STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN BELL TELEPHONE COMPANY, a/k/a AMERITECH,

Plaintiff-Appellant,

v

LAKE STATES INSURANCE COMPANY,

Defendant-Appellee,

and

CURTI INSURANCE AGENCY, INC., and THE DENNEHY AGENCY, INC., a/k/a THE MCNISH-DENNEHY AGENCY, INC.,

Defendants.

UNPUBLISHED
November 23, 1999

No. 212337
Wayne Circuit Court
LC No. 95-531597 CK

SHERYL L. NEMETH and STANLEY NEMETH,

Plaintiff-Appellants,

v

RELIANCE INSURANCE COMPANY and THE DENNEHY AGENCY, INC., a/k/a THE MCNISH-DENNEHY AGENCY, INC.,

Defendants,

and

LAKE STATES INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellee,

No. 212338
Wayne Circuit Court
LC No. 95-531598 CK

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and

CURTI INSURANCE AGENCY, INC.,

Defendant/Cross-Defendant.

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Plaintiff Michigan Bell Telephone Company and plaintiffs Sheryl and Stanley Nemeth (hereinafter "plaintiffs," collectively) appeal as of right the trial court's grant of summary disposition in favor of defendant Lake States Insurance Company ("Lake States"). We affirm.

Our prior opinion, *Nemeth v Lakes States Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued October 31, 1997 (Docket Nos. 196407 and 196409), sets forth the facts in these consolidated cases. In brief, plaintiffs attempted to collect default judgments entered against Lake States' now-defunct insured, Metro Utility. Previously, Lake States appealed from orders granting plaintiffs' motions for summary disposition on the ground that Lake States was not materially prejudiced by Metro Utility's failure to timely notify it of the underlying lawsuit. This Court reversed, ruling that "[b]ecause there is a question of fact regarding whether Lake States was prejudiced by its lack of notice of the underlying lawsuit until after default judgments were entered against its insured, the trial court erred in granting plaintiffs' motions for summary disposition." After remand, our Supreme Court decided *Koski v Allstate Ins Co*, 456 Mich 439; 572 NW2d 636 (1998). Lake States then moved for summary disposition, relying mainly on the *Koski* decision. Plaintiffs also moved for summary disposition. The trial court, relying on *Koski*, granted summary disposition in favor of Lake States. Plaintiffs appeal as of right this decision.

Plaintiffs argue on appeal that the trial court erred in granting summary disposition in favor of Lake States based on its finding that no genuine issue of material fact existed with regard to whether Lake States was prejudiced by the late notice of default judgments entered against its insured. Specifically, plaintiffs claim that the trial court misinterpreted the *Koski* decision and *Koski* is not controlling here. We disagree. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Russell v Dep't of Corrections*, 234 Mich App 135, 136; 592 NW2d 125 (1999).

In *Koski, supra* at 444, our Supreme Court explained that "it is a well-established principle that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position." The Court noted that "the duty to defend is broader than the duty to indemnify," and that failure to provide notice of suit undercuts the insurer's duty to defend. *Id*. at 445 n

5, quoting *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-451; 550 NW2d 475 (1996). According to our Supreme Court, the insurer in *Koski*, who received no notification of the suit brought against its insured until three months after entry of a default judgment, "was deprived of any opportunity to engage in discovery, cross-examine witnesses at trial, or present its own evidence relative to liability and damages." *Id.* at 445. Because the insurer had no knowledge of the suit until after the twenty-one-day time limit for setting aside the default judgment had passed, its "only recourse toward setting aside the judgment was a motion under MCR 2.612, which requires extraordinary circumstances not in existence here." *Id.* at 447. Finding the resulting prejudice clear, the Court reversed and remanded for entry of final judgment in favor of the insurer. *Id.* at 447-448.

We find that *Koski* is controlling and hold that the trial court correctly applied *Koski* to the present case. Here, Lake States received no pre-suit notice of the lawsuit and was not advised of its existence until after the twenty-one days to attack the default judgment had lapsed.[1] See MCR 2.603(D). As in *Koski*, Lake States' only recourse was to move under MCR 2.612 to set aside the judgment, which requires extraordinary circumstances not present here. *Koski, supra* at 447; see also *Altman v Nelson*, 197 Mich App 467, 478; 495 NW2d 826 (1992); *Gillispie v Board of Tenant Affairs of Detroit Housing Comm*, 145 Mich App 424, 427-428; 377 NW2d 864 (1985). Consistent with *Koski*, there was a sufficient showing of prejudice and Lake States is not obligated to provide coverage.[2] Thus, we conclude that the trial court properly granted Lake States' motions for summary disposition because, under *Koski*, and therefore as a matter of law, the late notice materially prejudiced Lake States.

Plaintiffs also argue that, under the law of the case, the trial court could not decide, as a matter of law, that Lake States was materially prejudiced by the late notice because this Court remanded for a factual determination of whether Lake States was materially prejudiced by the late notice. We disagree. The law of the case doctrine provides that an appellate court's ruling on a particular issue binds that court and all lower tribunals with respect to that issue. *Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 135; 580 NW2d 475 (1998); *Freeman v DEC International, Inc (After Remand)*, 212 Mich App 34, 37-38; 536 NW2d 815 (1995). However, an exception exists where an intervening change of law has occurred after the initial decision of the appellate court. *Kalamazoo, supra* at 138. Here, *Koski* is an intervening change of law which was issued after this Court's initial decision in the present case. Consequently, the law of the case doctrine is inapplicable. Moreover, when this Court reverses and remands a case for trial because a material issue of fact exists, "the law of the case doctrine does not apply because the first appeal was not decided on the merits." *Brown v Drake-Willock International, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995), citing *Borkus v Michigan Nat'l Bank*, 117 Mich App 662, 666; 324 NW2d 123 (1982).

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] Lake States had no opportunity to participate in pre-suit negotiations, nor post-suit discovery. Instead, it was confronted by demands to indemnify plaintiffs for a settlement that they had entered into by accepting the mediation award and without the benefit of participating in negotiations.

[2] Although plaintiffs argue that Lake States was obligated, as part of its duty to defend, to at least file a motion under MCR 2.612 to set aside the judgment, a party need not take each and every action available to establish prejudice, nor does *Koski* require such.