STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN VANATTA, Plaintiff-Appellant,	UNPUBLISHED November 20, 2001
v	No. 215889 Oakland Circuit Court
BENJAMIN J. PAOLUCCI, D.O. and BENJAMIN J. PAOLUCCI, D.O., P.C.,	LC No. 97-540527-NH
Defendants-Appellees.	ON REMAND

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

This case comes to us on remand from the Supreme Court. We again affirm.

I. Basic Facts And Procedural History

The first opinion[1] in this case set out the pertinent facts:

> In 1997, Vanatta filed suit against defendants and Oakland General Hospital Osteopathic (the hospital) alleging malpractice. On the first day of trial, Vanatta informed defendants that she had entered into a settlement agreement with the hospital. Defendants asked the trial court to order Vanatta to disclose the terms of the agreement, but the trial court denied their motion in an October 6, 1998 order. Defendants then filed an application for leave to appeal and moved this Court, pursuant to MCR 7.211(C)(4) and (C)(6), for immediate consideration and peremptory reversal "of the trial court's order denying [defendants] access to the amount and terms of the settlement agreement entered into between plaintiff and [defendant hospital]." On October 12, 1998, this Court granted defendants' motions and peremptorily reversed the trial court's October 6, 1998 order. This Court ordered the trial court to "immediately allow defendants to disclose to the

[1] *Vanatta v Paolucci*, unpublished per curiam opinion of the Court of Appeals, issued December 1, 2000 (Docket No. 215889).

> jury subject to the parties' non-disclosure agreement, the terms of plaintiff's agreement with the other defendants." This Court did not retain jurisdiction. After this Court issued its order, defendants informed the jury of the terms of the settlement agreement. On October 13, 1998, the jury returned a verdict of no cause of action. On November 2, 1998, the trial court entered a judgment of no cause of action pursuant to the jury verdict.
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> After the trial court entered the judgment of no cause of action, Vanatta filed an application for leave to appeal in the Michigan Supreme Court. Vanatta asked the Supreme Court to "reverse the [October 12, 1998] Court of Appeals order and remand this matter to the trial court for a new trial." The Supreme Court, however, denied her application for leave to appeal.

Vanatta appealed to this Court claiming that it was error for defendants to reveal to the jury the terms of her settlement with the hospital. We then applied the law of the case doctrine and, having determined that "none of the facts or law relevant to this issue have changed since this Court entered its earlier decision," affirmed.

Vanatta filed an application for leave to appeal with the Supreme Court. Rather than granting leave to appeal, the Supreme Court vacated this Court's opinion and remanded the case to us

> to decide whether disclosure to the jury of a settlement between plaintiff and an alleged co-tortfeasor was harmless. The October 1998 Court of Appeals order directing the trial court to allow defendant to disclose the settlement to the jury is contrary to the rule of Brewer v Payless Stations, Inc, 412 Mich 673 (1982). Unlike the Second Court of Appeals panel, this Court is not limited by the law of the case under the circumstances of the present case as this Court has not previously addressed the merits of this case. Further, this Court's May 25, 1999, denial order was interlocutory.[2]

II. The Issue On Appeal

The Supreme Court in its remand order stated that *it* was not limited by the law of the case doctrine "under the circumstances of the present case as this Court has not previously addressed the merits of this case." The Supreme Court refrained from saying that the law of the case doctrine does not limit *this* Court's analysis. Nevertheless, the Supreme Court has directed us to whether informing the jury of the settlement was harmless error, an issue we can only reach if the law of the case doctrine does not apply. Accordingly, we assume that, by the marvelous alchemy of a Supreme Court order, the law of the case doctrine does not apply now.

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[2] *Vanatta v Paolucci*, 464 Mich 875; 630 NW2d 626 (2001).

Further, the Supreme Court has conclusively determined that allowing defendants to disclose the terms of Vanatta's settlement agreement with the hospital to the jury violated the rule announced in *Brewer*:

> When there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount to be deducted, *the jury shall not be informed of the existence of a settlement or the amount paid, unless the parties stipulate otherwise*. Following the jury verdict, upon motion of the defendant, the court shall make the necessary calculation and find the amount by which the jury verdict will be reduced.[3]

This rule is intended, at least in part, to protect against exposing the jury to pieces of evidence that "have or should have no bearing upon either liability or ultimate damages," thereby avoiding confusion surrounding the jury's role.[4] Whether we agree with the way the Supreme Court has applied the *Brewer* rule to this case is irrelevant because the Supreme Court's order binds us. Thus, whether this disclosure to the jury was harmless is the *only* issue we may consider.

III. The Parties' Arguments

As we understand it, Vanatta's settlement with the hospital required the hospital to pay her $225,000 and, if the jury verdict exceeded $325,000, the hospital would then pay Vanatta an additional $25,000. As defendants note, this Court issued the October 6, 1998, order during their final arguments. The jury did not receive evidence of the settlement nor did they hear references to the settlement during opening statements. Defense counsel only referred to the nature and amount of settlement against the hospital in closing arguments, which the trial court put in its proper context by instructing the jury that the attorneys' arguments, statements, and remarks were not evidence. Further, defendants contend, disclosing this agreement was, by definition, harmless because the jury specifically found on a special verdict form that Dr. Paolucci was not negligent.

In contrast, Vanatta argues that the jury could have concluded that the hospital, as the settling party, had admitted liability. Therefore, Vanatta claims, the jury might have concluded that the hospital was the real culprit, not defendants because the defendants did not settle. Vanatta also suggests that the jury might have inferred that the settlement amount was an accurate measure of damages, making no additional damages award necessary. Relying on *Brewer*, Vanatta argues that neither inference was valid and that the prejudicial effect seriously undermined her right to a fair trial.

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[3] *Brewer*, *supra* at 679 (emphasis added).

[4] *Id*.

IV. Harmless Error

The court rules, which guide all proceedings in this state's courts, set the foundation for the harmless error rule, announcing a specific policy "to avoid the consequences of error that does not affect the substantial rights of the parties."[5] In turn, MCR 2.613(A) prescribes:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, *or an error or defect in anything done or omitted by the court or by the parties* is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, *unless refusal to take this action appears to the court inconsistent with substantial justice*.[6]

Thus, in examining the proceedings, the legal benchmark we apply is the "inconsistent with substantial justice" standard. We apply this standard to the error in informing the jury of the settlement to determine whether it was harmless.

This case is substantially similar to *Kokinakes v British Leyland LTD*.[7] In *Kokinakes*, the plaintiff was involved in a single-car accident.[8] He then sued British Leyland, the car manufacturer, under negligent design and breach of warranty theories.[9] During his closing argument, defense counsel informed the jury that the first three years of Kokinakes' lost wages were not recoverable because "[t]hey are recovered from insurance."[10] It is not clear whether the trial in *Kokinakes* occurred after the rule announced in *Brewer* became effective on March 1, 1982.[11] However, it is clear this Court in *Kokinakes* substantively applied the *Brewer* rule, holding that defense counsel erred in referring to the insurance policy in front of the jury.[12] Nevertheless, this Court concluded that this was harmless error because the "jury never reached the issue of damages. A special verdict form was submitted to the jury. The jury specifically found that defendant British Leyland, Ltd., was not negligent and that it did not breach an implied warranty of fitness."[13]

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[5] MCR 1.105.

[6] Emphasis added.

[7] *Kokinakes v British Leyland LTD*, 124 Mich App 650; 335 NW2d 114 (1983).

[8] *Id*. at 652.

[9] *Id*.

[10] *Id*. at 652.

[11] See *Brewer*, *supra* at 679 (making rule prospective).

[12] *Kokinakes*, *supra* at 653.

[13] *Id*. at 654; see also *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 102-103; 547 NW2d 36 (1997) (evidence that plaintiff received public assistance could have affected the calculation of damages, but was harmless because the jury never reached the issue).

Similarly, the jury in this case never reached the issue of damages. Rather, the jury specifically found that Dr. Paolucci was not negligent. Vanatta correctly contends that introducing this sort of evidence might affect how a jury attributes blame for an injury and, therefore, apportions or even denies damages. However, as in *Kokinakes*, it is clear that the jury's deliberations never progressed to the stage when the policy underlying *Brewer* would be relevant. Having found that Dr. Paolucci was not negligent, there was no possibility that the jury became confused regarding how to consider the settlement. The trial court's standard instruction concerning the limited value of an attorney's arguments further minimized any prejudice that could have possibly flowed from the reference. Though error, this reference in front of the jury was not inconsistent with substantial justice and, therefore, it was harmless.

Affirmed.

/s/ Jeffrey G. Collins
/s/ William C. Whitbeck