STATE OF MICHIGAN

COURT OF APPEALS

TERESA COX, as Next Friend of BRANDON COX, a minor, TERESA COX AND CAREY COX, individually,

Plaintiff-Appellees / Cross-Appellants,

v

BOARD OF HOSPITAL MANAGERS FOR THE CITY OF FLINT d/b/a HURLEY MEDICAL CENTER, a municipal corporation,

Defendant-Appellant / Cross-Appellee.

And

EDILBERTO MORENO, M.D.,

Defendant.

UNPUBLISHED
April 6, 1999

No. 205025
Genesee Circuit Court
LC No. 92-12247NM

Before: Hood, PJ, and Griffin and Markey, JJ.

PER CURIAM.

Judgment was entered in favor of plaintiffs on June 13, 1994 following a jury trial. Defendant moved for judgment notwithstanding the verdict (JNOV), and in the alternative a new trial or remittitur. The trial court granted defendant a new trial unless plaintiffs were willing to accept remittitur to the amount of $475,000. Plaintiffs appealed and this Court vacated the order granting a new trial. This Court also remanded for reconsideration of the motion for new trial and instructed the trial court to prepare a detailed analysis of economic and non-economic damages if it deemed remittitur appropriate. *Cox v Flint Bd of Hospital Mgrs,* unpublished order of the Court of appeals, entered December 14, 1994 (Docket No. 179366). Subsequently, the trial court entered an order granting defendant JNOV and conditionally granting a new trial if the JNOV was reversed on appeal. In *Cox v. Flint Bd of Hospital Mgrs,* unpublished per curiam opinion of the Court of Appeals, issued November 22, 1996

(Docket No. 184859), this Court reversed the grant of JNOV. In its opinion, the prior panel refused to decide several substantive issues raised by defendant because defendant had failed to file a cross-appeal. After unsuccessfully attempting to convince this Court to hear its issues relating to the June 13, 1994 judgment[1], defendant had the trial court enter a new order of judgment against it on July 21, 1997. From that order, defendant appeals as of right, raising substantially the same issues as previously briefed for this Court in docket number 184859. Plaintiffs cross-appeal claiming that defendant's appeal should be dismissed because the issues it raises are improperly before this Court. We agree with plaintiffs and dismiss defendant's appeal.

In *Cox, supra* at 3, this Court stated:

> Although defendant asserts in its brief on appeal that other issues warranted a new trial, these claims were not raised by way of a cross-appeal. Accordingly, review of these issues is precluded. *Barnell v Taubman Co, Inc,* 203 Mich App 110, 123; 512 NW2d 13 (1993).

Defendant filed a motion for rehearing, specifically arguing that this Court should have heard and decided the other issues because they could have warranted a new trial. This Court denied the motion for rehearing on January 14, 1997. Defendant did not appeal that order to the Supreme Court.

> Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. The law of the case mandates that a court may not decide a legal question differently where the facts remain materially the same. The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. The rationale supporting the doctrine is the need for finality of judgment and the want of jurisdiction in an appellate court to modify its own judgments except on rehearing. Two exceptions to the doctrine exist: (1) when the decision would preclude the independent review of constitutional facts and (2) when there has been an intervening change of law. [*Webb v Smith (After Second Remand)*, 224 Mich App 203, 209-210; 568 NW2d 378 (1997) (citations omitted).]

In *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997), this Court recently stated the doctrine as follows:

> The law of the case doctrine provides that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand *or in a subsequent appeal in the same case. This rule applies without regard to the correctness of the prior determination. . . .* (emphasis added).

In docket number 184859, plaintiffs raised the issue of law as to whether defendant's substantive issues relating to the underlying judgment should be reviewed absent a cross-appeal. This Court decided that they should not. *Cox, supra.* This Court reinforced its ruling that a cross-appeal

was necessary when it denied defendant's motion for rehearing. In the cross-appeal currently before this Court, we are once again asked to decide whether defendant's substantive issues relating to the underlying judgment should be reviewed when a cross-appeal was never filed at the time the initial appeal was briefed, argued and decided. We are bound by the prior panel's decision that it was necessary for defendant's to file a cross-appeal, after plaintiffs filed their initial appeal, if it wanted its substantive issues heard. We therefore need not address defendant's arguments that a cross-appeal was not necessary.

We note, however, that there is a conflict regarding whether a cross-appeal to the original appeal was necessary. We believe the prior panel's decision that a cross-appeal was necessary was correct. See *VanderWall v Midkiff,* 186 Mich App 191, 201-203; 463 NW2d 219 (1990) and *Shipman v Fontaine Truck Equipment Co,* 184 Mich App 706, 714; 459 NW2d 30 (1990). In *Shipman,* this Court reversed a grant of JNOV in favor of defendant Fontaine. In its brief on appeal, Fontaine argued, in the alternative, that if this Court reversed the JNOV, a new trial should be granted because plaintiffs failed to supplement discovery responses and because of allegedly improper jury instructions given during trial. The trial court had rejected these alternative arguments. This Court ruled that because the issues were not cross-appealed, they were not properly before this Court and would not be addressed. *Id.* See also 3 Martin, Dean & Webster, Michigan Court Rules Practice, p 230:

> To preserve any issue on appeal, not raised in an appellant's brief, an appellee must file a cross appeal.
>
> While the authors have been unable to find any Michigan case which thoroughly discusses an appellee's obligation to file a cross appeal in Michigan if the appellee merely wishes to defend, and not to enlarge, the judgment below, the purpose for the Michigan rule does appear in St. John v Nichols, 331 Mich. 148, 49 N.W.2d 113 (1951). The court there states that this rule serves the desirable purpose of placing both parties in the same position as relates to the necessity of apprising each other and the court of their claims of error and limiting the scope of their appeals thereto. In other words, it prevents an appellee from raising an issue in his or her brief to which the appellant has no opportunity to respond by way of reply brief[2].

There are, however, cases that have ruled to the contrary, finding that cross-appeals are not necessary where a party is urging alternate grounds to support a trial court's decision. See *ABATE v Public Service Comm,* 192 Mich App 19; 280 NW2d 585 (1991) and *Akyan v Auto Club Ins Ass'n (On Rehearing),* 208 Mich App 271, 274-275 (1994). *In ABATE,* this Court was asked to decide issues relating to a Public Service Commission (PSC) decision in favor of Michigan Consolidated Gas Co. On appeal, the gas company raised an issue, which had been specifically rejected by the PSC, as an alternative means of upholding the PSC decision. This Court stated that "an appellee who has taken no cross appeal may still urge in support of the judgment in its favor reasons that were rejected in the lower court." *Id.* at 24. In *Akyan,* defendant also urged an alternate ground for sustaining a dismissal that was granted in its favor. The alternate ground was raised and apparently rejected by the trial court in granting defendant a dismissal on other grounds. This Court indicated that although it would normally

be precluded from hearing the issue because a cross-appeal was not filed, it would hear the issue because the argument was an alternate ground for sustaining the judgment. *Akyan, supra* at 274.

While we acknowledge that there is a conflict in our case law over whether a cross-appeal is necessary, we conclude that the better rule of law is to require a cross-appeal under the circumstances. *Shipman, supra*. Where defendant decided not to file a cross-appeal, it did so at its own peril. Resolution of that conflict, however, is not necessary for a resolution of this case. We reiterate that even if a cross-appeal was not required because an alternate ground was being urged, defendant's claim in this case would nevertheless need to be dismissed. Correctly or incorrectly, this Court already ruled that defendant was required to file a cross-appeal. That decision was never appealed to our Supreme Court and it is the law of the case. *Driver, supra.*

After this Court denied defendant's motion for rehearing in docket number 184859 and defendant decided not to appeal to our Supreme Court, it directly filed a claim of appeal (Docket No. 200943) from the June 13, 1994 judgment entered in plaintiffs favor and attempted to raise the issues that this Court had already precluded from review. This claim of appeal was grossly tardy. It was filed on January 30, 1997, which was well in excess of the twenty-one day time limit set forth in MCR 7.204(A)(1)(a). By January 30, 1997, defendant had also lost the right to have a delayed application for leave to appeal granted on the June 13, 1994 judgment. See MCR 7.205(F)(3), which provides that if an application for leave to appeal is filed more than twelve months *after entry of the order or judgment on the merits, leave to appeal may not be granted* (emphasis added). This Court dismissed defendant's claim of appeal in docket number 200943 without prejudice on June 11, 1997 "for failure to pursue the case in conformity with the rules. MCR 7.216(A)(10)."

Defendant thereafter had the trial court enter a new order of judgment on July 21, 1997. The new order simply that the JNOV order was reversed pursuant to this Court's opinion in *Cox, supra*. It then also mirrored the June 13, 1994 judgment. Defendant appeals this new judgment as of right and again raises the issues that this Court previously precluded from review. The July 21, 1997 order was unnecessary. The prior ruling of this Court in *Cox, supra* intended that the June 13, 1994 judgment be enforced after the JNOV order was reversed. Notably, the prior panel did not remand the case for further proceedings or entry of a *new* judgment.

Moreover, even if the new order was necessary because the prior opinion failed to specify that the June 13, 1994 judgment should be reinstated, there is no authority to support that defendant was entitled to take an appeal as of right from this new judgment, which simply restated or reinstated the prior judgment. If we allowed defendant to appeal as of right from this new order, it would be tantamount to allowing defendant to escape the prior ruling of this Court that defendant was required to file a cross-appeal to plaintiffs' previous appeal. It would also ignore all applicable time limits within the court rules and would flaunt the policies of this Court, which advocate judicial economy and the closure of cases. It would encourage other parties to seek new orders after appeal in order to restart the time limits for filing an appeal and would allow an appeal as of right from an underlying judgment each time a JNOV or new trial order is simply reversed by this Court. For those reasons, we find that defendant did not have an appeal as of right from the July 21, 1997 judgment, which was entered solely for the

purpose of providing defendant with an opportunity to appeal the substantive issues from the June 13, 1994 judgment.

Finally, we note that on August 1, 1997, plaintiffs filed a motion to dismiss this appeal for want of jurisdiction. That motion was denied by a panel of this Court without comment on January 28, 1998. The denial of the motion to dismiss does not preclude this Court from deciding the jurisdictional issues, which were first raised in the motion to dismiss and are now raised in plaintiffs' cross-appeal. The denial of a motion to dismiss is a preliminary disposition of the issue. In *DAIIE v McMillan*, 97 Mich. App 687; 296 NW2d 147 (1980), rev'd on other grounds 417 Mich 946, for example, plaintiffs filed a claim of appeal. Defendants filed two motions to "dismiss", which were treated by this Court as motions to affirm the lower court. The motions were dismissed without comment. On appeal, defendants attempted to raise the issues, which were found to be without merit when this Court denied the motions to dismiss. This Court ruled that because no cross-appeal was filed, the issues would not be reconsidered. *Id.* at 695-696.

Michigan Court Rules Practice, Rule 7.211, states, when discussing motions to dismiss and affirm:

> Dismissal may be sought on the grounds that the appeal is not within the Court's jurisdiction, that the appeal was not filed or pursued in conformity with the court rules, or that the appeal is moot. MCR 7.211(2). *To fully preserve an issue raised in a motion to dismiss, however, an appellee may also be required to file a cross appeal*. See *DAIIE v McMillan*…and Author's Comment, MCR 7.204, pint 1. (emphasis added).

The Author's Comment to MCR.704, indicates that both a motion to dismiss raising jurisdictional issues and a cross-appeal raising the same issues may be filed:

> Counsel should note, however, that only the filing of a cross appeal fully preserves the issue for appellate review. An appellee's attempt to raise an issue on appeal found to be without merit in *preliminary orders disposing of a motion to dismiss will not be considered further if a cross appeal is not also filed.* (emphasis added).

It necessarily follows that the ruling of the motion docket panel which denied the motion to dismiss without comment does not constitute "law of the case" with regard to jurisdictional issues and does not preclude our consideration of those issues in plaintiffs' cross-appeal.

Defendant's appeal is dismissed, and the July 21, 1997 judgment is vacated. The trial court should enforce the June 13, 1994 judgment.

/s/ Harold Hood
/s/ Jane E. Markey

[1] Defendant filed a motion for rehearing in docket number 194859 and when that was denied, it filed a severely tardy claim of appeal from the June 13, 1994 judgment, which claim of appeal was dismissed in docket number 200943.

[2] We agree that from a practitioner's standpoint, requiring a cross-appeal is more equitable. An appellant is limited to a ten page reply brief. MCR 7.212(G). If appellee is allowed to file a fifty page response brief detailing numerous grounds for either sustaining the favorable trial court result or granting a new trial, the appellant is prejudiced in filing a meaningful response to those arguments. Motions for leave to file briefs in excess of page limitations are disfavored by this Court. See MCR 7.212(B).