STATE OF MICHIGAN

COURT OF APPEALS

TAMISHA HOYE, Individually and as Next Friend of COREY BATES, Minor,

Plaintiff-Appellant,

v

DMC/WSU and SINAI GRACE HOSPITAL,

Defendants,

and

VICTOR ADLAI, M.D.,

Defendant-Appellee.

UNPUBLISHED
January 28, 2010

No. 285780
Wayne Circuit Court
LC No. 04-407341-NH

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

GLEICHER, J. (*concurring*).

I concur in the results reached by the majority, but write separately to express my disagreement with the majority's application of the law of the case doctrine under the circumstances presented, and to propose an alternate analysis regarding case evaluation sanctions.

I. Facts and Proceedings

This medical malpractice case arises from plaintiff Tamisha Hoye's labor and delivery at defendant Sinai Grace Hospital. The parties' dispute concerns whether defendant Dr. Victor Adlai, an anesthesiologist, placed plaintiff's epidural catheter in a proper location, and whether Adlai and the hospital's attending nurses appropriately monitored plaintiff's condition after the epidural's placement. Indisputably, computerized fetal monitoring records supplied powerful direct and circumstantial evidence illuminating both questions.

During discovery, plaintiff repeatedly requested that the hospital produce a complete copy of its relevant documents, including the fetal monitoring records. In response, the hospital supplied some fetal monitoring records and represented that it possessed no others. On March 14, 2007, a jury trial commenced in the Wayne Circuit Court. On March 22, 2007, the sixth day of trial, the hospital disclosed for the first time pertinent fetal monitoring records that it had

previously withheld. By the time these records emerged, plaintiff's expert witnesses had completed their testimony. When court reconvened on March 26, 2007, plaintiff's counsel moved for entry of the hospital's default, contending that the newly produced records contained information that would have altered the expert witnesses' opinions.[1]

On March 30, 2007, the trial court conducted a midtrial evidentiary hearing concerning plaintiff's default request, at which seven witnesses testified. At the hearing's conclusion, the trial court stated that it would render a decision after arguments by counsel scheduled for a later date. The trial court then offered "preliminary findings," including that "[t]here was obvious negligence on the part of [the hospital] through one of its agents," and that "if the prejudice is so great that plaintiff has been denied a fair trial then this court will entertain a motion for mistrial on all claims."

During extensive oral arguments on April 3, 2007, plaintiff's counsel neither objected to continuing trial against Adlai nor suggested that the trial court declare a mistrial with respect to plaintiff's claims against Adlai. Rather, plaintiff's counsel proposed that the trial court enter a default of the hospital, "[a]nd what we should do is proceed with the trial as to Sinai Grace and Dr. Adlai . . . ." Plaintiff's counsel further suggested that the trial court should inform the jury that the default sanction against the hospital "should [in] no way affect [its] deliberations as to whether Dr. Adlai committed malpractice or not." When the trial court specifically questioned plaintiff's counsel about whether the hospital's "failures in discovery" impacted plaintiff's claim against Dr. Adlai, plaintiff's counsel responded that the delay inherent in a retrial would "inure to [defendants'] benefit," and elected to proceed to verdict. The trial court ultimately decided to enter a default of the hospital, and the trial then proceeded to verdict. The jury awarded plaintiff approximately $850,000 against the hospital, but found that Adlai had not committed professional negligence. On June 5, 2007, the trial court entered an order of judgment incorporating the jury's verdict.

The hospital subsequently filed motions to set aside the default and seeking a new trial. On October 10, 2007, the trial court set aside the default against the hospital, ruling that it had improperly entered the default instead of declaring a mistrial. The trial court also granted the hospital's motion for a new trial. Plaintiff then moved for a new trial or relief from judgment with regard to Adlai, asserting that the hospital's discovery abuse had deprived her of the ability to prove Adlai's professional negligence. The trial court denied plaintiff's motion, and on December 19, 2007 plaintiff sought leave to appeal in this Court.

While plaintiff's interlocutory application for leave remained pending, plaintiff settled with the hospital. On July 3, 2008, this Court denied "the application for leave to appeal as to defendant Victor Adlai, M.D., . . . for lack of merit in the grounds presented." Plaintiff additionally filed the instant claim of appeal, challenging the trial court's denial of her motion for a new trial concerning Adlai and the trial court's imposition of case evaluation sanctions.

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[1] Plaintiff's brief on appeal acknowledges, "Plaintiff never requested a mistrial, and consistently took the position that a mistrial would be unfair to Plaintiff."

II. Law of the Case Doctrine

The majority concludes that "because this Court expressed an opinion on the merits of plaintiff's arguments in denying the application for leave to appeal in Docket No. 282647, the law of the case doctrine precludes this Court from readdressing the arguments." *Ante* at 1-2. In my view, this Court's prior expression of an unexplained conclusion entirely lacking any legal analysis should not effectuate application of the law of the case doctrine.

The law of the case doctrine posits that an appellate court's decision concerning a particular issue binds courts of equal or subordinate jurisdiction during subsequent proceedings in the same case. *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 221-222; 555 NW2d 481 (1996). In *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991), the Supreme Court explained that the law of the case doctrine serves to maintain consistency in the law by avoiding reconsideration of matters previously decided in the course of a single, continuing lawsuit. Quoting Justice Holmes, the Supreme Court observed that unlike the doctrines of claim and issue preclusion, "the law of the case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Id*., quoting *Messenger v Anderson*, 225 US 436, 444; 32 S Ct 739; 56 L Ed 1152 (1912). This Court, too, has recognized that "[t]he law of the case doctrine is discretionary and expresses the practice of the courts generally; it is not a limit on their power." *Foreman v Foreman*, 266 Mich App 132, 138; 701 NW2d 167 (2005) (internal quotation omitted).

"Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue." *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997). This rule applies because the law of the case doctrine generally presumes that an appellate court already has actually decided the issue. "When successive appeals are heard in the ordinary course by three-judge panels," the first decision "usually represents deliberate resolution of a well-developed issue for the purpose of controlling further proceedings." 18B Wright, Miller & Cooper, Federal Practice & Procedure, § 4478.2, p 723. However, "deference is not subjection." *Id*. at 724. In my view, an order issued in response to an application for interlocutory review conclusorily announcing that an issue presented "lacks merit," without further elaboration, does not equate to "deliberate resolution of a well-developed issue for the purpose of controlling further proceedings." *Id*. at 723. Our Legislature has created an avenue for litigants to obtain a considered appellate determination: an appeal as of right from a final judgment of the circuit court. MCL 600.308(1)(a). Generally, litigants entitled to an appeal as a matter of right are entitled to oral argument on request, MCR 7.214(A), and a decision in writing. MCR 7.215(A). A summary order denying full consideration of an interlocutory appeal "for lack of merit in the grounds presented," issued without benefit of argument or even a memorandum explaining its basis, should not operate as a conclusive adjudication on the merits entitled to law of the case effect.[2]

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[2] I readily acknowledge that MCR 7.205(D)(2) permits this Court to "grant or deny the application [for leave to appeal]; [or] enter a final decision." But in my view, when this Court renders a "final decision" without explanation on an interlocutory basis in a case in which a party

(continued…)

Review of this Court's July 3, 2008 order permits only conjecture about the panel's reasons for concluding that the appeal lacked merit. I believe that appellants are due an appellate decision that includes at least some legal reasoning. Because the law of the case doctrine remains discretionary, not mandatory, it should give way in circumstances such as these to more compelling interests, including an appellant's entitlement to considered determination of issues presented in an appeal as of right.[3] Application of the doctrine here seems to simply penalize appellants for having sought interlocutory review.

III. Plaintiff's Motion for a New Trial against Adlai

Turning to the merits of plaintiff's first argument, I would hold that plaintiff waived her right to a new trial involving Adlai when she pursued a default against the hospital and deliberately elected to allow the jury to decide whether Adlai had committed professional negligence. The record reveals that when plaintiff made this election, she knew that the late disclosure of the fetal monitoring strips prejudiced her claims against Adlai. Even in plaintiff's brief on appeal, she concedes that she "agreed to forego a mistrial to all parties and to let the claim against Dr. Adlai go[] to the jury even though the jury never had the computer strips that established the timing issue as to Dr. Adlai." Given this election, plaintiff cannot now complain that the trial court did exactly as she asked. *Phinney v Perlmutter*, 222 Mich App 513, 558; 564 NW2d 532 (1997).

Plaintiff asserts that despite her apparent waiver of a mistrial, the trial court erred by denying her motion for a new trial concerning Adlai. This Court reviews for an abuse of discretion a decision to grant or deny a motion for a new trial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The decision whether to grant or deny a mistrial also resides within the discretion of the trial court, and this Court will reverse only in the presence of an abuse of discretion resulting in a miscarriage of justice. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999).

According to plaintiff, no precedent supports the trial court's decision to grant a "partial mistrial" applicable only to the hospital. However, no meaningful distinction exists between the "partial mistrial" resulting from the trial court's posttrial order vacating the hospital's default, and the "partial default" occasioned by the trial court's decision to enter the hospital's default while permitting the jury to determine the merits of plaintiff's claims against Adlai. Furthermore, MCR 2.611(A) provides,

> (1) A new trial may be granted *to all or some of the parties*, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:

(…continued)

maintains the right to appeal as of right, law of the case principles should not dictate the "final decision."

[3] The well-advised litigant seeking interlocutory review should think carefully before invoking this Court's jurisdiction by leave, since a request for appellate consideration before final judgment may result in only a one-sentence decision, forever foreclosing the right a future opportunity to full, or even memorandum-style, legal analysis.

(a) Irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial.

* * *

(g) Error of law occurring in the proceedings, or mistake of fact by the court. [Emphasis added].

Here, the trial court ruled that it had erred as a matter of law by entering a default of the hospital. The court rule specifically envisions a new trial as to a party impacted by the trial court's legally erroneous ruling. Accordingly, I would hold that the trial court did not abuse its discretion by granting a "partial mistrial."

Plaintiff further asserts that the new trial granted by the trial court violated our Supreme Court's admonition in *Kistler v Wagoner*, 315 Mich 162, 173-174; 23 NW2d 387 (1946), that "partial" new trials are disfavored. However, *Kistler* expresses disapproval of partial new trials limited to the issue of damages "in large part because issues relating to liability and damages are often closely intertwined."[4] *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29, 93 323 NW2d 270 (1982) (opinion by Moody, J., concurring in part and dissenting in part). Nor is the present situation analogous to a "mid-trial bifurcation" of a plaintiff's claims for liability and damages.

Plaintiff next invokes MCR 2.612(C)(1)(a) for the proposition that her counsel's surprise over the trial court's decision to vacate the hospital's default justifies relief from the judgment entered in favor of Adlai. Under the circumstances presented here, the trial court's decision to grant a new trial with respect to plaintiff's claims against the hospital does not qualify as a surprise. Plaintiff knew or should have known that the hospital would challenge the trial court's default ruling by filing an appeal, a motion for new trial, or a request for relief from judgment, and that the final result of that challenge would remain uncertain throughout the posttrial proceedings. And for precisely the same reasons, I reject that this Court should invoke its equitable powers to grant a new trial concerning Dr. Adlai. Plaintiff risked proceeding to a jury verdict regarding her claims against Adlai with the knowledge that the newly discovered evidence potentially would have strengthened her claim that Adlai committed professional negligence. *Limbach v Oakland Co Rd Comm*, 226 Mich App 389, 393; 573 NW2d 336 (1997). Because none of the bases for relief from judgment apply under these circumstances, the trial court did not abuse its discretion in denying plaintiff's motion.

IV. Case Evaluation Sanctions

The majority holds that the order approving plaintiff's settlement with the hospital does not constitute a "verdict" under MCR 2.403(O), and that "[t]he only 'verdict' in this case is the

[4] Furthermore, the Supreme Court's subsequent adoption of MCR 2.611(A)(1) calls into serious question whether *Kistler*'s holding with respect to "partial new trials" remains valid.

jury verdict of no cause of action with regard to Dr. Adlai." *Ante* at 6. I respectfully disagree that the only "verdict" in this case is the one exonerating Adlai. Clearly, the verdict in favor of plaintiff and against the hospital qualifies as a "verdict" under MCR 2.403(O)(2)(a). However, I disbelieve that subrule (2)(a) applies here because subrule (2)(c) resolves the issue. Subrule (2)(c) defines "verdict" to include "[a] judgment entered as a result of a ruling on a motion after rejection of the case evaluation." Because the judgment entered after the trial court's ruling on the hospital's motion for a new trial was more favorable to Adlai, the trial court properly assessed case evaluation sanctions against plaintiff. See *Keiser v Allstate Ins Co*, 195 Mich App 369, 374-375; 491 NW2d 581 (1992) (concluding that "it is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O)."). The "ultimate verdict" here is the jury's finding in favor of Adlai. I thus would affirm the trial court's case evaluation sanction award on this basis.

/s/ Elizabeth L. Gleicher