

STATE OF MICHIGAN
COURT OF APPEALS

DALE OSBURN, INC., OSBURN INDUSTRIES,
INC., and TRUCKWAY SERVICE, INC. OF
MICHIGAN,

UNPUBLISHED
May 15, 2007

Plaintiffs-Appellees,

v

No. 267927
Wayne Circuit Court
LC No. 98-836716-CK

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellant,

and

GARAN, LUCOW, MILLER & SEWARD, P.C.,
f/k/a GARAN, LUCOW, SEWARD, COOPER &
BECKER, P.C., and THOMAS L. MISURACA,

Defendants.

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant, Auto Owners Insurance Company (“Auto Owners”), appeals as of right from a judgment in favor of plaintiffs, Dale Osburn, Inc., Osburn Industries, Inc., and Truckway Service, Inc. of Michigan, entered in this breach of contract action. Because the law of the case doctrine precludes review of the issues raised by Auto Owners concerning estoppel, and no intervening change in the law precludes application of the doctrine, we affirm.

The necessary background facts regarding this matter were stated in *Detroit Edison Co v Dale Osburn Trucking, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2001 (Docket No. 218260), and subsequently cited in *Osburn v Auto Owners*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2003 (Docket No. 242313), as follows:

Edison is a producer and supplier of energy. One of the byproducts of its energy generation process is a substance known as fly ash. Since February 1, 1989, [Michigan Foundation Company, Inc.’s, “MFC”] operations have included the removal and sale of limestone from Sibley Quarry in Trenton, Michigan.

Sibley Quarry is owned by Edison and used as a disposal site for its fly ash. Under a contract known as the Sibley Quarry Agreement, MFC manages both the mining and ash disposal operations at the quarry, while Edison is responsible for the expenses associated with the ash disposal operation, and has certain other duties. At the heart of the arbitration action . . . is a reciprocal indemnity provision in the Sibley Quarry Agreement, whereby MFC and Edison agreed to indemnify each other for risks associated with “their respective activities.” . . .

Osburn is a trucking/hauling company that entered into a contract with Edison (“the Fly Ash Contract”) to haul fly ash from Edison’s energy generation facilities to the Sibley Quarry for disposal. A term of that contract expressly provided that Osburn would defend and indemnify Edison for a broad category of claims or charges that might be visited on Edison by virtue of Osburn’s performance of the Fly Ash Contract. Shortly after the Fly Ash Contract went into effect, one of Osburn’s truck drivers, Dennis Claffey, was injured when he fell from the top of an Edison-owned and MFC-provided water tanker truck that he was using to hose out his dump truck in accord with the terms of the Fly Ash Contract. Claffey and his wife sued MFC and Edison (“the Claffey suit”), alleging that his injuries were the result of their negligence.

In the Claffey suit, Edison filed a cross-claim for indemnity against MFC, but invoked its contractual right to arbitrate the dispute after MFC moved to do likewise. Edison also filed a third-party complaint against Osburn, invoking the indemnity provision of the Fly Ash Contract. Initially, Osburn opposed the third-party action, but eventually entered into a specific agreement to defend Edison in the Claffey suit (“the Defense/Settlement Agreement”). Thereafter, Osburn (through its insurer) [Auto Owners] paid \$100,000 to the Claffeys in settlement of their claims against Edison. Sometime after that, Amerisure paid \$ 150,000 to the Claffeys to settle their claims against MFC.

Following its payment to the Claffeys, Amerisure sought indemnity, as subrogee to MFC, by instituting an arbitration action against Edison. In turn, Edison made a demand on Osburn to defend and indemnify Edison in the arbitration action brought by Amerisure. Osburn refused, which led to the . . . Edison [lawsuit], [in which Edison was] claiming breach of the indemnity provision of the Fly Ash Contract, followed by Osburn’s countersuit, alleging breach of the Defense/Settlement Agreement. The trial court ultimately held that the indemnity provision of the Fly Ash Contract was broad enough to encompass actions against Edison seeking contractual indemnity for losses associated with Osburn’s performance, and that the Defense/Settlement Agreement, by its own terms, did not reduce Osburn’s indemnity duties with regard to Amerisure’s claim against Edison.

In *Osburn, supra*, slip op at 2-3, this Court, after citing the above passage, expanded on these facts as follows:

This Court affirmed the trial court’s decision in the Edison lawsuit. As a result, plaintiffs submitted Edison’s indemnification claims to Auto Owners, who

denied payment on the grounds that Auto Owners did not provide coverage for Edison's contractually assumed claims. Plaintiffs filed a complaint seeking a declaration regarding the scope of coverage under the liability insurance policy, as well as asserting breach of contract claims against Auto Owners and legal malpractice claims against Misuraca and Garan Lucow.

Auto Owners, Misuraca, and Garan Lucow all moved for summary disposition. The trial court concluded that plaintiffs' obligation to indemnify Edison for its contractual liability to MFC was not covered under Auto Owners' insurance policy. The trial court further concluded that plaintiffs were informed of this in a reservation-of-rights letter that Auto Owners sent plaintiffs and in the defense agreement that plaintiffs signed. The trial court therefore granted Auto Owners summary disposition pursuant to MCR 2.116(C)(8) and (10).

This Court, in *Osburn*, then reversed the trial court's order granting summary disposition in favor of Auto Owners. Specifically, this Court ruled that because plaintiffs' obligation to indemnify Edison for its liability to MFC arose out of the reciprocal indemnification provisions contained in the Sibley Quarry Agreement, plaintiffs' claim was excluded by policy language excluding coverage for damages plaintiffs are required to pay "by reason of the assumption of liability in a contract." *Osburn, supra* at 5-7. This Court nevertheless reversed the circuit court's order granting Auto Owners summary disposition because Auto Owners failed to provide reasonable notice that it was relying on the contractual liability exclusion, and directed entry of summary disposition in favor of plaintiffs on the question of coverage pursuant to MCR 2.116(I)(2). *Osburn, supra* at 4-5, 7.

Following this Court's *Osburn* opinion, the circuit court considered the only issue that remained for the court to decide—the amount of damages. The circuit court ultimately granted summary disposition in favor of plaintiffs and entered a judgment "in favor of Plaintiffs and against Defendant Auto Owners Insurance Company in the amount of \$480,353.26 . . ."

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the circuit court did not state the court rule it relied upon in granting plaintiffs' motion for summary disposition, it is apparent that the trial court considered evidence beyond the pleadings and, therefore, granted the motion under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

On appeal, Auto Owners claims that the trial court erred in entering judgment in favor of plaintiffs, devoting much of its brief to arguments concerning whether plaintiffs should have been afforded coverage based upon theories of estoppel. According to Auto Owners, despite the fact that the estoppel issue was resolved in *Osburn, supra*, the law of the case doctrine does not prohibit further review of the estoppel claim because the *Osburn* opinion was clearly erroneous and because the Michigan Supreme Court's decision in *Grosse Pointe Park v Liability Pool*, 473 Mich 188; 702 NW2d 106 (2005), constitutes an intervening change in the law that precludes application of the law of the case doctrine. We disagree.

Under the law of the case doctrine, an appellate court's decision on a particular issue binds both the lower courts and other appellate panels in subsequent appeals of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000). An exception to the application of the law of the case doctrine is invoked when there is a need for independent review of constitutional facts. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109-110; 476 NW2d 112 (1991). An exception is also created where there has been an intervening change in the law. *Freeman v DEC Int'l Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995). Neither of these exceptions is present in the instant matter.

In *Grosse Pointe Park, supra*, the Michigan Supreme Court was split 3-3 with regard to the analysis to be employed in determining whether the defendant insurance company, Michigan Mutual Liability and Property Pool ("Michigan Mutual"), was equitably estopped from enforcing a pollution exclusion clause contained in an insurance policy issued to Grosse Pointe Park. *Grosse Pointe Park, supra* at 225. The case arose as a result of residents living near Fox Creek suing Grosse Pointe Park ("the city") for claims stemming from sewage backups into their homes and businesses caused by the city's discharge of sewage into Fox Creek. *Grosse Pointe Park, supra* at 191-192. The city submitted the complaint to its insurer, Michigan Mutual, for defense and indemnification coverage. *Id.* at 192.

Michigan Mutual sent a letter to the city, indicating that it would provide the city a defense, but that it was reserving its rights under the policy and would not indemnify the city for a loss that was not covered by the insurance policy. The letter, *inter alia*, cited the pollution exclusion clause as a potential bar to coverage. *Grosse Pointe Park, supra* at 192-194. After the city settled the matter with the plaintiffs living near Fox Creek, Michigan Mutual noticed the city that indemnification would be denied. The city nevertheless finalized its settlement with the residents and filed a declaratory action against Michigan Mutual to determine coverage. *Id.* at 194. In the declaratory action, the trial court granted summary disposition in favor of the city, ruling that Michigan Mutual was equitably estopped from denying coverage because it had previously paid similar claims. Michigan Mutual appealed and this Court reversed, ruling that questions of fact existed regarding the estoppel issue and the parties' intent concerning the application and meaning of the pollution exclusion clause. *Id.* at 194-195. Our Supreme Court thereafter granted Michigan Mutual's application for leave to appeal.

Justices Cavanagh, Weaver and Kelly held that the city could not show that it justifiably relied on the fact that Michigan Mutual had previously paid sewage backup claims as a representation that Michigan Mutual was going to cover the city's loss. The Justices noted that the city's reliance was especially unjustified in light of Michigan Mutual's specific reservation of rights letter. *Id.* at 204-205, and accordingly ruled that the trial court erred in holding otherwise. *Id.* at 207.

Justices Young, Taylor and Markman agreed with the ultimate conclusion that equitable estoppel was inapplicable. *Grosse Pointe Park, supra* at 224-225. Justice Young, however, wrote that "equitable estoppel must not be applied to expand coverage beyond the scope originally contemplated by the parties *in the insurance policy as written*" (*Id.* at 223), essentially positing that even if the city could prove all the elements for the application of estoppel, the city would still be unprotected because estoppel can never be applied to extend coverage.

Justice Cavanagh recognized that notwithstanding the disagreement between the Justices on this point, “because Grosse Pointe Park’s estoppel claim fails, it is unnecessary to adopt Justice Young’s preferred rule, decide whether coverage in this case should be expanded, or depart from the Court’s prior precedent.” *Id.* at 206. Justice Young also aptly noted that because the bench was divided equally, the Supreme Court’s decision was not binding precedent. *Id.* at 208 n 1. Given that the Justices who wrote the opinion concede that *Gross Pointe Park* does not alter prior law and does not constitute binding precedent, Auto Owners has failed to demonstrate that an intervening change in the law precludes application of estoppel in the instant matter.

As stated, the law of the case doctrine dictates that an appellate court’s decision on a particular issue binds both the lower courts and other appellate panels in subsequent appeals of the case. *Lopatin, supra* at 260. Here, this Court ruled, in *Osburn v Auto Owners*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2003 (Docket No. 242313), that Auto Owners was estopped from denying coverage because it failed to provide plaintiffs with reasonable notice that it was proceeding under a reservation of rights. Specifically, this Court ruled:

Because neither the reservation-of-rights letter nor the Defense Settlement Agreement provided notice that Auto Owners would refuse to cover MFC’s claims under the exclusion for indemnity liability, we conclude that the trial court’s decision to grant Auto Owners summary disposition was improper and that, pursuant to *Meirthew [v Last, 376 Mich 33; 135 NW2d 353 (1965)]*, Auto Owners is estopped from asserting that exclusion. Further, pursuant to MCR 2.116(I)(2), we conclude that summary disposition in favor of plaintiffs was appropriate. [*Osburn, supra* at 4.]

This Court then ordered, “we reverse the trial court’s entry of summary disposition in favor of Auto Owners and direct entry of summary disposition in favor of plaintiffs on the question of coverage pursuant to MCR 2.116(I)(2).” *Osburn, supra* at 7.

On remand, the parties set forth proofs regarding, and ultimately stipulated to, a specific amount of damages. Auto Owners does not challenge the amount of the circuit court’s judgment, but merely contends that *Osburn* should be disregarded. Under the law of the case doctrine, the circuit court could not disregard this Court’s order in *Osburn*, nor are we permitted to do so now. *Lopatin, supra* at 260. The circuit court did not err in entering judgment in favor of plaintiffs. The remaining arguments made by Auto Owners were rejected by this Court in *Osburn, supra*, and need not be addressed here.

Affirmed.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto