

STATE OF MICHIGAN
COURT OF APPEALS

JAMES ZBORIL,

Plaintiff-Appellant,

v

GERALDINE FARKUS,

Defendant-Appellee.

UNPUBLISHED
February 26, 2002

No. 227338
Oakland Circuit Court
LC No. 96-535946-CK

Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order on remand granting defendant's motion for clarification/confirmation of order and entry of judgment. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a dentist in private practice, and defendant worked as a sales representative for Patterson Dental Supply Company. Defendant called on plaintiff in her professional capacity. The parties began a personal relationship. Defendant informed plaintiff that Patterson employees had the opportunity to purchase company stock at a discounted price. This opportunity was available only to Patterson employees. Plaintiff issued defendant two checks totaling \$16,000, and indicated that he wanted her to purchase 1,000 shares of stock. Defendant purchased the stock. The stock certificates were in defendant's name. The parties ended their personal relationship; however, plaintiff did not request that defendant surrender the stock or its value to him until four years later. Defendant ignored the request.

Plaintiff filed a complaint alleging causes of action for claim and delivery and breach of fiduciary duty. He moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), seeking judgment as a matter of law on the ground that the money tendered to defendant was not a gift. At a hearing, defendant asserted that if plaintiff did not intend to give her a gift of the money, then he intended to defraud Patterson by purchasing stock at the discounted price, and therefore was barred from recovering under the wrongful-conduct rule. She moved for summary disposition pursuant to MCR 2.116(C)(8), alleging that plaintiff's complaint failed to plead sufficient facts to establish causes of action for claim and delivery and breach of fiduciary duty.

The trial court denied plaintiff's motion and granted defendant's motion for summary disposition. The trial court found that defendant waived the defense of fraud, but concluded that

plaintiff could not state causes of action for claim and delivery and breach of fiduciary duty. The court granted summary disposition in favor of defendant based on the wrongful-conduct rule.

In *Zboril v Farkus*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 1999 (Docket No. 207156), this Court affirmed in part, reversed in part, and remanded for further proceedings. This Court held that the trial court properly denied plaintiff's motion for summary disposition brought pursuant to MCR 2.116(C)(10) for the reason that issues of fact existed regarding whether plaintiff intended to make a gift of the money to defendant. This Court held that the trial court erred in granting defendant's motion for summary disposition brought pursuant to MCR 2.116(C)(8), concluding that while plaintiff did not state a cause of action for breach of fiduciary duty, it was not convinced that no factual development could justify a right of recovery for plaintiff on the cause of action for claim and delivery.

On remand, defendant filed a motion for clarification/confirmation of order and entry of judgment. The trial court granted defendant's motion, concluding that because its initial decision regarding the applicability of the wrongful-conduct rule was not disturbed by the Court of Appeals, it constituted the law of the case, and further proceedings were unnecessary.

The law of the case doctrine provides that an appellate ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. 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. *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995). The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997). Whether the law of the case doctrine applies is a question of law subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

The wrongful-conduct rule provides that courts should not aid a plaintiff who founds his cause of action on his own illegal conduct. In order to implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. *Orzel v Scott Drug Co*, 449 Mich 550, 558-561; 537 NW2d 208 (1995).

We reverse the trial court's order granting defendant's motion for clarification/confirmation of order and entry of judgment, and remand this case for further proceedings in accordance with this Court's prior opinion. The trial court granted defendant's motion for summary disposition on the ground that plaintiff admitted that he gained a benefit not available to the general public, and that therefore any recovery was precluded under the wrongful-conduct rule. This Court affirmed the trial court's denial of summary disposition to plaintiff pursuant to MCR 2.116(C)(10), finding that issues of fact existed regarding whether plaintiff intended to make a gift of the money to defendant, but reversed the trial court's grant of summary disposition in favor of defendant pursuant to MCR 2.116(C)(8), holding that in light of its finding that issues of fact existed regarding plaintiff's intent, it was not convinced that no factual development could justify a right of recovery for plaintiff on the cause of action for claim and delivery. This Court's holding that defendant waived the fraud defense, coupled with its holding that a genuine issue of fact existed regarding plaintiff's intent, necessarily determined the question whether plaintiff's conduct precluded any recovery. *Webb, supra*. This Court's

decision reversed the trial court's application of the wrongful-conduct doctrine, and constitutes the law of the case on this issue. *Reeves, supra; Ashker, supra.*

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Martin M. Doctoroff

/s/ Donald S. Owens