[Cite as *Mandusky v. Woodridge Local School Dist.*, 2009-Ohio-6943.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
JEFFERY A. MANDUSKY, et al. Appellees v. WOODRIDGE LOCAL SCHOOL DISTRICT, et al. Appellants	C. A. No. 24787 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2007 07 5077

DECISION AND JOURNAL ENTRY

Dated: December 31, 2009

BELFANCE, Judge.

{¶1} Defendant-Appellant Woodridge Local School District ("Woodridge") appeals the denial of its renewed motion for summary judgment based upon sovereign immunity by the Summit County Court of Common Pleas. For reasons set forth below we do not reach the merits of Woodridge's appeal.

FACTS

{¶2} Beginning in 2005, Woodridge began construction to expand and improve the athletic facilities of Woodridge High School. These improvements included renovations to the stadium and football field, construction of a parking lot and soccer field, as well as the construction of a retention basin. Defendants Architectural Vision Group ("AVG") and Mayfield Engineering and Construction Management ("Mayfield Engineering") were involved in the improvements. Woodridge High School is adjacent to the property owned by Plaintiffs-

Appellees Jeffrey Mandusky, Linda Mandusky, and Velma Lawrence. Runoff from Woodridge's retention basin drains into the Plaintiffs' pond.

{¶3} In July 2007, Plaintiffs filed a complaint against Woodridge, AVG, and Mayfield Engineering. Plaintiffs' complaint contains five claims for (1) continuing trespass; (2) continuing nuisance; (3) strict liability; (4) disparagement of title; and (5) equitable relief. Essentially Plaintiffs allege that Woodridge, through the retention basin, "has repeatedly discharged surface water runoff contaminated with sediment, untreated human waste and other pollutants into the pond located on Plaintiffs' premises[]" resulting in damage to the property and to the value of their property. Much of the language of the complaint focuses on allegations concerning the design and construction of the basin; however, Plaintiffs also assert in their complaint that that the discharge of the polluted water began during construction and subsequently continued. Plaintiffs sought compensatory damages against all Defendants, punitive damages against Woodridge, interest, attorney fees, and an injunction against Woodridge. In its answer, Woodridge asserted an affirmative defense of immunity. Subsequently Woodridge filed a third party complaint against Seitz Builders, Inc. ("Seitz").

{¶4} Woodridge initially filed for summary judgment against Plaintiffs as to all claims in April 2008. Woodridge argued that it was immune from suit pursuant to R.C. 2744. Woodridge also argued that Plaintiffs' disparagement of title claim failed as a matter of law. Plaintiffs responded in opposition. Both a reply and surreply were filed. On September 2, 2008, the trial court concluded that the retention basin constitutes part of a sewer system and that Plaintiffs' complaint alleged both that the basin was negligently designed and constructed, a governmental function, as well as negligently operated and maintained, a proprietary function. Thus, the court concluded that the Plaintiffs were not prohibited from arguing negligent

operation and maintenance of the basin. However, the trial court found that as Woodridge had not presented expert testimony evidencing that the basin was functioning appropriately and thus, "an issue remain[ed] as to whether the cause of the contaminants was the negligent design or negligent maintenance of the retention basin, and thus ultimately whether damage to the pond resulted from a governmental or proprietary function." Therefore, to the extent the Plaintiffs' complaint alleged negligent maintenance of the basin, the court denied Woodridge's motion for summary judgment. Nonetheless, the trial court did grant Woodridge's motion for summary judgment with respect to Plaintiffs' claims for punitive damage and disparagement of title. Woodridge did not appeal from the trial court's denial.

{¶5} In November 2008, without leave of court, Woodridge filed a pleading it captioned "renewed motion for summary judgment" again arguing that it is immune from suit. Plaintiffs responded in opposition and Woodridge replied. Both parties submitted expert testimony. On May 28, 2009, the trial court denied Woodridge's motion concluding that:

> "genuine issues of factual dispute remain as to whether [Woodridge] was negligent in its maintenance of the retention basin. In the event that [Woodridge] was negligent in maintaining the basin, there remains a genuine issue of factual dispute as to whether [Woodridge's] maintenance of the basin constitutes the exercise of discretionary judgment. Further, if [Woodridge] was in fact exercising discretionary judgment, there remains an issue as to whether [Woodridge's] conduct was reckless."

{¶6} Woodridge has appealed the denial of its motion for summary judgment raising one assignment of error for our review. Woodridge argues that the trial court erred in denying it the benefit of immunity.

ANALYSIS

{¶7} We begin by noting that "when 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)." *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, at ¶2. The Supreme Court reaffirmed and expanded this holding in *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, at syllabus, when it concluded that "R.C. 2744.02(C) permits a political subdivision to appeal a trial court order that denies it the benefit of an alleged immunity from liability under R.C. Chapter 2744, even when the order makes no determination pursuant to Civ.R. 54(B)."

{¶8} Woodridge first filed for summary judgment on the basis of immunity in April 2008. On September 2, 2008, the trial court denied in part and granted in part Woodridge's motion. The trial court specifically stated that "the Plaintiffs are not prohibited from arguing that the damage to their pond resulted [from] the negligent maintenance of the basin." Thus, the trial court did deny Woodridge the benefit of immunity, and therefore that order of the trial court was immediately appealable. See *Hubbell* at ¶2. Given that *Hubbell* was decided nearly a year before the trial court issued its ruling on Woodridge's motion for summary judgment, it is reasonable to conclude that Woodridge was aware of its ability to appeal the trial court's ruling. Woodridge chose not to appeal, thus waiving the right to appeal any alleged error in that entry. See, e.g., *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶9, quoting *United States v. Olano* (1993), 507 U.S. 725, 733. ("[W]aiver is the 'intentional relinquishment or abandonment of a known right.'"). Therefore, Woodridge was bound by the trial court's decision determining that there was a genuine issue of material fact with respect to whether Woodridge was immune.

{¶9} Further, we conclude that Woodridge's "renewed" motion for summary judgment was in fact an improper motion for reconsideration. "Generally, the denial of summary judgment

is not a final, appealable order." *Hubbell* at ¶9. "In order to obtain relief from a non-final order, a party may file a motion for reconsideration with the trial court." *Flood Co. v. St. Paul Fire & Marine Ins. Co.*, 9th Dist. Nos. 21679, 21683, 2004-Ohio-1599, at ¶8. However, here, the trial court's initial September 2, 2008 ruling on Woodridge's motion for summary judgment denied it the benefit of immunity and thus that order was final and appealable. See *Hubbell* at ¶2; *Sullivan* at syllabus. Woodridge did not timely appeal the trial court's final order.

{¶10} Final orders are not subject to motions for reconsideration. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 379, fn. 1; *Countrywide Home Loans, Inc. v. Hannaford*, 9th Dist. No. 22000, 2004-Ohio-4317, at ¶16. While Woodridge's second motion for summary judgment was titled as a "renewed" motion for summary judgment, it was in fact a motion for reconsideration. This is underscored by the fact that Woodridge presented additional evidence in an attempt to convince the trial court that there were no genuine issues of material fact, thereby entitling it to the benefit of immunity; Woodridge was thus essentially reasserting its prior argument that it was immune due to the absence of a factual dispute, an argument the trial court already rejected in its September 2, 2008 final, appealable order. Thus, Woodridge's "renewed" motion for summary judgment was a nullity, id., as was the trial court's entry addressing that motion. See, e.g., *Dunkle v. Kinsey* (Oct. 17, 2001), 9th Dist. No. 20502, at *2. As the entry Woodridge attempts to appeal from is a nullity, we are without jurisdiction to hear this appeal. Id.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE. V. BELFANCE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

DOUG SHEVELOW, VLADIMIR P. BELO, and JACK ROSATI, JR., Attorneys at Law, for Appellants.

JOHN C. PIERSON, Attorney at Law, for Appellees.