STATE OF MICHIGAN

COURT OF APPEALS

VICKI ASHKER, Personal Representative of the Estate of MICHELLE ASHKER, Deceased,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY,

Defendant-Appellee,

and

FORD MOTOR CREDIT COMPANY, GEORGE G. SURDU, DAVID HOLMAN, HARRY MILLS, HOWARD LAYSON, GEORGE HALLORAN, GERALD DECKER, HAROLD COLLINS, RONALD BIERMAN, LARRY RICE, and WILLIAM ODOM,

Defendants.

FOR PUBLICATION
March 6, 2001
9:05 a.m.

No. 214537
Wayne Circuit Court
LC No. 91-101922-CL

Updated Copy
April 27, 2001

Before: Markey, P.J., and Murphy and Collins, JJ.

MURPHY, J.

Plaintiff[1] appeals as of right from the trial court's order granting summary disposition, pursuant to MCR 2.116(C)(10), in favor of defendant Ford Motor Company. We reverse and remand.

In January of 1991, Michelle Ashker initiated this action alleging civil conspiracy, violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*,

intentional interference with economic advantage, intentional infliction of emotional distress, breach of contract, and intentional interference with a contractual relationship. The lawsuit named as defendants Ford Motor Company, Ford Motor Credit Company (FMCC) and ten individual defendants. Ashker entered into a consent judgment with FMCC and the individual defendants following mediation, and only defendant Ford remained. In August 1995, the trial court dismissed the suit against defendant. Ashker appealed to this Court, which affirmed in part and reversed in part in *Ashker v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 1997 (Docket No. 188647) (*Ashker I*).

In *Ashker I*, this Court affirmed the dismissal of plaintiff's claims of civil conspiracy, intentional infliction of emotional distress, and interference with a contractual relationship, but reversed the dismissal of the CRA claim.[2] With respect to the CRA claim, this Court held that the proper test to determine whether defendant was Ashker's employer was the economic reality test:

> The circuit court erred in granting summary disposition to defendant regarding plaintiff's CRA claim. The economic reality test is the proper test to determine whether defendant Ford was plaintiff's employer. See *McCarthy v State Farm Insurance*, 170 Mich App 451, 455; 428 NW2d 692 (1988). The factors to be considered in applying the economic reality test are (1) control; (2) payment of wages; (3) hiring and firing; and (4) responsibility for the maintenance of discipline. *Wells v Firestone Co*, 421 Mich 641, 648; 364 NW2d 670 (1984).

Under this test, this Court held that there was a genuine issue of material fact regarding whether defendant was Ashker's employer. Accordingly, this Court remanded for further proceedings regarding the CRA claim.

Defendant again moved for summary disposition in July 1998, this time arguing that this Court's decision in *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231; 581 NW2d 746 (1998), changed the law and that the control test should now be used to determine whether defendant was Ashker's employer. Defendant contended that *Norris* expressly overruled *McCarthy, supra,* and adopted the control test in all but worker's compensation cases. Defendant argued that, under the control test, there was no genuine question of material fact that it was not Ashker's employer. The trial court agreed with defendant's arguments and entered summary disposition in its favor.

Plaintiff now contends that the *Norris* panel misinterpreted the *McCarthy* decision and that under the facts of this case the economic reality test is still the appropriate test to determine whether defendant was Ashker's employer for the purposes of this CRA claim. Plaintiff argues that the law of the case doctrine applies such that the trial court is precluded from reconsidering whether there is a genuine issue of fact regarding whether plaintiff was Ford's employee. We agree.

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. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). 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. *Id.* 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. *Bennett v Bennett,* 197 Mich App 497, 499-500; 496 NW2d 353 (1992). However, the doctrine does not

preclude reconsideration of a question if there has been an intervening change of law. *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995). For this exception to apply, the change of law must occur after the initial decision of the appellate court. *Id*. Whether law of the case applies is a question of law subject to review de novo. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998).

At issue here is whether *Norris* represents an intervening change of law that precludes application of the law of the case doctrine. We find that it is not. Although the panel in *Norris* specifically overruled *McCarthy* while holding that the appropriate test for respondeat superior liability is the control test, *Norris, supra* at 238-239, the panel actually misinterpreted *McCarthy* by failing to recognize that the earlier decision addressed two separate issues. *Norris*, in fact, merely reiterated the second of two holdings reached in *McCarthy* and thus the two decisions are fully consistent.

McCarthy first addressed whether the defendant State Farm was the plaintiff 's employer and, second, whether, in the alternative, the defendant State Farm could be held liable for actions of its agent under the theory of respondeat superior. In addressing the first issue *McCarthy* applied the economic reality test, *McGarthy, supra* at 455-456, and in addressing the second it applied the control test. *Id.* at 457-458. In *Norris*, by contrast, it appears that the plaintiff asserted claims against the defendant State Farm companies pursuant to a theory of respondeat superior liability only. *Norris, supra at* 238. No allegation of direct liability is discussed.[3] *Norris* concluded that for all but worker's compensation cases it is well established that the correct standard to assess respondeat superior liability is the control test, not the economic reality

test. *Id*. at 239. However, because *McCarthy* also held that the control test applies to assess respondeat superior liability, *Norris* does not constitute an intervening change in the law. Accordingly, the law of the case doctrine is applicable and the trial court should not have reconsidered the issue.

Although the doctrine is applicable regardless of the correctness of this Court's decision in *Ashker I*, see *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995); *Bennett, supra* at 500, we additionally find that the *Ashker I* panel appropriately utilized the economic reality test. In *Chilingirian v City of Fraser*, 194 Mich App 65, 69; 486 NW2d 347 (1992), this Court noted:

> The "control test" has been limited to those situations where respondeat superior has been alleged and the vicarious liability of a master is involved. The control test has been abandoned as the exclusive criterion by which the existence of an employee-employer relationship, for the purpose of remedial social legislation, is determined. Because vicarious liability of a master is not alleged herein, we find the control test to be inappropriate. The test to be employed is one of "economic reality." [Citations omitted.]

Here, it is not clear that Ashker sought only to hold defendant vicariously liable for the acts of a servant or an agent. Rather, it appears that she sought to hold defendant liable for its own actions concerning its investigation, or lack thereof, of her workplace complaints of ethnic harassment. Before consideration of defendant's original motion for summary disposition, Ashker supported this theory of liability with evidence regarding defendant's involvement in investigation of her complaints and defendant's oversight and review of FMCC's termination process. Regardless of whether sufficient evidence to prevail will ultimately be presented, Ashker did not merely assert liability on the part of defendant for the actions of an agent, FMCC.

To the extent, therefore, that this case presents a question of direct liability on the part of defendant, the *Ashker I* panel correctly held the economic reality test applicable. The control test is irrelevant because its purpose is to define and delimit the circumstances under which a master should be held liable for the acts committed by a servant that injure a third party. *Nichol v Billot*, 406 Mich 284, 297; 279 NW2d 761 (1979).[4]

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Jeffrey G. Collins

[1] The original plaintiff in this matter was Michelle Ashker. According to plaintiff Vicki Ashker's motion for substitution of party, Michelle Ashker died on April 26, 1999, eight months after the court entered the order presently being appealed.

[2] Ashker did not appeal the dismissal of the claims of intentional interference with economic advantage or breach of contract.

[3] *Norris* seemingly viewed *McCarthy* as an identically structured case involving only a respondeat superior theory. It was on this premise that *Norris* held that *McCarthy* was wrongly decided, ruling that the earlier panel had erred in applying the economic reality test to a respondeat superior situation. Given the facts of both cases, each of which included three apparently identically positioned parties—an employee, an independent insurance broker exclusively selling State Farm policies, and State Farm—it is plausible that both cases could have been analyzed under the framework addressed in *Norris*. Nevertheless, the claims presented in the two cases did differ, and rightly or wrongly *McCarthy* did not focus solely on the theory of respondeat superior. To the extent it was appropriate to view the relationship between the parties in *McCarthy* in a framework other than respondeat superior, the panel's reasoning with regard to the issue of direct liability was appropriate and is still good law.

[4] Given our resolution of these questions, we need not address plaintiff's additional argument that under the control test there is a material question of fact regarding whether defendant had control over Ashker.