

[Cite as *Murgu v. Lakewood City School Dist. Bd. of Edn.*, 2018-Ohio-4643.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105699

VIOREL MURGU, ET AL.

PLAINTIFFS-APPELLEES

vs.

**LAKWOOD CITY SCHOOL DISTRICT,
BOARD OF EDUCATION**

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-856093

BEFORE: Laster Mays, J., E.T. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: November 15, 2018

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ON RECONSIDERATION¹

ANITA LASTER MAYS, J.:

{¶1} After reconsideration, the opinion as announced by this court on April 26, 2018, *Murgu v. Lakewood City School Dist.*, 8th Dist. Cuyahoga No. 105699, 2018-Ohio-1636, is hereby vacated and substituted with this opinion.

{¶2} Defendant-appellant Lakewood City School District, Board of Education (“Lakewood”), appeals the trial court’s decision denying their motion for leave to file a new

¹ The original announcement of decision *Murgu v. Lakewood City School Dist., Bd. of Edn.*, 8th Dist. Cuyahoga No. 105699, 2018-Ohio-1636, released on April 26, 2017, is hereby vacated. This opinion, issued upon reconsideration, is the court’s journalized decision in this appeal. See App.R. 22(C); see also S.Ct.Prac.R. 7.01.

motion for summary judgment. Lakewood asks this court to remand this matter to the trial court with instructions to grant Lakewood leave to pursue its political subdivision immunity defense through a motion for summary judgment. After review of the record, we affirm.

I. Procedural History

{¶3} On December 21, 2015, plaintiffs-appellees Viorel and Marianne Murgu (“the Murgus”) filed a complaint against Lakewood after their minor daughter, A.M., fell through an auditorium stage floor at Lakewood High School. Lakewood filed its answer denying all of the Murgus’s allegations and raised its political subdivision immunity defense. Then Lakewood filed a motion for summary judgment, but did not assert its political subdivision immunity defense in the motion, but rather an argument based on premises liability. After the Murgus filed their brief in opposition to Lakewood’s motion for summary judgment, Lakewood filed, without leave of the court, a sur-reply arguing immunity. The Murgus filed a motion to strike Lakewood’s sur-reply, and the trial court granted the motion. Next, Lakewood filed a motion for leave to file supplement and sur-reply brief in order to assert the political subdivision immunity defense. The trial court issued a journal entry denying Lakewood’s motion and granted the Murgus’s motion to strike Lakewood’s supplement to its motion for summary judgment and sur-reply. Lakewood then filed a motion for leave to file a motion for summary judgment on political subdivision immunity.

{¶4} The trial court did not rule on Lakewood’s motion for leave to file a motion for summary judgment on political subdivision immunity. Instead, on October 18, 2016, the trial court granted Lakewood’s motion for stay and ordered that Lakewood’s motion for leave to file a motion for summary judgment on political subdivision immunity be held in abeyance until this court made a determination on Lakewood’s appeal. Lakewood filed an appeal with this court,

on October 6, 2016, arguing that the trial court abused its discretion in disallowing Lakewood from presenting its political subdivision immunity defense in summary judgment proceedings.

The Murgus requested that this court dismiss the appeal. This court, in its journal entry, stated,

Motion by appellee to dismiss appeal is granted. A motion for summary judgment based on sovereign immunity is pending before the trial court. In light of the Ohio Supreme Court's decision in *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, the trial court's resolution regarding sovereign immunity is necessary.

Journal Entry No. 503338 (Jan. 18, 2017).

{¶5} On April 4, 2017, the trial court denied Lakewood's motion for summary judgment stating that "genuine issues of material fact exist and the moving party is not entitled to judgment as a matter of law." The trial court also denied Lakewood's motion for leave to file a motion for summary judgment on political subdivision immunity. In the journal entry, the trial court stated that "affirmative defenses will be addressed at trial based on evidence presented. Defendant's motion is out of rule."

II. Facts

{¶6} On December 7, 2011, A.M. participated in a school band assembly at Lakewood Civic Auditorium at Lakewood High School. As A.M. walked toward her seat, she stepped through a trap door on the stage floor with her right leg up to her hip and sustained permanent injury. When Lakewood employees inspected the trap door, they discovered that a small piece of wood was missing from the trap door.

{¶7} On August 12, 2014, the deposition of Patricia Hendy ("Hendy"), the full-time auditorium manager of Lakewood City Schools, occurred, and Hendy gave her sworn testimony about altering the stage, specifically the trap door prior to A.M.'s fall. Hendy stated that she and the assistant manager, William Langenhop ("Langenhop") were concerned about the

auditorium stage floor, specifically the trap doors that would slightly give as “things were rolling across it.” Hendy testified that she and Langenhop put a piece of plywood under the trap door to keep the pieces all together and from sliding.

{¶8} Langenhop echoed Hendy’s testimony when he testified that he and Hendy put pieces underneath the trap door to bring the hole up all the way to floor level, “so that if it did flip or fall, you couldn’t fall farther than that half inch, inch down.” Both Langenhop and Hendy testified that they altered the stage floor to make it safer, and they were concerned that they observed the trap door slightly giving. They “assessed different ideas, again with the concern of the heavier and heavier equipment” being rolled across the stage floor.

{¶9} As a result of A.M.’s injuries, the Murgus filed a complaint against Lakewood. The trial court ruled against Lakewood, denying their summary judgment motion. As a result, Lakewood filed this appeal and argues one assignment of error for our review:

- I. The trial court abused its discretion in disallowing defendant-appellant Lakewood City School District, Board of Education from presenting its political subdivision immunity defense in summary judgment proceedings.

III. Resolution of Affirmative Defenses

{¶10} Lakewood argues three issues within one assignment of error, that we need to address. The first issue is that the trial court abused its discretion by not allowing them to present its political subdivision immunity defense in summary judgment proceedings. The second issue is that the trial court, by not allowing Lakewood leave to file a motion for summary judgment on political subdivision immunity, abused its discretion by not resolving its right to political subdivision immunity in summary judgment proceedings so as to avoid an unnecessary and costly trial, thereby denying Lakewood the benefit of immunity. (Appellant’s motion for reconsideration brief, pg. 3, and Appellant’s merit brief, pgs. 9-13.) The third issue is that the trial court abused its discretion by ignoring our original order that the trial court’s “resolution regarding sovereign immunity is necessary,” and the trial court’s decision to address affirmative defenses at trial based on evidence presented is in error. (Appellant’s merit brief, pg. 10, and Appellant’s motion for reconsideration brief, pg. 3.)

{¶11} “An abuse of discretion implies that the trial court’s attitude is unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

A. Summary Judgment Proceedings and Immunity

{¶12} Lakewood argues that the trial court abused its discretion by not allowing them to present its political subdivision immunity defense in summary judgment proceedings. On April 4, 2017, the trial court denied Lakewood’s motion for summary judgment stating that “genuine issues of material fact exist and the moving party is not entitled to judgment as a matter of law.” Lakewood did not assert political subdivision immunity in its motion for summary judgment.

Under Civ.R. 8(C), a defendant is required to affirmatively set forth matters which will effectively preclude a finding of liability on the part of the defendant. Failure to raise such defenses in a responsive pleading or motion will constitute a waiver of those defenses. Although not specifically listed as an affirmative defense under Civ.R. 8(C), all types of immunity have been considered affirmative defenses. *See Mitchel v. Borton*, 70 Ohio App.3d 141, 145, 590 N.E.2d 832 (1990) (listing numerous examples of affirmative defenses not listed in Civ.R. 8(C)). Further, even if immunity is asserted as an affirmative defense in a defendant's answer, it still must be asserted in the motion for summary judgment. *Leibson v. Ohio Dept. of Mental Retardation & Developmental Disabilities* (1992), 84 Ohio App.3d 751, 761, 618 N.E.2d 232.

O'Brien v. Olmsted Falls, 8th Dist. Cuyahoga Nos. 89966 and 90336, 2008-Ohio-2658, ¶ 13.

{¶13} The trial court has the discretion to allow Lakewood to present an argument in proceedings that they did not assert in their motion. However, the failure to raise the immunity defense in their summary judgment motion constitutes a waiver of that defense. *See Leibson v. Ohio Dept. of Mental Retardation & Dev. Disabilities*, 84 Ohio App.3d 751, 618 N.E.2d 232 (8th Dist.1992) (the defendant "asserted qualified immunity as a defense in his answer; however, he failed to assert it in his motion to dismiss and failed to file a motion for summary judgment. Therefore, it was effectively waived."). *See also Cudlin v. Cudlin*, 64 Ohio App.3d 249, 580 N.E.2d 1170 (8th Dist.1990). ("Even though the defendants raised qualified immunity as a defense in their answer, they did not raise the defense in their motion for summary judgment. * * * the defendants were not entitled to qualified immunity.") *Id.* at 256-257. Therefore, we find that the trial court did not err in denying Lakewood the opportunity to present its political subdivision immunity defense in summary judgment proceedings.

B. Denial of Leave to Amend the Summary Judgment Motion to Include Political Subdivision Immunity Defense

{¶14} Lakewood further argues that the trial court, by not allowing Lakewood leave to file a motion for summary judgment on political subdivision immunity, abused its discretion by

not resolving its right to political subdivision immunity in summary judgment proceedings so as to avoid an unnecessary and costly trial, thereby denying Lakewood the benefit of immunity. Before requesting leave to file a motion for summary judgment on immunity, Lakewood filed a motion for leave to file a supplement and sur-reply brief in order to assert the political subdivision immunity defense. The trial court denied the motion.

{¶15} The Murgus argue that the trial court did not err because the dispositive motion deadline for Lakewood to assert its immunity defense had passed.

We note that the decision of whether or not to grant such leave under Civ.R. 56(A) is left to the sound discretion of the trial court. *See Brinkman v. Toledo*, 81 Ohio App.3d 429, 432, 611 N.E.2d 380, 382 (1992); also *see Manogg v. Stickle*, 5th Dist. Licking No. 99CA82,1999, Ohio App. LEXIS 6365 (Dec. 29, 1999), unreported; *DeTray v. Mount Carmel Health*, 10th Dist. Franklin No. 96APE08-1010, 1997 Ohio App. LEXIS 1542 (Apr. 7, 1997), unreported.

Keller v. Russell, 4th Dist. Scioto No. 99 CA 2659, 2000 Ohio App. LEXIS 2748 (June 9, 2000).

{¶16} “Although the grant or denial of a leave to amend a pleading is within the sound discretion of the trial court, this discretion is not unfettered. ‘A motion for leave to amend should be granted absent a finding of bad faith, undue delay, or undue prejudice to the opposing party.’”

Jontony v. Colegrove, 2012-Ohio-5846, 984 N.E.2d 368, ¶ 14 (8th Dist.), quoting *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6, 465 N.E.2d 377 (1984). It is not apparent from the record that granting Lakewood leave to file the motion would have caused any further appreciable delay in these proceedings or precipitated any undue prejudice to appellees.

Thus, it may well be that some members of this [c]ourt might have exercised their discretion differently and allowed the motion(s) to be filed. That is not the standard, however, and we are keenly aware of the proposition that a reviewing court should not substitute its judgment for that of a trial court. *See State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732, 654 N.E.2d 1254, 1258 (1995); *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181, 1184 (1991); *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301, 1308 (1990). We note that in order for a court to abuse its discretion, the result must

be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, and not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996).

Keller at 14-15.

{¶17} Lakewood has not demonstrated that the trial court’s decision was so egregious and grossly violative of fact, or logic, or that the trial court’s attitude was unreasonable, arbitrary, or unconscionable. Therefore, we find that the trial court did not abuse its discretion or err by not allowing Lakewood leave to file a motion for summary judgment on political subdivision immunity.

C. Resolution of Immunity Prior to Trial

{¶18} Lakewood also argues that the trial court abused its discretion by ignoring this court’s original order that the trial court’s “resolution regarding sovereign immunity is necessary,” and the trial court’s decision to address affirmative defenses at trial based on evidence presented is in error. On January 18, 2017, this court dismissed Lakewood’s appeal determining that it was not a final appealable order.

{¶19} As previously stated, this court, in its journal entry, stated,

Motion by appellee to dismiss appeal is granted. A motion for summary judgment based on sovereign immunity is pending before the trial court. In light of the Ohio Supreme Court’s decision in *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, the trial court’s resolution regarding sovereign immunity is necessary.

Journal Entry No. 503338 (Jan. 18, 2017).

{¶20} Upon remand, the trial court denied Lakewood’s motion for leave to file summary judgment on political subdivision immunity.

On remand, a trial court must obey the mandate of the court of appeals. *See State ex rel Davis v. Cleary*, 77 Ohio App.3d 494, 602 N.E.2d 1183 (1991). The

order of remand restores the trial court with jurisdiction to carry out the directive of the court of appeals. *See Internatl. Union of Operating Engs., Local 18 v. Wannemacher Co.*, 67 Ohio App.3d 672, 675, 588 N.E.2d 176 (1990).

Orrville Prods. v. MPI, 8th Dist. Cuyahoga No. 65184, 1994 Ohio App. LEXIS 2512 (June 9, 1994).

{¶21} We find that the trial court followed the mandate by ruling on the pending motion that was before it. Therefore, Lakewood's third issue is without merit.

{¶22} Judgment is affirmed.

It is ordered that appellee recover of said appellant 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 common pleas court to carry this judgment into execution.

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

ANITA LASTER MAYS, JUDGE

EILEEN T. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR