STATE OF MICHIGAN

COURT OF APPEALS

I-FUSION TECHNOLOGY, INC.,

Plaintiff-Appellee,

v

TRW AUTOMOTIVE U.S., L.L.C.,

Defendant,

and

TRW SAFETY SYSTEMS, INC., and TRW VEHICLE SAFETY SYSTEMS, INC.,

Defendants-Appellants.

UNPUBLISHED
June 13, 2013

No. 312528
Macomb Circuit Court
LC No. 2009-001292-CZ

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

PER CURIAM.

TRW Safety Systems, Inc. and TRW Vehicle Safety Systems, Inc. (collectively "TRW"), appeal by leave granted from the trial court's order granting I-Fusion Technology, Inc.'s (I-Fusion) motion to compel the deposition of John Plant, an "apex" corporate officer of TRW. We reverse and remand.

This case arises out of a contract dispute between I-Fusion, and automobile parts supplier TRW. I-Fusion filed this action in 2009, seeking damages and other relief under several different legal theories, including breach of contract and fraud. Beginning in August 2010, I-Fusion filed several motions to compel the deposition of John Plant, a corporate officer of TRW. The trial court initially denied the motions. Following further discovery, the trial court entered an amended order on September 15, 2011, granting a second renewed motion to compel Plant's deposition. Thereafter, on September 16, 2011, the trial court denied TRW's motion for partial summary disposition of I-Fusion's fraud claim and related request for exemplary damages. TRW filed separate applications for leave to appeal from each order, and both matters were resolved in their favor.

On October 25, 2011, this Court, in lieu of granting leave to appeal, peremptorily reversed the trial court's September 15, 2011, amended order granting I-Fusion's second renewed motion to compel Plant's deposition. This Court's order stated:

> [I-Fusion] has not shown that Mr. Plant, an "apex" corporate officer of [TRW], has superior or unique information regarding the subject matter of the litigation, or that [I-Fusion] cannot obtain this information through a less intrusive method, such as by direct interrogatories to Plant as previously permitted by the court.[1] [2]

Thereafter, on May 29, 2012, the trial court ordered TRW to respond to interrogatories that I-Fusion had directed to Plant. After receiving the responses, I-Fusion again moved to compel Plant's deposition. At a hearing on August 29, 2012, the trial court expressed its view that Plant "does have some knowledge about this case[]" and "[h]e has to know something," and, accordingly, it granted the motion. This Court thereafter granted TRW's application for leave to appeal the trial court's order, which is the subject of this appeal. After this Court granted the application, it issued a decision in TRW's separate appeal and reversed the trial court's September 16, 2011, order denying TRW's motion for summary disposition of I-Fusion's fraud claim and related request for exemplary damages, and remanded for entry of judgment in favor of TRW on those claims.[3]

In the appeal now before us, TRW challenges the trial court's August 29, 2012, order granting I-Fusion's motion to compel Plant's deposition. We agree with TRW that the trial court's decision is contrary to the law of the case as established by this Court's prior October 25, 2011, order.

This Court generally reviews a trial court's ruling on a motion to compel discovery for an abuse of discretion.[4] But this Court reviews de novo whether the law of the case doctrine applies, including whether a trial court properly followed an appellate court's ruling on remand.[5] We also consider de novo the meaning of a court order.[6]

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[1] *Alberto v Toyota Motor Corp*, 289 Mich App 328, 334; 796 NW2d 490 (2010).

[2] *I-Fusion Technology, Inc v TRW Auto US, LLC*, unpublished order of the Court of Appeals, entered October 25, 2011 (Docket No. 306178).

[3] *I-Fusion Technology, Inc v TRW Auto US, LLC*, unpublished opinion per curiam of the Court of Appeals, issued December 18, 2012 (Docket No. 306466).

[4] *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 440; 814 NW2d 670 (2012).

[5] *Manske v Dep't of Treasury*, 282 Mich App 464, 467; 766 NW2d 300 (2009); *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

[6] *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008).

In its order in the prior appeal, this Court applied the apex-deposition rule in *Alberto v Toyota Motor Corp*[7] when reversing the trial court's September 15, 2011, order granting I-Fusion's motion to compel Plant's deposition. Under the apex-deposition rule, where a party seeks the deposition of a high-ranking corporate officer, the party opposing the deposition must show by affidavit or other testimony that "the proposed deponent lacks personal knowledge or unique or superior information relevant to the claims in issue[.]"[8] If this burden is met, the party seeking the deposition must show that the "potential deponent has unique or superior knowledge of issues relevant to the litigation and that the information cannot be obtained by less intrusive means, such as by deposing lower-level officials or employees."[9] In *Alberto*, this Court adopted the apex-deposition rule applied by federal appellate and district courts, which it described as follows:

> Generally, these cases hold that before a high-ranking corporate executive may be deposed, the plaintiff must establish that the executive has superior or unique information regarding the subject matter of the litigation and that such information cannot be obtained through a less intrusive method, such as by deposing lower-ranking executives.[10]

Examined in light of *Alberto*, we reject I-Fusion's contention that this Court's October 25, 2011, order permitted Plant's deposition if I-Fusion could show *either* that Plant had superior or unique information *or* that I-Fusion could not obtain relevant information through less intrusive means. The October 25, 2011, order is properly construed as a determination that I-Fusion was required to show both that Plant has superior or unique information regarding the subject matter of the litigation *and* that I-Fusion could not obtain the information through less intrusive means, and that I-Fusion failed to satisfy either of these requirements.

The law of the case doctrine provides that where an appellate court decides a legal question and remands for further proceedings, the legal question will not be determined differently by the appellate court in a subsequent appeal where the facts are materially the same.[11] "The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court."[12] The law of the case doctrine generally applies regardless of the correctness of a prior decision in the case.[13]

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[7] *Alberto*, 289 Mich App at 334.

[8] *Id*. at 339.

[9] *Id*.

[10] *Id*. at 334, 336.

[11] *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000).

[12] *Id*. at 260.

[13] *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995).

In this case, the trial court failed to consider, let alone find, a material change of facts since the issuance of this Court's prior October 25, 2011, order to justify it in disregarding the law of the case established by that order, which established that grounds for Plant's apex deposition had not been shown. Although I-Fusion argued below that Plant's answers to interrogatory questions 5, 7, 8, and 16 supported its motion to compel Plant's deposition, we conclude that those answers do not show any change in the material facts that this Court previously determined failed to establish that Plant had superior or unique information regarding the subject matter of the litigation. We also disagree with I-Fusion's newly raised argument that the disclosure by Plant in interrogatory no. 19 constituted a new material fact to disregard the law of the case established by this Court's prior order.

In sum, this Court previously determined in Docket No. 306178 that I-Fusion "has not shown that Mr. Plant, an 'apex' corporate officer of [TRW], has superior or unique information regarding the subject matter of the litigation," and I-Fusion failed to demonstrate on remand a material change of facts to allow the trial court to revisit this issue. Thus, the law of the case doctrine precluded the trial court from deciding that issue differently on remand. Accordingly, we reverse the trial court's August 29, 2012, order granting I-Fusion's motion to compel Plant's deposition.

In passing, we note that I-Fusion's concerns regarding the signature dates for the interrogatory answers, and whether certain answers were incomplete or evasive, are matters that I-Fusion could have raised in an appropriate motion under MCR 2.313.[14] Because the matter before us does not involve a motion to compel answers to interrogatories under MCR 2.313, but rather I-Fusion's attempt to use answers to interrogatories to satisfy the apex-deposition rule without exhausting the procedures and remedies provided in MCR 2.313, we do not address I-Fusion's concerns.

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

/s/ Michael J. Riordan
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood

[14] See MCR 2.309(C) ("[t]he party submitting the interrogatories may move for an order under MCR 2.313(A) with respect to an objection to or other failure to answer an interrogatory"); see also MCR 2.313(A)(4) (an evasive or incomplete answer is treated as a failure to answer).