

STATE OF MICHIGAN
COURT OF APPEALS

LYDELL BREWER,

Plaintiff-Appellee,

v

PAUL E. SCHULZ,

Defendant-Appellant,

and

MARGARET SCHULZ,

Defendant.

UNPUBLISHED

March 22, 2011

No. 294220

Wayne Circuit Court

LC No. 03-340557-CZ

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant Paul E. Schulz appeals as of right from an order confirming an earlier default judgment against him for \$100,000, which had previously been conditionally set aside. The trial court confirmed the earlier default judgment after defendant failed to satisfy an award of \$12,060 in attorney fees and costs that were imposed as a condition for setting aside the default judgment. We reverse and remand.

On July 12, 2006, the trial court entered a default judgment against defendant for \$100,000. Thereafter, on August 3, 2007, the trial court entered an order conditionally granting defendant's motion to set aside the default judgment, provided defendant post a \$100,000 bond. In a prior appeal, this Court vacated the bond requirement, stating:

[W]e vacate the portion of the [trial] court's August 3, 2007 order that requires that defendant post a \$100,000 bond. We remand with instructions that the court amend the order to require only that defendant pay the reasonable attorney fees and taxable costs incurred by plaintiff as the result of defendant's failure to file a timely answer. MCR 2.603(D)(4); MCR 2.625(D). [*Brewer v Schultz*, unpublished order of the Court of Appeals, entered January 4, 2007 (Docket Nos. 279125 and 280275).]

On remand, the trial court awarded plaintiff attorney fees and costs in the amount of \$12,060. When defendant failed to pay that award by the date specified by the trial court, the trial court entered an order confirming the earlier default judgment.

Although defendant now raises several issues on appeal, we find that one is dispositive. We agree with defendant that the trial court erred by imposing attorney fees and costs that exceeded the scope of this Court's remand order in the prior appeal.

The interpretation of a court order is a question of law that this Court reviews de novo on appeal. *Silberstein v Pro-Golf of America, Inc.*, 278 Mich App 446, 460; 750 NW2d 615 (2008). The determination whether the law of the case doctrine applies is also a question of law that this Court reviews de novo. *Manske v Dep't of Treasury*, 282 Mich App 464, 467; 766 NW2d 300 (2009).

MCR 2.603(D) governs the setting aside of a default or a default judgment. Subsection (4) of that rule provides:

An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed by MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

Although this court rule does not require an award of attorney fees, it also does not limit an award of attorney fees to those "incurred" by the plaintiff. In contrast to the court rule, this Court's order in the prior appeal provided, in pertinent part:

We remand with instructions that the court amend the order to require only that defendant pay the reasonable attorney fees and taxable costs *incurred by plaintiff* as the result of defendant's failure to file a timely answer. MCR 2.603(D)(4); MCR 2.625(D). [Emphasis added.]

Thus, this Court's order is narrower than the court rule in that it only allows an award of attorney fees *incurred by plaintiff*. On remand, the parties stipulated to the entry of an order containing identical pertinent language, allowing an award of attorney fees "*incurred by plaintiff* as the result of defendant's failure to file a timely answer."

As defendant argues, to "incur" means "to become liable or subject to." *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003), quoting *Webster's II New College Dictionary* (2001). The record discloses that plaintiff has a contingency fee agreement with his attorneys, and he has not been billed for or paid any attorney fees in this case. On appeal, plaintiff concedes that he has not incurred any attorney fees.

Under MCR 2.603(D)(4), plaintiff could have been awarded a reasonable attorney fee in this case, without regard to his fee arrangement. However, this Court's order allows only an award of reasonable attorney fees and taxable costs "incurred by plaintiff." Because plaintiff has

not become liable or subject to any attorney fees, the trial court erred in entering an award of attorney fees in plaintiff's favor.

In addition, the trial court erred in entering an award of costs expended by plaintiff to file a motion to allow a late answer to defendant's application for leave to appeal in Docket No. 280275. Those costs resulted from plaintiff's lack of diligence in timely opposing the application for leave to appeal, not from "defendant's failure to file a timely answer," and therefore fell outside the scope of costs permitted under the clear language of this Court's order.

Plaintiff argues that, despite the clear language of this Court's order, this Court incorporated MCR 2.603(D)(4) by reference. However, the reference to MCR 2.603(D)(4) only appears as a supportive citation. To the extent that there is a discrepancy between the language of this Court's order and the language of MCR 2.603(D)(4), the clear and unambiguous language of this Court's order is controlling as the law of the case.

"Under the doctrine of the law of the case, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal question will not be differently determined in a subsequent appeal in the same case where the facts remain materially the same." *Bennett v Bennett*, 197 Mich App 497, 499; 496 NW2d 353 (1992). Although the doctrine is discretionary, the goal of the doctrine is to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Id.* at 499-500. In *Bennett*, this Court recognized that it may be appropriate to ignore the doctrine where constitutional rights are involved, but explained "that a conclusion that the prior decision was erroneous is [not] sufficient by itself to justify ignoring the law-of-the-case doctrine." *Id.* at 500. The Court observed that "the law-of-the-case doctrine has no usefulness if it is only applied when a panel agrees with the decision reached by a prior panel." *Id.*

Plaintiff never challenged this Court's prior decision and the trial court was bound to follow it exactly. See *id.* at 501-502. Because the record discloses that attorney fees and costs were not incurred by plaintiff as the result of defendant's failure to file a timely answer, the trial court erred in entering the award of attorney fees and costs as a condition for setting aside the earlier default judgment. Accordingly, we vacate the trial court's orders imposing attorney fees and costs, and confirming the earlier default judgment, and remand for further proceedings.¹ In light of our decision, it is unnecessary to address defendant's remaining issues.

¹ We note that, on appeal, defendant did not challenge the award of \$20 for the cost of a motion fee for entry of default judgment and during oral argument defendant conceded that this sum was appropriately awarded. On remand, plaintiff may tax this sum against defendant.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Pat M. Donofrio