

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Counter-Defendant-
Appellant,

v

FISHER HOTEL, a/k/a FISHER HOTEL
ANNEX, a/k/a 4520 & 4626 BRYANT STREET,
FLINT, EXECUTIVE PROPERTY
DEVELOPMENT, L.L.C., and MKD
INVESTMENT, L.L.C.,

Defendants/Counter-Plaintiffs-
Appellees,

and

ALL RESIDENTS,

Defendants.

UNPUBLISHED

March 25, 2008

No. 274009

Genesee Circuit Court

LC No. 05-082755-CZ

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the circuit court order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8) with respect to the counter complaint filed by defendants, Fisher Hotel, a/k/a Fisher Hotel Annex, and Executive Property Development, L.L.C. (Fisher defendants). On appeal, plaintiff argues that the circuit court erred in denying its motion for summary disposition and in allowing the Fisher defendants to file an amended counter complaint alleging gross negligence because plaintiff is immune from suit and the gross negligence exception to governmental immunity applies only to individuals, not to a governmental agency. We remand for further proceedings consistent with this opinion.

Plaintiff commenced nuisance abatement proceedings pursuant to MCL 600.3805 against the Fisher defendants and MKD Investment, L.L.C., and all residents, as a result of alleged drug and prostitution activity at the Fisher Hotel and Fisher Hotel Annex. The circuit court granted a temporary restraining order, which provided that the Fisher Hotel and Fisher Hotel Annex would

be closed during the pendency of the action and required residents to vacate the premises. After a hearing, the circuit court granted a preliminary injunction to the same effect. The Fisher defendants filed a counter complaint, asserting that plaintiff had undertaken responsibility for the property, had failed to properly secure it and, as a result of that failure, the Fisher defendants had suffered damages including physical damage to the property, and continued habitation on the property by unauthorized persons. Plaintiff then filed a motion for summary disposition, claiming that the Fisher defendants' counter complaint was barred by governmental immunity from tort liability and because the Fisher defendants had failed to allege gross negligence. The circuit court allowed the Fisher defendants to amend their counter complaint to allege gross negligence and denied plaintiff's motion for summary disposition.

On appeal, plaintiff argues that the circuit court erred in denying its motion for summary disposition and in allowing the Fisher defendants to amend their counter complaint.¹ Ordinarily, we would deny relief under these circumstances on the basis that a party cannot lead the court to make an erroneous ruling and then challenge that ruling on appeal.² See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2002). In order to be preserved for appeal, an issue must generally have been raised before and addressed by the trial court. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Because plaintiff did not argue below that the gross negligence exception to governmental immunity applied only to individuals, not to plaintiff as a governmental agency, this issue is unpreserved. And, because plaintiff impliedly acknowledged the potential application of the gross negligence exception, the issue would appear to be waived. Nevertheless, while this waiver would operate to bar an appeal of the court's order allowing the amendment and denying summary disposition on the grounds raised, we see no reason why plaintiff should be precluded from bringing another motion for summary disposition regarding gross negligence claims in the amended complaint after the amended complaint is filed. At that point, the circuit court will have an opportunity to apply *Gracey v Wayne County Clerk*, 213

¹ As an initial matter, we reject the Fisher defendants' argument on appeal that plaintiff waived the defense of governmental immunity by failing to raise it as an affirmative defense in its answer to the Fisher defendants' first amended counter complaint. "Governmental immunity is not an affirmative defense proffered by governmental defendants, but rather, is a characteristic of government; therefore, 'a party suing a unit of government must plead in avoidance of governmental immunity.'" *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006), quoting *Mack v Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002). Accordingly, plaintiff did not waive its claim of governmental immunity by failing to raise it as an affirmative defense. On the contrary, the burden was on the Fisher defendants to plead an exception to governmental immunity.

² Plaintiff's summary disposition motion included an argument addressed to defendants' failure to plead or prove gross negligence or recklessness. Further, in arguing in support of summary disposition on governmental immunity grounds, plaintiff's counsel observed that there was no allegation of gross negligence in the complaint. In subsequent hearings, the argument clearly focused on whether the facts alleged were sufficient to support an allegation of gross negligence. At no time did plaintiff's counsel assert that the gross negligence exception is not applicable.

Mich App 412; 540 NW2d 710 (1995), overruled on other grounds *American Transmissions, Inc v Attorney General*, 454 Mich 135; 560 NW2d 50 (1997).³ Defendants will also have an opportunity to assert their claims against others, if appropriate.

Remanded for proceedings consistent with this opinion. We not retain jurisdiction.

/s/ Helene N. White

/s/ Brian K. Zahra

³ In *Gracey*, 213 Mich App at 420, this Court stated:

The gross-negligence exception to governmental immunity states that it applies to officers, employees, members, or volunteers of governmental agencies. The cardinal rule of statutory construction is to ascertain and give effect to the intention of the Legislature. The exception does not state that it applies to the governmental agencies themselves. Express mention in a statute of one thing implies the exclusion of other similar things. . . . Here, had the Legislature intended to include governmental agencies in the gross negligence exception to governmental immunity, it easily could have used the appropriate general language. [*Id.* (internal citations omitted).]