

Nos. 2018-0213 & 2018-0189

In the Supreme Court of Ohio

NEW RIEGEL LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,

Plaintiffs-Appellees,

v.

THE BUEHRER GROUP ARCHITECTURE & ENGINEERING, INC., et al.,

Defendants-Appellants.

DISCRETIONARY APPEAL FROM THE THIRD APPELLATE DISTRICT,
SENECA COUNTY, APP. NO. 13-17-06
(CONSOLIDATED WITH 13-17-03, 13-17-04, 13-17-05)

**JOINT BRIEF IN OPPOSITION TO PLAINTIFF-APPELLEE'S MOTION FOR
RECONSIDERATION BY DEFENDANTS-APPELLANTS CHARLES
CONSTRUCTION SERVICES, INC. & OHIO FARMERS INSURANCE COMPANY**

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MEMORANDUM IN OPPOSITION

Appellee New Riegel Local School District Board of Education (“New Riegel”) requests that this Court reconsider its decision of July 17, 2019, in which it correctly determined that Ohio’s construction statute of repose applies to claims sounding in contract as well as in tort. This Court also remanded the case to the Third District Court of Appeals to address the argument raised by New Riegel that was not encompassed within the propositions of law presented to this Court—specifically, that even if R.C. 2305.131 applies to claims sounding in contract, the statute of repose does not bar its claims because the statute does not limit commencement of an action once a claim has accrued within ten years. New Riegel seeks reconsideration on the limited issue of the destination of the remand, arguing that these consolidated cases should be remanded to the Seneca County Court of Common Pleas rather than to the Third District Court of Appeals. However, a remand to the appellate court is appropriate in this case because the trial court has already considered the issue being remanded, and the issue is subject to a de novo review.

New Riegel contends that this case should be remanded to the trial court because the trial court’s function cannot be replaced by an independent review by the appellate court. Here, one of two things is true: Either New Riegel raised the argument in question to the trial court, or it did not.

In fact, New Riegel did raise its argument to the trial court related to whether its breach of contract claim accrued within the applicable ten-year period as part of the briefing on the 12(C) motions. As a non-exhaustive example, in its “Memorandum in Opposition of Plaintiff Charles Construction Services, Inc.’s Motion for Judgment on the Pleadings on Second Amended Complaint” [sic], New Riegel argued that “there is no dispute that the alleged breach

of contract occurred when the building was defectively construed, well within the ten year window set forth in R.C. 2305.131(A)(1). Thus, the statute of repose is inapplicable.” *Id.* at p. 3. Because the trial court has already considered this issue in the first instance, and the issue is subject to a de novo review, a remand to the court of appeals promotes judicial economy by avoiding duplicative litigation. Counsel and clients should be spared the time and expense to re-argue this issue in the trial court.

Insofar as New Riegel now contends that the case should be remanded to the trial court because New Riegel did not raise those issues in the trial court, New Riegel waived those arguments and cannot raise them now, for the first time, in the trial court. In short, remanding to the trial court accomplishes nothing, aside from drawing out the proceedings.

Further, the cases cited by New Riegel in support of its argument are simply inapplicable to the appellate court’s review of a motion for judgment on the pleadings pursuant to Civ.R. 12(C); these cases fail to establish that a remand to the trial court is necessary in the present case. In *Murphy v. Reynoldsburg*, 65 Ohio St.3d 365, 604 N.E.2d 138 (1992), this Court determined that even though the trial court’s disposition of a motion for summary judgment is reviewed de novo on appeal, Civ.R. 56(C) “imposes an absolute duty upon the trial court to read and consider all pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact when ruling on a motion for summary judgment.” *Id.* at 359. Accordingly, where the trial court explicitly states that it has not considered briefing or exhibits submitted in support of and in opposition to a motion for summary judgment, the failure to comply with the mandates of Civ.R. 56(C) is reversible error. *Id.* at 360; *see also Risner v. Ohio Dept. of Natural Resources*, 6th Dist. Huron No. H-13-009, 2013-Ohio-5902, ¶ 26 (“We stress that because the trial court expressly declined to address the constitutional issues

before it [through a motion for summary judgment], the merits of those issues are not properly before us in the context of this appeal.”).

First, the present matter involves review of a motion for judgment on the pleadings filed pursuant to Civ.R. 12(C) and not a motion for summary judgment filed pursuant to Civ.R. 56(C). The main problem that arises when an appellate court reviews an issue raised in a motion for summary judgment which the trial court *expressly declined* to consider is that the trial court forgoes its obligations under Civ.R. 56(C). However, even in the context of a motion for summary judgment, because the appellate court applies the same standard of review as the trial court it “‘must affirm the trial court’s judgment if any valid grounds are found on appeal to support it, even if the trial court failed to consider those grounds.’” *Reo v. Allegiance Administrators LLC*, 11th Dist. Lake No. 2017-L-112, 2018-Ohio-2464, ¶ 25, quoting *Coventry Twp. V. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist. 1995). Civ.R. 12(C) does not impose the same “absolute duty” as Civ.R. 56(C). Further, in this case, the trial court did not expressly decline to consider the issue of whether New Riegel’s claim accrued within the ten-year period under R.C. 2305.131.

New Riegel also relies on *Stotts v. Stotts*, 4th Dist. Athens No. 16CA14, 2017-Ohio-5738 and *Utlely v. M.T. Automotive, Inc.*, 9th Dist. Summit Nos. 24482 & 24483, 2009-Ohio-5161. In *Stotts*, the trial court’s judgment entry made clear that it did not consider the plaintiff’s opposition to the defendant’s objections to the magistrate’s decision. *Id.* at ¶ 15. *Utlely* involved a bench trial where the trial court erroneously believed that it was bound by certain precedent involving a debatable legal issue. *Id.* at ¶¶ 16-17. The Ninth District Court of Appeals determined that it was not clear to what extent the trial court’s decision was impacted by that belief and remanded for the trial court to make its own determination on the legal issue. *Id.* at

¶ 17. In this case, there is no reason to believe that the trial court failed to consider any of the briefing on the 12(C) motions. Further, it is not necessary to remand for the trial court to apply its independent judgment because the trial court has already considered the issue of the accrual of New Riegel's breach of contract claim.

This Court should not reconsider its decision to remand this case to the appellate court rather than to the trial court. The trial court has already considered the issue, and a remand to the trial court would only result in duplicative effort and expense by counsel and the parties. Further, because a motion for judgment on the pleadings is reviewed de novo, the appellate court conducts an independent review and does not give deference to the trial court's judgment. Thus, review by the appellate court is independent of the trial court's decision. There is no benefit (except further delay and the waste of scarce judicial resources) from beginning the process again at the trial court level. This Court should not reconsider its correct determination to remand this matter to the Third District Court of Appeals. New Riegel's motion for reconsideration should be denied.

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CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R.3.11(C), a copy of the foregoing Defendant-Appellant Charles Construction Services, Inc.'s Opposition to New Riegel's Motion for Reconsideration was served upon the following by email on the 7th day of August, 2019:

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