NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2460-15T4

JANET HENEBEMA,

Plaintiff-Appellant,

v.

DOMENICO RADDI, JR.,

Defendant,

and

SOUTH JERSEY TRANSPORTATION
AUTHORITY and NEW JERSEY
STATE POLICE,

Defendants-Respondents.

APPROVED FOR PUBLICATION

December 6, 2017

APPELLATE DIVISION

Argued November 28, 2017 – Decided December 6, 2017

Before Judges Fasciale, Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-0964-07.

Ralph A. Paolone argued the cause for appellant.

Stephen M. Orlofsky argued the cause for respondents (Porzio, Bromberg & Newman, PC, Blank Rome LLP, J. Ric Gass (Gass Weber Mullins LLC) of the Wisconsin bar, admitted pro hac vice, and Michael B. Brennan (Gass Weber Mullins LLC) of the Wisconsin bar, admitted pro hac vice, attorneys; Mr. Orlofsky, Mr. Gass, Mr. Brennan, Adrienne C.

Rogove and Eliyahu S. Scheiman, on the briefs).

The opinion of the court was delivered by

FASCIALE, J.A.D.

This case involves a misapplication of Royster v. N.J. State Police, 439 N.J. Super. 554, 561 (App. Div. 2015), aff'd as modified, 227 N.J. 482 (2017), which held that "the doctrine of state sovereign immunity preclude[d] [a] plaintiff's [Americans with Disabilities Act (ADA)] claim, even though [the] defendants [had] not fully raise[d] that argument until their motion for a judgment notwithstanding the verdict (JNOV)." Plaintiff filed claims, not under the ADA, but rather, under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, which unlike under the ADA, are not federal law claims. By enacting the TCA, the Legislature waived state sovereign immunity, subject to the statute's provisions.

Plaintiff appeals from orders dated December 7, 2015 and January 19, 2016 entered on remand granting summary judgment to South Jersey Transportation Authority (SJTA) and the New Jersey State Police (NJSP) (collectively defendants). In support of their motions, defendants belatedly raised the affirmative defenses of N.J.S.A. 52:17C-10 (9-1-1 dispatcher immunity) and N.J.S.A. 59:5-4 (failure to provide police protection). Plaintiff maintains that the judge exceeded the scope of

detailed remand instructions from this court and the Supreme Court, and he otherwise erred as a matter of law.

In a TCA case, when a public entity substantially waits before raising the affirmative defenses of N.J.S.A. 52:17C-10 and N.J.S.A. 59:5-4, we hold that the judge must first determine whether defendants waived those defenses. That is so because waiver negates reliance on the defenses. If the judge concludes that a public entity timely raised, and has not waived these affirmative defenses, then the judge should address whether dispositive relief is appropriate.

Here, the judge granted summary judgment before resolving whether defendants waived the affirmative defenses, even though defendants raised them for the first time on remand, which occurred ten years after the accident; those ten years included three years of extensive pre-trial litigation, a lengthy and expensive trial, an appeal to us, and an appeal to the Supreme Court. We conclude that defendants waived the new affirmative defenses, reverse the orders, and re-remand for a liability trial on an expedited basis due to the age of this case.

I.

In December 2005, plaintiff's leg was severed in a car accident. After the jury trial, the judge entered a judgment of

$9,002,565.80 against defendants.[1] Defendants appealed from that judgment arguing primarily that the judge erred by failing to charge the jury on the correct standard required by N.J.S.A. 59:2-3(d). Henebema v. S. Jersey Transp. Auth., 430 N.J. Super. 485, 500 (App. Div. 2013), aff'd, 219 N.J. 481 (2014). On that issue, we stated:

> The parties contested the predicate facts relevant to determining whether defendants either exercised discretionary decisionmaking or performed ministerial acts, a distinction central to applying the correct standard of liability under the [TCA]. The structural question before us is whether a judge or jury resolves that threshold dispute. We hold that when the evidence establishes a genuine issue of material fact regarding whether the alleged failures of a public entity were the result of discretionary decisionmaking as to how to use its resources, or instead involved ministerial acts mandated by law or practice, then that fact issue must be submitted to the jury. The resolution of that factual dispute will guide the jury in applying either ordinary negligence law or the [TCA]'s "palpably unreasonable" standard. N.J.S.A. 59:2-3(d). Because the judge himself settled that fact-laden dispute here and charged a potentially erroneous standard of care, we reverse the judgment on liability and remand for a new trial.

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[1] The verdict consisted of $6,150,330.50 for pain and suffering, $2,247,980.50 for future medical expenses, and $350,000 for past and future lost wages. The judge added, pursuant to the offer of judgment rule, Rule 4:58-3, $168,660 in counsel fees and $85,594.80 in costs.

[Id. at 491.]

In rendering our decision, we remanded for a new trial on liability only. Id. at 517. We provided detailed instructions as to the procedure for resolving the ministerial versus discretionary issue at the re-trial. Id. at 506-07.

> If, in the new liability trial, the jury determines that defendants had the discretion to determine, in the face of competing demands, whether and how to apply their existing resources, the jury would then be required to find whether that determination was palpably unreasonable. "Whether the conduct of the public entity or entities was 'palpably unreasonable' under all of the circumstances is a question for jury determination." Paternoster v. N.J. Dep't of Transp., 190 N.J. Super. 11, 20, 461 A.2d 759 (App. Div.), certif. denied, 96 N.J. 258, 475 A.2d 564 (1983). If, on the other hand, the jury determines that defendants had no discretion and were obligated, for example, to accept mutual aid and split up the troopers, then the jury would evaluate defendants' liability exposure using ordinary negligence principles. The final jury charge and verdict sheet must be tailored accordingly at the new trial.
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> We anticipate that the jury verdict sheet will contain questions for each disputed predicate fact where the record shows that defendants consciously considered whether to exercise discretion on how to utilize their resources. If the jury finds that the decision to decline mutual aid, for example, was discretionary, then they must determine, in accordance with the final charge, whether defendants' determination was palpably unreasonable. On the other hand, if they find that it was a ministerial

> act, then they must determine whether defendants acted negligently. The same applies to the other disputed predicate facts if the record shows that defendants consciously considered how to allocate their resources. By tailoring the verdict sheet to fit the facts at the new liability trial, any uncertainty regarding whether the jury found defendants negligent for discretionary decisions will be removed.
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> [Ibid.]

In affirming our opinion, the Supreme Court specifically addressed the scope of the trial on remand.

> The purpose of the retrial -- ordered due to the jury instruction error on public-entity liability pursuant to the TCA -- is to have the jury determine, from the evidence, whether the public entities' employees were performing either ministerial or discretionary actions. If the conduct is found to have been ministerial, then the ordinary negligence standard would apply in determining the public entities' liability. If the conduct is found to have been discretionary, then the correct standard for imposing liability would be palpably unreasonable conduct. Once the appropriate standard is identified, the jury can determine, based upon the applicable standard, whether the public-entity defendants are liable.
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> [Henebema v. S. Jersey Transp. Auth., 219 N.J. 481, 495 (2014).]

Before the case proceeded to re-trial on remand, we decided Royster. Unlike this case, Royster dealt with the defendants' reliance on the doctrine of state sovereign immunity to dismiss

the plaintiff's State claims under the ADA. Royster, supra, 439 N.J. Super. at 561.

In Royster, we held that the doctrine of state sovereign immunity precluded the plaintiff's ADA claim, even though the defendants did not fully raise that argument until their JNOV motion. Ibid. We vacated that part of the judgment awarding the plaintiff damages under the ADA and dismissed his ADA claim with prejudice. Ibid. We also concluded – where, importantly, the plaintiff had not made claims under the TCA, but rather, asserted claims under the ADA – that a defendant could raise the issue of state sovereign immunity at any time during the proceedings to dismiss the ADA claim. Id. at 572.

Instead of re-trying this matter as instructed, defendants moved for summary judgment raising new affirmative defenses to plaintiff's TCA claims. Defendants argued for the first time that they were now entitled to immunity, not pursuant to the general doctrine of state sovereign immunity, but rather, pursuant to N.J.S.A. 52:17C-10[2] and N.J.S.A. 59:5-4.[3] Defendants

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[2] N.J.S.A. 52:17C-10 provides:

> a. Whenever possible and practicable, telephone companies shall forward to jurisdictional public safety answering points via enhanced 9-1-1 network features, the telephone number and street address of any telephone used to place a 9-1-1 call.

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Subscriber information provided in accordance with this section shall be used only for the purpose of responding to emergency calls or for the investigation of false or intentionally misleading reports of incidents requiring emergency service.

b. (Deleted by amendment, P.L.1999, c.125).

c. No telephone company, person providing commercial mobile radio service as defined in 47 U.S.C.s. 332(d), public safety answering point, or manufacturer supplying equipment to a telephone company, wireless telephone company, or PSAP, or any employee, director, officer, or agent of any such entity, shall be liable for damages to any person who uses or attempts to use the enhanced 9-1-1 service, wireless 9-1-1 service or wireless enhanced 9-1-1 service established under this act for release of the information specified in this section, including non-published telephone numbers. This limitation of liability is inapplicable if such failure resulted from a malicious purpose or a wanton and willful disregard for the safety of persons or property.

d. No telephone company, person providing commercial mobile radio service as defined in 47 U.S.C.s. 332(d), public safety answering point, or manufacturer supplying equipment to a telephone company, wireless telephone company, or PSAP, or any employee, director, officer, or agent of any such entity, shall be liable to any person for civil damages, or subject to criminal prosecution resulting from or caused by any act, failure or omission in the development, design, installation, operation, maintenance, performance or provisioning of any hardware, software, or any other aspect of delivering enhanced 9-1-1 service,

(continued)

contended that Royster empowered them to file the summary judgment motions.

Defendants had not raised these affirmative defenses, although they could have, at any point before the first trial. They did not make these contentions during the three years of

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(continued)

> wireless 9-1-1 service or wireless enhanced 9-1-1 service. This limitation of liability is inapplicable if such failure resulted from a malicious purpose or a wanton and willful disregard for the safety of persons or property.
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> e. No telephone company, person providing commercial mobile radio service as defined in 47 U.S.C.s. 332(d), public safety answering point, or manufacturer supplying equipment to a telephone company, wireless telephone company, or PSAP, or any employee, director, officer, or agent of any such entity, shall be liable to any person for damages resulting from or in connection with such entity's provision of any lawful assistance to any investigative or law enforcement officer of this State or a political subdivision of this State, of the United States, or of any other state or a political subdivision of such state in connection with any lawful investigation by or other law enforcement activity of the law enforcement officer unless the entity, in providing such assistance, acted in a manner exhibiting wanton and willful disregard for the safety of persons or property.

[3] N.J.S.A. 59:5-4 provides that "[n]either a public entity nor a public employee is liable for failure to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service."

pre-trial litigation, during the first trial, or before us on their appeal after the jury verdict. And they did not move for a limited remand before the Supreme Court granted certification, or raise the new immunity arguments before the Supreme Court, even though we stated in our opinion that

> at trial the SJTA did not raise as a defense the immunity afforded to 9-1-1 employers under N.J.S.A. 52:17C-10. See Wilson v. City of Jersey City, 209 N.J. 558, 588, 39 A.3d 177 (2012) (involving a case where the parties did not dispute the predicate facts showing that the 9-1-1 operators were performing ministerial functions, and holding that 9-1-1 operators and their employer are immune "for any negligent mishandling of the emergency calls . . . under section (d) of N.J.S.A. 52:17C-10"). The SJTA dispatchers apparently were not a 9-1-1 public safety answering point under N.J.S.A. 52:17C-7. However, we need not address whether the SJTA is entitled to immunity pursuant to N.J.S.A. 52:17C-10(d) because the parties did not raise this issue.
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> [Henebema, supra, 430 N.J. Super. at 499-500 n.5.]

We note that N.J.S.A. 52:17C-10(e) provides immunity to 9-1-1 operators for negligent acts or omissions in assisting ongoing law enforcement investigations and activities; however, the immunity provision does not apply when 9-1-1 operators acted in "wanton and willful disregard for the safety of persons or property." Wilson, supra, 209 N.J. at 586-87 (quoting N.J.S.A.

52:17-10(e)). Whether 9-1-1 operators act wantonly and willfully is purportedly fact sensitive.

Plaintiff opposed defendants' summary judgment motions contending that such motion practice went beyond the scope of the remand, and that defendants had otherwise waived the affirmative defenses. Plaintiff emphasized that defendants substantially waited before raising the new defenses: ten years had expired since the accident; the parties had engaged in litigation for over three years; and they participated in substantial appellate practice.

The judge granted the motions and rendered oral opinions. He too relied on our Royster decision, which the judge concluded permitted the late filing of the motions and was dispositive. The judge stated:

> [T]he Royster . . . Appellate Division opinion . . . applie[s] to claims of immunity brought under the Dispatchers Liability Act as well as the [TCA] because [Royster] involved a claim under the [ADA]. . . . I [am] not reaching the issue of whether in fact there [has been] a waiver . . . . [B]ecause of the Royster opinion[,] the State can't waive the immunity under the [TCA]. So if the State can't waive the immunity under the [TCA], then why even get into whether or not the conduct of the defendants in this case constituted a waiver.

In the event that we disagreed with the judge on his opinion that Royster controlled, he expressed his preference that we

"make a decision for [our]selves . . . whether or not there was a waiver" of the new affirmative defenses. Of course, waiver of the affirmative defenses would negate defendants' belated reliance on the new immunity arguments.

II.

On appeal, plaintiff argues that any reliance on Royster is misplaced, and the judge exceeded the scope of the remand instructions. Plaintiff maintains that we should remand for a new liability trial consistent with the instructions outlined in our decision and the opinion by the Supreme Court. Although the judge did not resolve the related question of whether defendants had waived the new affirmative defenses by their failure to timely raise them, plaintiff asserts that we should do so in the interest of judicial economy.

We begin by rejecting any notion that our holding in Royster is dispositive on defendants' summary judgment motions. The principles of law outlined in Royster did not authorize defendants to raise the new affirmative defenses belatedly, and file their post-appeal motions. Royster is a completely different case.

The question in Royster was whether the general doctrine of state sovereign immunity precluded the plaintiff's State ADA claim, even though the defendants there had not fully raised

such an argument until they moved for JNOV. Royster, supra, 439 N.J. Super. at 561. We concluded that "absent clear and unequivocal consent by the State Legislature, the State . . . retained its sovereign immunity against plaintiff's ADA claim." Id. at 569. We noted the body of law that likened the doctrine of state sovereign immunity to subject matter jurisdiction, id. at 567-68, and concluded that the defendants had properly raised it, id. at 572.

Here, we are not dealing with a general application of whether the doctrine of state sovereign immunity precludes plaintiff's claim under the ADA. Plaintiff made claims under the TCA, not the ADA. In Royster, state sovereign immunity applied because the State had not consented to ADA claims. Id. at 569. By enacting the TCA, the State Legislature waived sovereign immunity as to certain claims against public entities. Of course, the Court has recognized that the waiver is not unlimited, but rather, "is bound by the Legislature's declaration of purpose, see N.J.S.A. 59:1-2, and enforced through the application of numerous express limitations embodied in the statute's provisions." D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 133 (2013). Public entities raise those limitations as affirmative defenses so that opposing parties are on notice.

There is a substantial difference between the absolute state sovereign immunity available to dismiss an ADA claim in State court, and the immunity limitations expressed in the TCA. In its legislative declaration, N.J.S.A. 59:1-2, the Legislature recognized the "inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity." Recognizing further the differences between liability for negligence of a private entrepreneur and liability for acts done by public entities, the Legislature further declared that it

> be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.
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> [Ibid. (emphasis added).]

The Legislature therefore waived, in TCA cases, the absolute and strict application of the doctrine of state sovereign immunity that we applied in Royster. Accordingly, public entities in TCA cases are liable only subject to the statute's provisions.

Consequently, a public entity sued in a TCA case must plead as an affirmative defense the immunity under the TCA on which it relies. At trial, defendants focused on whether they engaged in ministerial or discretionary acts, pursuant to N.J.S.A. 59:2-

3(d), and then raised for the first time N.J.S.A. 59:5-4, even though such a defense had always been available. See Suarez v. Dosky, 171 N.J. Super. 1, 9 (App. Div. 1979) (concluding that N.J.S.A. 59:5-4 provides a general immunity, with exceptions, based upon a Comment by the California Law Revision Commission on its Tort Claims Act, which "is couched in language identical to N.J.S.A. 59:5-4"), certif. denied, 82 N.J. 300 (1980). The facts here illustrate the fundamental unfairness of dismissing plaintiff's TCA claims based on the untimely raised affirmative defenses, especially because the Legislature waived strict application of the doctrine of state sovereign immunity.

We stress that the remand instructions were clear. We intended the remand proceedings to rectify the error in the jury charge as to the correct standard by which to consider defendants' conduct. Because the parties sharply disputed the predicate facts leading to a determination of whether defendants engaged in ministerial or discretionary acts, consistent with the multiple instructions on remand, the jury must first resolve that factual dispute before the judge can properly charge the jury on the applicable standard of care. We did not contemplate defendants' filing of summary judgment motions raising, for the first time, the affirmative defenses on remand.

The remand instructions established law of the case as to the applicability of either ordinary negligence law or the TCA's "palpably unreasonable" standard. It is well-known that a "trial court is under a peremptory duty to obey in the particular case the mandate of the appellate court precisely as it is written." Flanigan v. McFeely, 20 N.J. 414, 420 (1956). We are well aware, however, that the law of the case rule is not inflexible, SMB Assocs. v. N.J. Dep't of Envtl. Prot., 264 N.J. Super. 38, 59-60 (App. Div. 1993), aff'd, 137 N.J. 58 (1994), and does not apply when new law controls, Underwood v. Atl. City Racing Ass'n, 295 N.J. Super. 335, 340 (App. Div. 1996), certif. denied, 149 N.J. 140 (1997).

Our holding in Royster, however, is unrelated to immunity for 9-1-1 dispatcher liability and failure to provide police protection under the TCA. Defendants essentially concede that point. As to the 9-1-1 dispatcher immunity, defendants argued that they were unable to raise N.J.S.A. 52:17C-10 until the Court rendered its decision in Wilson, but the Court decided Wilson in March 2012, well before we rendered our first opinion remanding the matter for a new liability trial. Furthermore, the Legislature enacted N.J.S.A. 52:17C-10 in 1989, and the limited 9-1-1 immunity afforded under the statute had been long available to defendants as a defense. Thus, there exists no new

law obviating the law of the case directing the parties to re-try the matter consistent with the appellate instructions, and therefore entertaining argument pertaining to whether the new affirmative defenses on defendants' late summary judgment motions exceeded the remand instructions.

In entering summary judgment, the judge should nevertheless have resolved whether defendants waived the new defenses, especially because he contemplated the issue would remain outstanding if we disagreed with him that Royster controlled. One cannot rely on a waived affirmative defense. Expressing a desire that we resolve the waiver issue in the first instance does a disservice to this court and the parties because "both Rule 1:7-4 and Rule 2:5-1(b) . . . state that the court 'shall' set forth the facts and make conclusions of law to support the order or judgment." Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 300-01 (App. Div. 2009). Compliance with these rules enables our full review of the judge's ruling.

The main questions presented by the summary judgment motions included whether those motions went beyond the remand instructions, and whether defendants had waived the affirmative defenses by not raising them. Even if the judge erroneously concluded, as he did here, that Royster controlled, he still needed to address the waiver issue. That is so because waiver

negates reliance, not on the general doctrine of state sovereign immunity, but rather on the limited immunity afforded under the TCA and 9-1-1 dispatcher liability statute.

The judge applied Royster, concluded he need not address the waiver issue because he had determined that defendants were entitled to state sovereign immunity, and granted summary judgment to defendants. The judge premised his ruling, however, on the misapplication of Royster. Reliance on the immunity afforded in the affirmative defenses and waiver of those defenses are logically connected. It would be illogical to dismiss a complaint relying on a ground that a defendant has waived. Therefore, the judge should have adjudicated whether defendants waived the affirmative defenses before dismissing the complaint.

We conclude that defendants waived the new affirmative defenses. We are mindful that addressing a waiver issue requires us to exercise original jurisdiction. Rule 2:10-5 provides that "[t]he appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review." We must exercise our original fact-finding authority sparingly and only in clear cases that are free of doubt. Tomaino v. Burman, 364 N.J. Super. 224, 234-35 (App. Div. 2003), certif. denied, 179 N.J. 310 (2004). Here,

the facts as to the late filing of the new affirmative defenses are undisputed. The waiver issue presents predominantly a legal question, which we will address in the interests of judicial economy.

"Public entities and public employees have the burden [to plead] that they are immune from suit." Crystal Ice-Bridgeton, LLC v. City of Bridgeton, 428 N.J. Super. 576, 585 (App. Div. 2012). Here, defendants had the burden of pleading the affirmative defenses they intended to raise, including N.J.S.A. 52:17C-10 and N.J.S.A. 59:5-4. That is so because the Legislature's waiver of sovereign immunity as to claims against public entities is not unlimited. It "is bound by the Legislature's declaration of purpose, see N.J.S.A. 59:1-2, and enforced through the application of numerous express limitations embodied in the statute's provisions." D.D., supra, 213 N.J. at 133.

We have previously addressed the consequence of failing to file an affirmative defense in a case involving the TCA. The idea behind raising the defense is to avoid surprise. See Hill v. Middletown Bd. of Educ., 183 N.J. Super. 36, 40 (App. Div.) (stating that "[t]he defense of failure to file notice under the [TCA] is an affirmative one which must be pleaded in order to avoid surprise, and a defendant may be found to have waived the

protection thereof by failing to plead it as a defense"), certif. denied, 91 N.J. 233 (1982); see also Lauber v. Narbut, 178 N.J. Super. 591, 593 n.1 (App. Div.) (declining to consider the TCA immunity defense raised for the first time on appeal), certif. denied, 89 N.J. 390 (1981). Rule 4:5-4 provides that "[a] responsive pleading shall set forth specifically and separately a statement of facts constituting an . . . affirmative defense." Thus, the pleading of affirmative defenses must be, not merely by legal conclusion, but by a statement of facts. Pressler, Current N.J. Court Rules, comment 1.1 on R. 4:5-4 (2018). It is undisputed that defendants failed to raise the defenses until the remand proceedings.

"Waiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). "The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Ibid. The Legislature enacted N.J.S.A. 59:5-4 in 1972 and N.J.S.A. 52:17C-10 in 1989, providing defendants with these immunities and their notice of them.

Defendants had the full opportunity to raise these affirmative defenses before the first trial. Doing so would have affected pre-trial discovery and perhaps the manner in

which plaintiff would have tried her case. It also may have saved plaintiff substantial time, expense, and effort had the new affirmative defenses been timely raised and adjudicated prior to the first trial.[4] Such an adjudication would have been part of our initial appellate review, and any further review by the Supreme Court. Defendants could have raised the affirmative defenses in their pleadings, before the first trial began, prior to an appeal to us, after the appeal to us, or before the appeal to the Supreme Court. At no point did defendants move for a limited remand seeking permission to amend their pleadings to raise the defenses. Failure to raise them therefore prejudiced plaintiff.

Reversed and remanded for a new trial solely on liability consistent with this opinion and the previous remand instructions from this court and the Supreme Court. We direct that the re-trial proceed on an expedited basis. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

[4] We do not address the merits of the new affirmative defenses because they exceed the scope of remand, and defendants have waived them.