

STATE OF MICHIGAN
COURT OF APPEALS

DOREEN BINT and ROBERT BINT,

Plaintiffs-Appellants,

v

ROGER DOE, USF HOLLAND, INC., TST
SOLUTIONS, INC., USF LOGISTICS, INC., USF
FREIGHTWAYS, INC., USF FREIGHTWAYS
CORPORATION, THOMAS NATIONWIDE
TRANSPORT, and KPN, INC.,

Defendants-Appellees.

UNPUBLISHED
February 12, 2004

No. 242252
Huron Circuit Court
LC No. 02-001746-NI

DOREEN BINT and ROBERT BINT,

Plaintiffs-Appellants,

v

ROGER DOE, USF HOLLAND, INC., and
CITIZENS INSURANCE COMPANY,

Defendants-Appellees.

No. 242253
Huron Circuit Court
LC No. 97-000256-NI

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition to all the defendants under either MCR 2.116(C)(10) or MCR 2.116(C)(3). This appeal is the second we have heard regarding this case. We reverse in part, affirm in part, and remand for trial.

To prevent further misunderstanding of our holding, we begin by reviewing the factual and procedural evolution of this case from its inception. According to the complaint, a tractor-trailer struck plaintiff Doreen Bint's vehicle while it was pulled to the side of the road during a severe snowstorm. The complaint alleges that the collision injured Doreen Bint severely, and also contains a derivative consortium claim by her husband, Robert. According to Doreen's deposition testimony, the truck that hit her displayed the orange letters TNT on its wind

deflector. This account was partially corroborated by the testimony of another individual who saw a white and orange truck pass near the scene of the accident.

The record reflects that plaintiffs initially believed that USF Holland necessarily owned the truck because of its use of the orange TNT logo that plaintiff saw on the truck's wind deflector. USF Holland denied responsibility when the accident was reported however, and subsequently destroyed all its records that could identify which of its trucks were in the area at the time. USF Holland asserted that several other companies also used the logo and argued that plaintiffs had no hard evidence that Doreen Bint was hit by one of its trucks and not by a truck owned by some other company. Recognizing the potential that they may never identify the truck's owner, plaintiffs claimed unidentified motorist "hit and run" benefits from Citizens Insurance Company. Citizens denied the claim, alternatively arguing that plaintiffs had already identified the owner, or plaintiffs unduly delayed informing Citizens that they could not identify the owner or operator of the truck.

Suit followed against USF Holland, Citizens, and a possible driver known only as "Roger." Plaintiffs also moved to amend their complaint to include other trucking companies that operated under the orange TNT logo. USF Holland and Citizens reiterated their defenses in motions for summary disposition. The trial court granted summary disposition in favor of defendants and denied plaintiffs' motion to amend. The trial court held that plaintiffs did not present sufficient evidence to implicate USF Holland in the accident and failed to notify Citizens of the nature of the accident within thirty days, excusing Citizens from paying benefits. Plaintiffs appealed and we reversed in all respects in an unpublished opinion. *Bint v Doe*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2001 (Docket No. 220309).

On remand, the trial court consolidated the original case with a new case naming several new defendants but again granted summary disposition to each of the defendants. Plaintiffs appeal again, claiming that the trial court improperly disregarded our previous opinion when it again granted summary disposition to USF Holland and Citizens. We agree. We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

As we explained in the prior appeal, *Kaminsky v Hertz Corp*, 94 Mich App 356, 362-363; 288 NW2d 426 (1979), applies to this case. In *Kaminsky*, the plaintiffs were injured when a sheet of ice flew off the roof of a passing truck. *Id.* at 358. The truck was identified as yellow in color bearing the "Hertz" logo of the Hertz Corporation. *Id.* Evidence was presented that approximately ten percent of "Hertz" trucks on the road were owned by licensees, franchisees, or others who had purchased the trucks and not removed the Hertz logo. *Id.* We held that Hertz's "color scheme and logo establish a prima facie showing of ownership or control sufficient to prevent a summary judgment." *Id.* at 359.

While USF Holland still admits that it used the TNT logo in the area, it argues that the circuit court properly granted it summary disposition under MCR 2.116(C)(10) because on remand it supplemented the record with additional affidavits from its drivers. In the affidavits, its drivers all denied their involvement or presence in the area at that time of the accident. However, these additional affidavits are only as strong as the credibility of USF Holland's drivers. They do not eliminate the existence of contrary prima facie evidence – namely that

Doreen Bint was struck by a truck bearing USF Holland's logo. Therefore, the circuit court erred by again granting summary disposition to USF Holland. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

In defense of its reaffirmed dismissal, Citizens claims that plaintiffs failed to file timely notice that their claims arose from a collision with an unidentified motorist. Citizens raised this argument the first time we reversed its dismissal. Plaintiffs admittedly did not file a claim for unidentified-motorist benefits within thirty days of the accident as the policy required. But plaintiffs did not discover the possibility that the truck's owner remained unidentified until after they learned that the TNT logo was used by companies other than USF Holland. Therefore, plaintiffs reasonably delayed requesting unidentified-motorist benefits until after the possibility emerged that they may never identify the truck's owner or driver, and Citizens does not show any prejudice from the delay. *Kennedy v Dashner*, 319 Mich 491, 494-495; 30 NW2d 46 (1941). These circumstances excuse plaintiffs from strictly adhering to the notice deadline as we usually require. *Monti v League Life Ins Co*, 151 Mich App 789, 797-798; 391 NW2d 490 (1986).

Moreover, the law of the case doctrine mandates that a trial court follow our decision in all subsequent stages of litigation as long as it is unaffected by a higher court's opinion. *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988). On remand, the power of the lower court "is to take such action as law and justice require that is not inconsistent with the judgment of the appellate court." *McCormick v McCormick*, 221 Mich App 672, 679; 562 NW2d 504 (1997). Given our previous opinion and order denying clarification, it was totally improper for the circuit court to reaffirm its grant of summary disposition to Citizens.

The circuit court did not err, however, when it granted summary disposition to some of the new defendants. USF Freightways Corporation argues that the circuit court properly granted it summary disposition under MCR 2.116(C)(10) because it was only a shareholder of USF Holland, Inc. USF Freightways Corporation asserted without dispute that it did not operate vehicles in Michigan, so the trial court did not err when it granted summary disposition to USF Freightways Corporation. Also, plaintiffs fail to provide any argument opposing the dismissal of USF Freightways, Inc. or USF Logistics for plaintiffs' failure to serve these defendants. We do not find any error in the trial court's dismissal of these defendants. MCR 2.102(F). Plaintiffs' total failure to serve Thomas Nationwide Transport also justifies its dismissal from this suit. *Holliday v Townley*, 189 Mich App 424, 425; 473 NW2d 733 (1991).

However, defendants TST Solutions, Inc., and KPN, Inc. should not have been dismissed. They justify the trial court's grant of summary disposition to them by contending that plaintiffs presented no evidence that their companies' vehicles were involved in the accident. This overlooks the fact that plaintiffs presented evidence that a truck bearing their logo caused the collision. This evidence, slight as it may be, suffices to raise the factual issue of whether the truck belonged to one of them. *Kaminsky, supra* at 362-363. Barring the level of proof shown by USF Freightways Corporation, these companies may not obtain summary disposition by relying on their drivers' denials or other refutable evidence that their trucks were not involved. The trial court must leave for the jury such determinations of evidential value. To prevent further pretrial appeal, we note that these defendants are not entitled to dismissal for failure of service. They were properly served, MCR 2.104(B), and stipulated to reinstatement of plaintiffs claims, MCR 2.102(F). Therefore, the trial court erred when it granted them summary disposition.

Affirmed in part, reversed in part, and remanded for trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Peter D. O'Connell