# STATE OF MICHIGAN

# COURT OF APPEALS

MEDHEALTH SYSTEMS CORPORATION,

Plaintiff-Appellant,

v

R. TODD KERR,

Defendant-Appellee.

UNPUBLISHED
January 9, 2001

No. 219619
Washtenaw Circuit Court
LC No. 98-010093-CK

Before: O'Connell, P.J., and Zahra and B. B. MacKenzie,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order holding that an earlier order of this Court regarding plaintiff's request for a preliminary injunction constituted the law of the case and prevented the trial court from subsequently ruling on plaintiff's request for a permanent injunction to enforce a noncompetition covenant against defendant, a former employee. We reverse.

I

Plaintiff MedHealth Systems Corporation provides athletic training, physical rehabilitation, physical therapy, and sports medicine services from its offices in Riverview and Plymouth. Defendant was hired in August 1997 as an athletic trainer in the Plymouth office. Defendant was required to sign a noncompetition agreement which provided that, if defendant ceased working for plaintiff, he could not work for a competitor within twenty-five miles of plaintiff's offices for two years.

In March 1998, plaintiff fired defendant after he attended an out-of-state athletic training conference without plaintiff's permission. In April 1998, defendant was hired by Oakwood Hospital, a competitor of plaintiff's, in Dearborn. Defendant was assigned to work at Dearborn Heights Annapolis High School as an athletic trainer. Defendant concedes that the high school was located within twenty-five miles of plaintiff's offices.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

On October 16, 1998, plaintiff filed this lawsuit, seeking a temporary restraining order and a preliminary injunction, as well as a permanent injunction, against defendant to enforce the noncompetition covenant. On December 21, 1998, the trial court granted a preliminary injunction, finding that the two-year time limit was reasonable and that the twenty-five-mile geographical restriction was reasonable so long as it applied only to plaintiff's Riverview and Plymouth offices. The trial court found the covenant's prohibition of defendant from working for a competitor in any capacity to be overly broad, and modified the restriction to apply only to work as an athletic trainer or consultant in sports medicine.

Defendant filed an application for interlocutory leave to appeal with this Court, arguing that the trial court had erred in granting the preliminary injunction. In lieu of granting leave to appeal, this Court issued a peremptory order modifying the preliminary injunction as follows:

> The preliminary injunction shall run through March 12, 1999, and is dissolved as of March 13, 1999. Given the facts and circumstances of this case, a duration of more than one year for the covenant not to compete is unreasonable. MCL 445.774a(1). MCR 7.216(A)(1), (7). In all other respects the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review. This interlocutory matter is REMANDED for further proceedings. Jurisdiction is not retained. [*MedHealth Systems Corp v R Todd Kerr*, unpublished order of the Court of Appeals, entered 3/5/99 (No. 217357).]

On remand—after the date for dissolution of the preliminary injunction—plaintiff moved for prospective relief, claiming that it was entitled to a nine-month permanent injunction because defendant had only complied with the noncompetition agreement for three months of the one-year period that this Court had deemed reasonable. The trial court held that it was precluded from ruling on plaintiff's request for a permanent injunction because this Court's earlier order dissolving the preliminary injunction constituted the law of the case. This appeal ensued.

II

A

Before reaching the merits of this case, we address sua sponte whether the issue of a permanent injunction is moot given that the noncompetition agreement in this case has expired by its own terms. That is, we must determine whether, because of normal delays in the appellate process, the noncompetition agreement expired by its own terms in March 2000, two years after defendant's employment was terminated. We conclude that the issue is not moot.

In appropriate circumstances, the durational term of a noncompetition agreement may be extended beyond its stated expiration date to avoid injustice. *Thermatool Corp v Borzym*, 227 Mich App 366; 575 NW2d 334 (1998). Thus, where a party has "flouted the terms of a noncompetition agreement," a court may grant appropriate equitable relief to the extent that the injured party does not have an adequate remedy at law, notwithstanding the fact that the parties did not expressly provide for such relief in their agreement. *Id.* at 375. In a similar vein, the breaching party to a noncompetition agreement should not be allowed by his own voluntary conduct to render moot any litigation arising from that breach. As the *Thermatool* Court stated,

*id.* at 375, "the breaching party should not be rewarded because the agreement has already expired." Accordingly, given the circumstances of this case, we decline to dismiss this matter as moot.

B

Turning to the merits of the case, we must determine whether the trial court erred in concluding that this Court's earlier order dissolving the preliminary injunction constituted the law of the case so as to preclude the trial court from ruling on plaintiff's request for a permanent injunction. This is a question of law which we review de novo. *Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 135; 580 NW2d 475 (1998). Having reviewed the record, we conclude that the trial court erred and reverse.

Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The appellate court's decision similarly binds lower courts, which may not take action on remand that is inconsistent with the judgment of the appellate court. *Grievance Administrator v Lopatin*, 462 Mich 235, 261; 612 NW2d 120 (2000). Hence, an appellate court's determination of an issue binds lower courts on remand and the appellate court in subsequent appeals. *Id.*; *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997).

However, law of the case applies only to issues actually decided either implicitly or explicitly in the prior appeal. *International Union v Michigan*, 211 Mich App 20, 24; 535 NW2d 210 (1995). In the earlier interlocutory leave application filed by plaintiff, the only issue that had been decided by the trial court and the only issue raised in the application concerned the appropriateness of the issuance of the preliminary injunction, which in turn required this Court to consider the reasonableness of the noncompetition agreement. A preliminary injunction is by its very nature interlocutory and impermanent, and remains enforceable until final judgment is rendered on the merits in the underlying controversy. *Id.* at 26. In peremptorily modifying the preliminary injunction, this Court may have used somewhat ambiguous language, but the reviewing panel neither explicitly nor implicitly reached the merits of a permanent injunction.[1] Accordingly, because the trial court erred in construing this Court's earlier order as law of the case regarding the issuance of a permanent injunction, we reluctantly remand this matter to the

[1] We would certainly agree with defendant, however, that to the extent this Court's order dissolved the preliminary injunction on March 13, 1999, holding that a one-year period was reasonable, the earlier panel appeared to be suggesting that further litigation of the matter on remand was imprudent. However, recognizing the limited nature of an interlocutory appeal from the issuance of a preliminary injunction, the panel did not attempt to extend its jurisdiction by peremptorily ruling on a possible request for a permanent injunction.

trial court for further proceedings. The trial court shall determine whether defendant's noncompliance with the terms of the noncompetition agreement, as modified, entitles plaintiff to relief at law or in equity.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Brian K. Zahra
/s/ Barbara B. MacKenzie