They alleged the City owned and operated a sewer line on their property, negligently failed to maintain the line, and as a result, the line cracked and released sewage water and effluent that caused "massive erosion" which led to "slippage and earth movement" that damaged their home on or about April 24, 2011. The complaint asserted that since that date, the property had been exposed to raw sewage and the home had become uninhabitable.

¹ They also asserted claims for personal injury and loss of consortium which they later dismissed.

{¶4} The City moved for summary judgment asserting immunity pursuant to R.C. Chapter 2744. The trial court denied the motion, the City appealed, and we affirmed in *Pierce I*. We held the allegations in the complaint regarding the initial landslip event “properly allege negligent maintenance” of sewer lines and that the Pierces “presented evidence that, if proven, would establish that [the City] negligently maintained the sewer lines near their residence” and “expose it to liability under R.C. 2744.02(B)(2).” *Pierce I*, 2015-Ohio-2995, 39 N.E.2d 858, at ¶ 25. We also held the Pierces “presented evidence that, if proven, would establish that [the City] negligently maintained the sewer lines near their residence even after the initial landslip event of April 2011” and “expose it to liability under R.C. 2744.02(B)(2).” *Id.* at ¶ 39. We noted the City did “not set forth a R.C. 2744.03(A) defense in the event it is liable under R.C. 2744.02(B).” *Id.* at ¶ 19, fn. 2.

{¶5} On remand, the City moved for judgment on the pleadings asserting R.C. 2744.02(B)(2) did not apply because it subjects a political subdivision to liability only for negligent acts, not negligent omissions as alleged by the Pierces. The trial court denied the motion, and the City appealed. We affirmed and issued an opinion, which did not receive the support of a majority of the court, concluding the law-of-the-case doctrine required denial of the motion. *Pierce II*, 4th Dist. Gallia No. 16CA7, 2017-Ohio-546, at ¶ 15.

{¶6} The matter proceeded to a jury trial, and after the Pierces’ presented their evidence, the City moved for a directed verdict. It argued that the evidence was insufficient to warrant a verdict for the Pierces, that its efforts to remedy the problem at the Pierce home involved the construction or reconstruction of a sewer system for which

it is immune, and that the Pierces failed to provide evidence showing “governmental immunity should not be reinstated pursuant to [R.C.] 2744.03(A)(5).” The court orally denied the motion, and the City requested the court journalize that decision so the City could appeal it. The court noted it would not normally journalize such a decision but did so. However, it rejected the claim that once the City filed its notice of appeal, the court would be divested of jurisdiction to proceed with the trial during the pendency of the appeal. The court determined that the decision denying a directed verdict was not a final, appealable order and stated that in the interest of judicial economy it “must move forward until * * * the Court of Appeals says otherwise.”

{¶7} Thus, after the City filed its notice of appeal, the court proceeded with the trial, and at the close of evidence, the City again moved for a directed verdict. The court denied the motion and the City’s request for jury instructions on governmental immunity. The jury returned a verdict in favor of the Pierces and awarded compensatory damages of \$300,000 for the negligence claim and \$50,000 for the nuisance claim. The Pierces moved for prejudgment interest, attorney fees, and payment of judgment pursuant to R.C. 2744.06.

{¶8} On February 6, 2018, the court issued a Judgment Entry on Verdict and entered judgment for the Pierces in the amount of \$350,000. Then, on February 27, 2018, we dismissed the appeal from the order denying the City’s first motion for a directed verdict due to lack of jurisdiction. *Pierce III*, 4th Dist. Gallia No. 18CA1, 2018-Ohio-1030, at ¶ 1-2. We held the order was not a final, appealable order because it did not deny the City the benefit of immunity but rather denied the City “a directed verdict on the underlying issue of negligence.” *Id.* at ¶ 2. We explained the immunity issue was

“fully determined” in *Pierce I*, *id.* at ¶ 13, and the City deprived itself of a R.C. 2744.03(A)(5) defense “by failing to raise it in the context of *Pierce I*,” *id.* at ¶ 17.

{¶9} The City then appealed the Judgment Entry on Verdict in Gallia App. No. 18CA4 and moved for judgment notwithstanding the verdict (“JNOV”) asserting the maximum damages the Pierces could receive was \$165,000, i.e., the value of their real estate. On June 1, 2018, the trial court issued a Judgment Entry on Post-Trial Motions in which it denied the motions for prejudgment interest and attorney fees, granted the motion for payment of judgment, and granted in part and denied in part the motion for JNOV, reducing the verdict from \$350,000 to \$275,000. The City appealed this entry in Gallia App. No. 18CA7, and we sua sponte consolidated Gallia App. No. 18CA4 and 18CA7.

II. ASSIGNMENTS OF ERROR

{¶10} The City assigns the following errors for our review:

1. The Trial Court erred in failing to grant Appellant’s motion for directed verdict for reinstatement of governmental immunity pursuant to [R.C.] 2744.03(A)(5).
2. The Trial Court erred in failing to include Appellant’s proposed jury instructions regarding reinstatement of governmental immunity pursuant to [R.C.] 2744.03(A)(5) in the final jury instructions.
3. The Trial Court erred in failing to grant Appellant’s motion for directed verdict as to Plaintiffs’ alleged moving and rental damages.
4. The Trial Court erred in failing to grant Appellant’s post-trial motion to reduce the jury award to the maximum value of the Plaintiffs’ residence.

III. JURISDICTION OF THE TRIAL COURT

{¶11} At oral argument, we sua sponte raised the issue whether the trial court had jurisdiction to continue with the trial during the pendency of *Pierce III*. We

instructed the parties to file supplemental briefs on this issue and to specifically address the Supreme Court of Ohio's decision in *State ex rel. ECOT*. The City urges us to apply *State ex rel. ECOT* and conclude the trial court lacked jurisdiction to continue with the trial during the pendency of *Pierce III*. The Pierces argue that *State ex rel. ECOT* is factually distinguishable from this case, that the entry denying the first motion for a directed verdict "was clearly an interlocutory order that was not appealable," and that the "vast majority of jurisdictions" hold that a "premature notice of appeal does not divest the trial court of jurisdiction over the merits of a case." The Pierces assert that a holding that the trial court lost jurisdiction under these circumstances "would be a disastrous precedent for the administration of justice." They predict that "no jury trial would be safe from being able to proceed to conclusion as any litigant who was not happy with any particular decision from the trial judge, or the composition of a jury for that matter could file an appeal for nearly any reason which would stop the jury trial until such time as the court of appeals ruled on the appellate issue."

{¶12} In *State ex rel. ECOT*, Supportive Solutions Training Academy, L.L.C. filed suit against Electronic Classroom of Tomorrow ("ECOT") and others in common pleas court. *State ex rel. ECOT*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, at ¶ 4. In a motion for partial summary judgment, ECOT raised the affirmative defense of political subdivision immunity for the first time. *Id.* at ¶ 5. Supportive Solutions claimed ECOT waived this defense by not asserting it in ECOT's answer. *Id.* ECOT moved for leave to file an amended answer, and the trial court denied the motion in a journalized entry. *Id.* ECOT appealed, and during the pendency of that appeal, the trial proceeded before another judge who denied ECOT's motion to limit the evidence to matters not

currently under the jurisdiction of the court of appeals. *Id.* at ¶ 6. The jury returned a verdict for Supportive Solutions, and the trial court entered a judgment reflecting that verdict. *Id.* at ¶ 7. ECOT appealed the judgment, and the trial court denied its motion for a stay of execution. *Id.* ECOT then moved the appellate court for a stay, which it granted conditioned on the posting of a supersedeas bond. *Id.* at ¶ 8. The same day, the appellate court dismissed ECOT's appeal from the denial of the motion for leave to file an amended answer for lack of a final, appealable order. *Id.* ECOT then filed an action in the Supreme Court of Ohio asserting portions of the trial court's judgment were invalid because they were entered while its appeal from the denial of the motion for leave was pending. *Id.* at ¶ 12. ECOT sought a writ of prohibition to prevent the trial court and judges from enforcing those portions of the judgment and a writ of mandamus compelling them to vacate those portions of the judgment and stay the remaining judgment without bond pending appeal. *Id.* at ¶ 1, 9.

{¶13} In granting the requested writs, the Supreme Court explained:

“[W]e have consistently held that once an appeal is perfected, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment.” *State ex rel. Rock v. School Emp. Retirement Bd.*, 96 Ohio St.3d 206, 2002-Ohio-3957, 772 N.E.2d 1197, ¶ 8.

When ECOT appealed from Judge Suster's denial of its motion for leave to file an amended answer to raise the affirmative defense of political-subdivision immunity, the common pleas court and its judges lacked authority to proceed with the trial of any claims that might be subject to ECOT's immunity defense because those claims were within the appellate court's jurisdiction on review. * * * Judge Sweeney, however, proceeded with the jury trial on all the pending claims, including those that could be affected by ECOT's appeal, e.g., Supportive Solutions' claims for breach of implied contract and for negligent misrepresentation.

It is true that the court of appeals has now dismissed ECOT's appeal from the denial of its motion for leave to file an amended answer

for lack of a final, appealable order and that the jurisdictional bar of a pending appeal does not apply when the appeal is no longer pending. See *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 12-13. But the common pleas court acted *while the appeal was pending* by conducting a jury trial on the affected claims and entering judgment on the jury verdict; the court did not wait for the court of appeals to resolve the appeal before it proceeded.

Moreover, the mere fact that ECOT perfected the appeal from an order that the court of appeals ultimately determined not to be a final, appealable order did not confer authority on the trial court to proceed on those claims that could be affected while the appeal was pending. “[T]he determination as to the appropriateness of an appeal lies solely with the appellate court,” and a trial court judge’s opinion that the order appealed from is not a final, appealable order does not alter the fact that the filing of the notice of appeal divests the trial court of jurisdiction to proceed with the adjudication during the pendency of the appeal. *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 10-11; see also *In re Terrance P.* (1997), 124 Ohio App.3d 487, 489, 706 N.E.2d 801 (“the trial court does not have any jurisdiction to consider whether the person has validly invoked the jurisdiction of the appellate court”).

Furthermore, the common pleas court and judges’ reliance on the statement in *Everhart*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 14, that “a premature notice of appeal under App.R. 4(C) does not divest the trial court of jurisdiction to proceed because the appeal has not yet been perfected,” is misplaced. The quote refers to a notice of appeal filed “after the announcement of a decision, order, or sentence but before the entry of the judgment or order.” *Id.*; see App.R. 4(C). The appeal in *Everhart* was from *an oral decision and not from a decision journalized on the record*. *Everhart* at ¶ 2, 4. ECOT’s appeal was not from an oral decision but from a journalized order. Nothing in *Everhart* overruled our decision in *S.J.* precluding a trial court from usurping a court of appeals’ exclusive authority to determine whether a journalized order that has been appealed constitutes a final, appealable order.

Therefore, consistent with longstanding precedent, the common pleas court and judges patently and unambiguously lacked jurisdiction to proceed on all the claims against ECOT that were affected by its appeal, i.e., all the claims except for breach of express contract. * * * Accordingly, ECOT is entitled to a writ of prohibition to prevent the common pleas court and judges from enforcing those portions of the judgment against it finding it liable for breach of implied contract and negligent misrepresentation and assessing damages on those claims and to a writ of mandamus to compel the court and judges to vacate those portions of the judgment.

(Alterations sic; first emphasis in original; second emphasis added.) *Id.* at ¶ 13-18.

{¶14} *State ex rel. ECOT* is dispositive of this appeal, and based on it, we conclude the trial court lacked jurisdiction to continue with the trial on the Pierces' claims during the pendency of *Pierce III*. The fact that *State ex rel. ECOT* involved a notice of appeal filed prior to trial and this case involves a notice of appeal filed during trial is a distinction without a difference given the Supreme Court of Ohio's unequivocal holding that " 'once an appeal is perfected, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment.' " *Id.* at ¶ 13, quoting *State ex rel. Rock v. School Emps. Retirement Bd.*, 96 Ohio St.3d 206, 2002-Ohio-3957, 772 N.E.2d 1197, ¶ 8. Once the City perfected its appeal from the denial of its first motion for a directed verdict, the trial court lacked authority to proceed with the trial of the Pierces' claims, which were the subject of that motion and therefore within our jurisdiction on review. Nonetheless, as in *State ex rel. ECOT*, the trial court acted while the appeal was pending by "conducting a jury trial on the affected claims and entering judgment on the jury verdict." *Id.* at ¶ 15. And as in *State ex rel. ECOT*, the fact that the City perfected its appeal from an order this court "ultimately determined not to be a final, appealable order did not confer authority on the trial court to proceed on those claims that could be affected while the appeal was pending." *Id.* at ¶ 16. The trial court judge's opinion that the order appealed from was not a final, appealable order did not alter the fact that the filing of the notice of appeal divested "the trial court of jurisdiction to proceed with the adjudication during the pendency of the appeal." *Id.* This court had the "exclusive authority" to

determine whether the journalized order denying the first motion for a directed verdict constituted a final, appealable order. *Id.* at ¶ 17.

{¶15} Although the Pierces direct this court to caselaw from other jurisdictions to support their position and raise concerns about judicial economy and the potential for abuse of a holding that the trial court was divested of jurisdiction in this case, “[t]rial courts and intermediate courts of appeals are bound by and must follow decisions of the Ohio Supreme Court.” *State v. Cox*, 4th Dist. Adams No. 02CA751, 2003-Ohio-1935, ¶ 12. Moreover, we are not convinced that today’s decision will lead to the abuse predicted by the Pierces. A notice of appeal from an oral decision made during trial would not divest a trial court of jurisdiction. *See State ex rel. ECOT*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, at ¶ 17, citing *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 2, 4, 14. In addition, litigants and their lawyers have incentives to not intentionally delay a pending trial by filing a frivolous interlocutory appeal from a journalized order. For example, App.R. 23 authorizes an appellate court to order an appellant who files a frivolous appeal “to pay reasonable expenses of the appellee including attorney fees and costs.” In addition, Prof.Cond.R. 3.1 states that a lawyer shall not bring a proceeding or assert an issue in a proceeding “unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.” A violation of this rule constitutes professional misconduct and subjects an attorney to discipline. *See Prof.Cond.R. 8.4(a); Gov.Bar. R. V(12)(A) and V(35)(J).*

{¶16} The present case is an outlier. A party, believing it had an immediate right to appeal a decision made during trial pursuant to R.C. 2744.02(C), persuaded a trial

court to journalize a decision the court ordinarily would have made only orally. Even though the party then perfected an appeal from the journalized decision, the trial proceeded and concluded before this court resolved the appeal.

{¶17} For the foregoing reasons, we conclude the trial court was divested of jurisdiction to continue with the jury trial after the City filed its notice of appeal in *Pierce III*. “If a trial court improperly exercises jurisdiction while an appeal is pending, any resultant orders are void.” *Redmond v. Wade*, 4th Dist. Lawrence No. 16CA25, 2017-Ohio-7192, ¶ 8, citing *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 15. Thus, the February 6, 2018 Judgment Entry on Verdict is void, as is the related June 1, 2018 Judgment Entry on Post-Trial Motions. We vacate those judgments, dismiss the present appeals for lack of a final, appealable order, and remand this matter to the trial court for further proceedings consistent with this opinion.

JUDGMENTS VACATED,
APPEALS DISMISSED,
AND CAUSE REMANDED.

Abele, J., dissenting:

{¶18} I respectfully dissent. The principal opinion concludes that the Supreme Court of Ohio's pronouncement in *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149 (ECOT) is dispositive in the case sub judice. Although this view is well-reasoned, I believe that the scenario before us dictates a different result.

{¶19} As the principal opinion points out, this is the City of Gallipolis' (City) FOURTH appeal in its quest to prevent the plaintiffs-homeowners from recovering damages for the April 2011 extensive harm caused to their home due to the City's failure to maintain a sewer line. The first two appeals, from a Civ.R. 56 summary judgment motion and a Civ.R. 12(C) motion for judgment on the pleadings, asserted that the City is entitled to governmental immunity and, thus, entitled to the immediate appeal of an adverse ruling. See R.C. 2744.02(C). Usually, the denial of a pre-trial motion will not constitute a final appealable order. However, this special statutory provision allows for an immediate appeal. One benefit of providing this avenue for an immediate appeal of a judgment that denies governmental immunity is to minimize the expense for all litigants. Unfortunately, the reverse is true in this particular case. Here, the City's multiple appeals in this bottomless chasm of litigation appears to have served no purpose other than to delay this proceeding and dramatically increase the expenses involved in the pursuit of this claim.

{¶20} At this juncture, the central issue is whether the trial court lost jurisdiction during the jury trial when the City attempted to appeal the court's denial of the Civ.R. 50(A) motion for a directed verdict made at the close of the plaintiffs' evidence. Unlike

the principal opinion, I do not believe that the trial court lost jurisdiction in this matter. Instead, based upon the reasons set forth below, I believe that the court acted properly by proceeding with the jury trial to its conclusion.

{¶21} First, I do not believe that the trial court's denial of the motion for a directed verdict actually denied the City the benefits of governmental immunity. Rather, much like the City's second appeal, this ruling addressed the underlying issue of negligence. Thus, because the immunity issue had been previously resolved, the R.C. 2744.02(C) procedure for an immediate appeal should not apply. See *Pierce v. City of Gallipolis*, 4th Dist. Gallia No. 18CA1, 2018-Ohio-1030. In contrast, it appears that the ECOT appeal (1) involved a pre-trial matter (request to amend answer) that related to a governmental immunity issue, and (2) occurred prior to a jury trial, not during a lengthy trial after the plaintiff had fully presented its case.

{¶22} Second, in the case at bar the City filed its notice of appeal after the trial court had denied the City's request for a directed verdict at the close of the plaintiffs's evidence. Obviously, the City could have appealed this issue after the trial's conclusion. Generally, the denial of a motion for a directed verdict is not final and appealable at the time of the denial, but rather constitutes an interlocutory order that merges into the final judgment and may be appealed after the final judgment is rendered. See R.C. 2505.02; *Colvin v. Abbey's Restaurant, Inc.*, 85 Ohio St.3d 535, 1999-Ohio-286, 709 N.E.2d 1156; *Breech v. Liberty Mutual Fire Ins. Co.*, 5th Dist. Stark No. 2017CA12, 2017-Ohio-9211, 101 N.E.3d 1199; *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, 866 N.E.2d 547 (2nd Dist.). In the case at bar, the premature notice of appeal, regarding the interlocutory order, did not divest the trial court of jurisdiction to proceed to final

judgment. The premature filing of a notice of appeal from a nonappealable order should not divest a court of jurisdiction to proceed with the case to final resolution.

{¶23} Therefore, in my view, after the trial court overruled the City's motion for a directed verdict the court acted appropriately and proceeded with the jury trial until final judgment. At that point, the City could appeal any issue that it deemed appropriate.

{¶24} Consequently, because I believe that the appeal of the trial court's judgment is properly before this appellate court, we should review the merits of the assignments of error, issue a decision and judgment and help to bring this eight year ordeal to a close.

JUDGMENT ENTRY

It is ordered that the JUDGMENTS ARE VACATED, that the APPEALS ARE DISMISSED, and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

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

McFarland, J.: Concurs in Judgment and Opinion.

Abele, J.: Dissents with Opinion.

For the Court

BY: _____
Michael D. Hess, 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.