STATE OF MICHIGAN

COURT OF APPEALS

MARY E. SHULTZ THOMPSON, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED June 11, 1999
v	No. 208587 Ingham Circuit Court
JOHN J. BLACK and KIDS R' US, INC., Defendants-Appellees/Cross-Appellants.	LC No. 92-07095 NI

Before: Gribbs, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting a judgment of no cause of action pursuant to a jury verdict and granting defendants costs. Defendants cross-appeal by right from an order denying their motion for summary disposition. We conclude that the motion for summary disposition should have been granted.

This Court reviews an order granting summary disposition de novo. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994). Summary disposition pursuant to MCR 2.116(C)(7) is properly granted where a claim is barred by the applicable statute of limitations. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 527; 538 NW2d 424 (1995).

Defendants first argue that the trial court erred in denying their motion for summary disposition on the basis of the law of the case doctrine. The law of the case doctrine provides that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). However, the doctrine only applies if the facts remain substantially or materially the same. *People v Phillips (After Second Remand)*, 227 Mich App 28, 32; 575 NW2d 784 (1997), citing *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995); *Johnson v White*, 430 Mich 47, 52; 420 NW2d 87 (1988). At issue here is this Court's previous ruling that plaintiff suffered a latent injury and that, therefore, the discovery rule applied to toll the statute of limitations until she discovered the injury in February 1991. *Schultz v Black (On Remand)*, 215 Mich App 248; 544 NW2d 741 (1996). In the interest of avoiding harsh results with respect to claimants who are injured, but unaware of their injury,

Michigan recognizes the "discovery rule," whereby the statute of limitations does not begin to run until the claimant is aware of the basis for an action; however, *any* basis will suffice. *Stephens v Dixon*, 449 Mich 532, 534; 536 NW2d 755 (1995), citing *Hammer v Hammer*, 142 Wis2d 257, 264; 418 NW2d 23 (1987). "[T]he discovery rule is not available in a case of ordinary negligence where a plaintiff merely misjudges the severity of a known injury." *Stephens*, *supra* at 537.

At the time of defendants' previous motion for summary disposition, the only facts before this Court regarding the 1987 accident included plaintiff's medical records and her affidavit wherein she stated that she "went to the emergency room following the collision and there were no abnormalities found" and that "she did not have any significant problems following the collision for four years until February, 1991 . . . ." In holding that the discovery rule applied to plaintiff's suit, this Court stated, "Plaintiff presented unrebutted evidence that she did not know, nor should she have known, that she sustained *any* injuries as a result of the automobile accident until February 1991 . . . ." *Schultz, supra* (emphasis in original). Based on this language it is clear that this Court did not view plaintiff's affidavit and medical records as evidencing that plaintiff knew she was injured but did not realize the extent of the injuries. At the time of defendants' second motion for summary disposition, after this Court's remand and further discovery, both plaintiff's and her coworker's deposition testimony had been taken and indicated that plaintiff did know, or should have known, that she was injured. Plaintiff, in fact, agreed that she was injured but that she did not know the extent of the injury. Her coworker testified that she had canceled dates in the weeks following the accident because she was suffering from pain in her neck. Because these facts were not before this Court when it made its previous ruling and because these facts materially alter the factual scenario, this Court's previous ruling was not the law of the case. Therefore, the trial court erred in denying defendants' motion for summary disposition on the basis of the law of the case doctrine.

Defendants next argue that the trial court erred in denying their motion for summary disposition based on the substantive finding that plaintiff's injury was latent. Plaintiff's injuries were not the type of latent, or otherwise undiscoverable, injuries to which the discovery rule has previously been applied. For example, our Supreme Court applied the discovery rule to a negligence claim, brought in 1989, premised on a cataract surgery that took place in 1963. *Chase v Sabin*, 445 Mich 190, 193-194; 516 NW2d 60 (1994). The Court noted that, while the plaintiff's claim was admittedly stale, "the defendants generally controlled the medical records that constituted the evidence on which the plaintiff would generally rely and were 'in a superior position to recognize the occurrence of a negligent act.' [*Id*., 200.]" *Lemmerman v Fealk*, 449 Mich 56, 67; 534 NW2d 695 (1995). In addition, the Court has applied the discovery rule in a case where "the plaintiffs discovered reproductive problems as adults that were possibly linked to exposure to diethylstilbestrol (DES) manufactured by the defendants and prescribed to their mothers when pregnant. The plaintiffs had no knowledge of their mothers' ingestion of the drug until they were adults." *Id*., 67 n 7, citing *Moll v Abbott Laboratories*, 444 Mich 1, 6-11; 506 NW2d 816 (1993). Lastly, the Supreme Court "applied the discovery rule to asbestos-based products liability actions because the latent nature of asbestos injuries made it difficult for plaintiffs to diligently pursue their claims, while the longer period in which defendants were vulnerable to suit did not make it appreciably more difficult for them to defend." *Lemmerman*, *supra* at 68.

Plaintiff testified that on the day of the accident she suffered from pain and injuries in her neck and shoulders. Plaintiff was not precluded, as was the *Chase* plaintiff, from realizing that she had been injured because defendant didn't reveal the evidence of her injury; the evidence of her injury was the pain and tightness she felt in her neck and shoulders. Further, plaintiff was aware that she had been involved in a potentially injurious situation, unlike the *Moll* plaintiffs; plaintiff was in a collision with a tractor-trailer and sought treatment at an emergency room. Lastly, the evidence of plaintiff's injury manifested itself immediately; plaintiff's neck and shoulders began to hurt the very afternoon of the accident. Further, while it is undisputed that plaintiff did not know she had a herniated disk in her neck, or that a herniated disk would develop from the pain in her neck, until at least February 1991, in 1987 she knew that she was suffering pain from injuries in her neck and shoulders. Therefore, we conclude that plaintiff knew she was injured, but misjudged the severity of her injury. As a result, the trial court erred in applying the discovery rule to toll the statute of limitations. Because plaintiff did not file suit within the three year statute of limitations, defendants' MCR 2.116(7) motion for summary disposition should have been granted.

Reversed and remanded for vacation of the judgment of no cause of action and entry of an order granting defendants summary disposition.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Harold Hood