STATE OF MICHIGAN

COURT OF APPEALS

JOHN VINCENT HOVER, Personal Representative of the Estate of SARA JANE HOVER, Deceased,

Plaintiff-Appellant,

v

CHRYSLER CORPORATION, CHRYSLER MOTORS CORPORATION and AMERICAN MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
February 22, 2000

No. 206893
Wayne Circuit Court
LC No. 96-620360 NP

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff John Vincent Hover, personal representative for the estate of Sarah Jane Hover, appeals as of right from an order granting summary disposition to defendant pursuant to MCR 2.116(C)(7). The trial court found that plaintiff's suit is barred by the statute of limitations under Canadian law. We affirm.

In February 1989, Sara Jane Hover (hereafter referred to as plaintiff), and John Hover and their two children were involved in a rollover accident in Alberta, Canada while traveling in a Jeep manufactured by defendant. As a result of the accident, plaintiff sustained injuries to her left hand, including the amputation of her ring finger on her left hand. The other passengers sustained less severe injuries. The Hover family commenced this product liability action in February 1992, three years after the accident, in the Wayne Circuit Court. The trial court granted summary disposition in favor of defendants finding that the case was time-barred by the two-year Canadian statute of limitations, which was applicable under Michigan's borrowing statute, MCL 600.5861; MSA 27A. 5861.[1]

Plaintiff appealed the trial court's decision in *Hover v Chrysler Corp*, 209 Mich App 314, 530 NW2d 96 (1995) (hereafter referred to as *Hover I*). This Court affirmed the application of Canadian law and affirmed the dismissal of the claims of John Hover and the two Hover children. However, this Court found that a question of fact was created by a letter from plaintiff's psychiatrist[2] as to whether the

Canadian tolling provisions applied to plaintiff's claim.[3] This Court reversed and remanded plaintiff's claim for further proceedings.

On remand, the parties conducted further discovery and took the depositions of plaintiff and her family and Dr. Kotkas, the psychiatrist who wrote the letter stating that plaintiff was not able to manage her affairs. At the close of discovery, defendant again brought a motion for summary disposition pursuant to MCR 2.116(C)(7). Defendant claimed that the testimony given in the depositions, particularly the testimony of Dr. Kotkas, failed to establish that plaintiff was unable to understand any advise or instructions given by legal counsel. The trial court granted defendant's motion finding that the tolling provisions of the Canadian statute of limitations were not applicable in this case because the deposition testimony failed to establish that plaintiff was of unsound mind and unable to manage her affairs. Plaintiff now appeals as of right.[4]

Plaintiff first argues that the law of the case doctrine precluded the trial court from granting summary disposition a second time on the basis of statute of limitations because this Court previously found that there was a question of fact as to whether the tolling provisions of the statute of limitations should be applied. We disagree.

The law of the case doctrine holds 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). 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. *Id*. However, when this Court remands it to the trial court 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 Int'l Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995). Moreover, the law of the case doctrine controls only if the facts have remained materially the same. *Driver, supra* at 565.

In this case, the trial court did not decide a question of law differently on remand. This Court made a ruling as a matter of law that the Canadian statute of limitations should be applied in this case. However, this Court did not find as a matter of law that the tolling provisions are applicable because plaintiff was of unsound mind. Instead this Court found that there was a question of fact as to whether plaintiff was of unsound mind in order to invoke the tolling provisions of the Canadian statute of limitations. The trial court followed this Court's rule of law in *Hover I, supra* by applying Canadian law. The second motion for summary disposition was based on additional evidence that was not available to this Court in *Hover I, supra,* including the deposition of Dr. Kotkas, which clarifies part of the letter that this Court relied upon previously to find a question of fact.[5]

Because the trial court's decision does not conflict with a rule of law set forth in *Hover I* and because the trial court relied on additional evidence developed through the discovery process that was not considered by this Court in *Hover I*, we find that the trial court's decision to grant summary disposition a second time was not precluded by the law of the case doctrine.

Plaintiff next argues that the evidence considered by the trial court on the second motion for summary disposition established a question of fact as to whether plaintiff was of unsound mind in order invoke the tolling provisions of the statute of limitations. We disagree.

Under § 59(1) of the Limitation of Actions Act, RSA 1980, c209, there is an exception to the two-year statute of limitations for persons who are under disability at the time the cause of action arises. § 59(1) provides:

> Where a person entitled to bring an action to which this Part applies is under disability at the time of the cause of action arises, he may commence the action at any time within two years from the date he ceased to be under disability.[6]

"Disability" is defined in §1(c) of the Limitation of Actions Act, RSA 1980, c209, as "a disability arising from infancy or unsoundness of mind."

In *Kaszyk v Kloetstra*, (1976) 1 WWR 423, 427-428, the trial court found that in order to toll the running of the statute of limitations due to disability arising from unsoundness of mind, "it is necessary to determine if the plaintiff ever was or now is under a disability sufficient to prevent him from being able to understand any instructions, directions or legal advice that might be given to him . . . ." The court further stated:

> Simple incapacity to appreciate the cause of action and the consequences of delay will be sufficient to constitute unsoundness of mind. *This broad description will apply to sufficiently severe cases of mental defect, disease or abnormally low intelligence*. This may be affected by the statutes of the relevant jurisdiction which may give some indication of conditions that will amount to unsoundness of mind, but ability to understand and act upon the cause of action will be paramount considerations. [*Kaszyk, supra* at 432, citing Williams on Limitation of Actions in Canada at p 203 (emphasis added).]

In *Kaszyk*, the plaintiff suffered severe brain trauma which impaired his judgment and left him unable to accurately recall things that an eight or nine-year-old child could do. *Kaszyk, supra* at 430. The court ruled that the plaintiff suffered from a disability at the time the cause of action accrued and tolled the running of the statute of limitations for the period of time that the plaintiff was not represented by a Public Trustee. On appeal, the appellate division affirmed the trial court's decision concluding that unsoundness of mind included a person who, through mental infirmity, is incapable of managing his affairs. *Kaszyk v Kloestra*, 5 WWR 205, 207, 209 (Alta App Div, 1976).

In *Scott v Birdsell*, (1993) 143 AR 254; 12 Alta LR (3d) 347 (QB), the Alberta Court of Queen's Bench held that the tolling provision due to disability was not applicable where the plaintiff suffered from emotional distress and other symptoms similar to those exhibited by plaintiff in this case. The plaintiff in *Scott* was diagnosed with depression, had suicidal thoughts and sought the help of a

clinical psychologist who, during the course of his treatment, referred her to a psychologist who prescribed antidepressant medication. The court found that the plaintiff was not disabled within the meaning of the Act. Although she may have become emotionally distraught when she learned about alternative breast cancer treatments, the court concluded that the plaintiff failed to present any evidence that she was suffering under any such disability as defined in *Kaszyk, supra* at 427-428. *Scott, supra* at _____.

In this case, plaintiff's psychiatrist diagnosed her with acute traumatic stress syndrome due to the loss of her finger. Plaintiff suffered from depression, had suicidal thoughts, sought treatment from a psychiatrist, and was prescribed antidepressant medication. Although Dr. Kotkas opined in his letter dated July 22, 1992 that plaintiff was unable to instruct legal counsel or manage her daily affairs, Dr. Kotkas clarified this opinion at his sworn deposition to state that plaintiff was legally competent, but she would have difficulty instructing legal advisors properly.[7] Dr. Kotkas' description of plaintiff's abilities do not meet the definition of disability set forth in *Kaszyk* such that the disability prevented plaintiff from being able to understand "any instructions, directions or legal advice that might be given." *Kaszyk, supra* at 427-428. Therefore we find that the trial court did not err in concluding that there was no evidence to establish that plaintiff was disabled within the meaning of §§ 1(c) and 59(1) of the Limitation of Actions Act, RSA 1980, c209.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] The court found that Canadian law was applicable because plaintiffs were Canadian residents and the accident occurred in Canada.

[2] The psychiatrist's letter stated that after having her finger amputated, Mrs. Hover was severely depressed, suicidal, unable to deal with the injury and the results of the injury, and unable to instruct legal advisers or manage her daily life.

[3] Section 59 of the Limitation of Actions Act, RSA 1980, c209, tolls the running of the statute of limitations if plaintiff is under disability at the time the cause of action arose.

[4] Shortly after summary disposition was granted the second time, plaintiff Sara Jane Hover died. John Hover, as personal representative of the estate of Sara Jane Hover, has been substituted as the plaintiff in this case.

[5] We note that Dr. Kotkas' letter dated July 22, 1992 is not the equivalent of a sworn affidavit or sworn testimony and does not constitute admissible evidence. This Court used the letter in

Hover, supra, as an indication that there might be evidence yet to be discovered that would support a finding that plaintiff suffered from a disability arising from unsoundness of mind.

[6] By the plain language of the statute plaintiff must be under disability at the time the cause of action arises. In this case, plaintiff's alleged disability did not arise until her finger was amputated, which was approximately two weeks after the date the cause of action arose.

[7] Dr. Kotkas clarified part of the July 22, 1992 letter at his sworn deposition by stating:

> Q. Again, looking at this statement: I didn't feel that she was capable of managing these affairs and instructing legal advisors?
>
> A. No. That's what I wish I hadn't put.
>
> Q. And why is that?
>
> A. Well, she couldn't instruct them very well, put it that way, but she certainly wasn't incompetent. You know that word? That's one we use in Canada. She wasn't legally incompetent, but she was so ill that she had no way of - you know, the - the thought of suing was not on anybody's mind . . . .
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> * * *
>
> Q. So it sounds like perhaps maybe what you were concerned about was the effect on her that the litigation would have and not that she in fact - -
>
> A. That's right.
>
> Q. - could not give advice to her legal counsel or provide facts that would relate to the lawsuit?
>
> A. Well, she would have had a difficult time doing it. What I am saying here is correct, I just don't want you to misunderstand it. She was competent, but she would have had difficulty instructing. I said I didn't feel she's capable of instructing legal advisors, you know, I would have to change that to say I didn't feel she was capable of instructing legal advisors properly, so I would like to make that distinction, she wasn't incompetent.