

STATE OF MICHIGAN
COURT OF APPEALS

JOANN VALENTI,

Plaintiff-Appellee,

v

GKN AUTOMOTIVE, INC.,

Defendant-Appellant.

UNPUBLISHED

December 14, 2001

No. 220035

Oakland Circuit Court

LC No. 90-387972

JOANN VALENTI,

Plaintiff-Appellant,

v

GKN AUTOMOTIVE, INC.,

Defendant-Appellee.

No. 220204

Oakland Circuit Court

LC No. 90-387972

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

SMOLENSKI, J. (*dissenting*).

I respectfully dissent. I conclude that the law of the case doctrine requires this Court to hold that the trial court properly denied defendant's motion for a directed verdict and for judgment notwithstanding the verdict on plaintiff's invasion of privacy claim.

As this Court explained in *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001):

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. 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. The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. . . . Whether law of the case applies is a question of law subject to review de novo. [Citations omitted.]

The decision of an appellate court is controlling at all subsequent stages of litigation, so long as it is unaffected by a higher court's opinion. *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 222; 555 NW2d 481 (1996); *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995), citing *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988). Furthermore, the law of the case doctrine applies regardless of the correctness of the prior decision. *Sumner v GMC (On Remand)*, 245 Mich App 653, 662; 633 NW2d 1 (2001); *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994).

The first time this case came before this Court on appeal, we determined that the trial court had erroneously granted defendant summary disposition on plaintiff's invasion of privacy claim. *Valenti v GKN Automotive, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 4, 1997 (Docket No. 151613), slip op. at 2. This Court held that plaintiff had presented sufficient evidence to establish the prima facie elements of such a claim, and held that a reasonable jury could find in plaintiff's favor. *Id.*, slip op. at 3-4. Now this case returns to this Court, after entry of a substantial jury verdict in plaintiff's favor. In direct conflict with this Court's earlier opinion, the majority would hold that the facts were insufficient to establish a prima facie invasion of privacy claim.

The majority contends, "reasonable jurors could not conclude that plaintiff proved that defendant's requirement that plaintiff undergo a psychiatric examination before returning to work from a medical leave was a means to ascertain information about matters in which plaintiff had a right to privacy." *Supra*, slip op. at 2. However, in its prior opinion, this Court specifically found a genuine issue of material fact regarding whether "defendant required plaintiff to submit to a psychological examination in order to discover personal facts." *Valenti, supra*, slip op. at 4. The majority also contends, "it is beyond dispute that defendant had a legitimate reason to require plaintiff to submit to a psychiatric exam. Further, no evidence was presented at trial to show that there was any other motive for the exam." *Supra*, slip op. at 2. In contrast, this Court's prior opinion enumerated specific evidence that could support a reasonable jury in finding that "defendant required plaintiff to be examined by a psychiatrist for the purpose of discovering private information." *Valenti, supra*, slip op. at 3. Finally, the majority concludes that "plaintiff waived her right to privacy." *Supra*, slip op. at 3. However, this Court's prior opinion concluded that "plaintiff did not waive her right to privacy," and found no "waiver by plaintiff that would pertain to this factual situation." *Valenti, supra*, slip op. at 3, 4.

"A legal question may not be decided differently where the facts remain materially the same." *McNees, supra* at 222; see also *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997). The majority does not contend that the facts presented at trial differed in any way from the facts upon which this Court rendered its prior decision. Indeed, a review of the record reveals that the same proofs previously recognized by this Court as sufficient to maintain an action for invasion of privacy were submitted to the jury.

The majority discusses the law of the case in a single footnote. *Supra*, slip op. at 2, n 1. In that footnote, the majority cites *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995), for the proposition that, "[w]hen this Court reverses a case and remands it for a 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." *Id.* I respectfully disagree that *Brown's* holding bars application of the law of the case doctrine to the instant appeal. This Court's prior

opinion directly addressed the sufficiency of plaintiff's proofs regarding the invasion of privacy claim, and specifically held that plaintiff had presented sufficient evidence on that claim to reach a jury. Applying the law of the case doctrine, I would affirm the trial court's denial of defendant's motion for new trial and judgment notwithstanding the verdict.

/s/ Michael R. Smolenski