

STATE OF MICHIGAN  
COURT OF APPEALS

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J & B SAUSAGE COMPANY, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF MANAGEMENT &  
BUDGET and DEPARTMENT OF EDUCATION,

Defendants-Appellants.

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UNPUBLISHED

June 4, 2009

No. 281866

Court of Claims

LC No. 04-000091-MK

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

In a prior appeal, this Court reversed a Court of Claims order granting defendants' motion for summary disposition, affirmed the denial of plaintiff's motion for summary disposition, and remanded for further proceedings. *J & B Sausage Co v Dep't of Mgt & Budget*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 259230). On remand, the Court of Claims granted plaintiff's second motion for summary disposition under MCR 2.116(C)(10) and entered judgment against each defendant in the amount of \$187,767. Defendants appeal as of right. We affirm.

As we explained in our prior opinion, plaintiff and defendants contracted for the processing of United States Department of Agriculture (USDA) donated pork into morning sausage rolls for use by school districts. Defendants caused 80,000 pounds of USDA pork to be delivered to plaintiff; plaintiff processed this pork into 16,608 cases of sausage rolls. Defendants ordered delivery of approximately 1,600 of these cases, leaving the balance in storage in plaintiff's care pending further orders. Thereafter, defendants requested a reduction in price; plaintiff rejected this request. Defendants made no further requests for delivery of the processed sausage rolls and, after plaintiff tendered them to defendants, "defendants essentially ordered them delivered to various food banks." *J & B Sausage Co, supra*, slip op at 1. Defendants did not pay plaintiff for the sausage rolls delivered to the food banks. Plaintiff commenced this action seeking to recover payment for these sausage rolls under the contract. The Court of Claims granted defendants' motion for summary disposition and plaintiff appealed. *Id.*, slip op at 1-2. This Court then determined that the parties' contract was not a requirements contract; it was a contract for services under which plaintiff was obligated to process any received USDA pork upon receipt and without further authorization from defendants. *Id.* at 2-5. The record not being developed as to whether defendants repudiated their obligations under the contract, this

Court reversed the Court of Claims' grant of summary disposition to defendants but affirmed the denial of summary disposition to plaintiff and remanded for further proceedings. *Id.* at 7.

On remand, the Court of Claims granted plaintiff summary disposition, determining that plaintiff was owed \$363,534 for meat processing services rendered to defendants. The Court of Claims apportioned the judgment equally between the defendants, entering judgment in plaintiff's favor in the amount of \$181,767 against each of them.

We first address defendants' arguments regarding whether either res judicata or the law of the case doctrine precluded them from raising on remand "new issues" concerning the effect of bidding and purchase order documents with regard to the meaning of the parties' contract. Defendants claim that they were not required to present this argument in the prior appeal because it had not been argued in the Court of Claims and the evidence simply provided additional support for the Court of Claims' grant of their initial motion for summary disposition.

The record indicates that only the law of the case doctrine was raised and presented to the Court of Claims on remand. In general, an issue is not properly preserved for appeal unless it was presented to the trial court. *Keenan v Dawson*, 275 Mich App 671, 681; 739 NW2d 681 (2007). Nonetheless, because application of res judicata presents a question of law and consideration of this doctrine is necessary to a proper resolution of this appeal, we will consider it. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

We review de novo both the application of res judicata and the law of the case doctrine. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008). Under the law of the case doctrine, if an appellate court passes on a legal question and remands for further proceedings, the legal question decided will not be determined differently in a subsequent appeal in the same case where the facts remain materially the same. *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). "The rationale behind the doctrine includes the need for finality of judgments and the lack of jurisdiction of an appellate court to modify its judgments except on rehearing." *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002).

The doctrine of res judicata generally applies to bar a claim in a separate subsequent lawsuit, not to the continuation of an original action. *Harvey v Harvey*, 237 Mich App 432, 437; 603 NW2d 302 (1999). But the doctrine may be applied to an original action where there has been a prior appeal by right from a final order or judgment, and not an interlocutory appeal. *Andrews v Donnelly (After Remand)*, 220 Mich App 206, 211; 559 NW2d 68 (1996); *VanderWall v Midkiff*, 186 Mich App 191, 198; 463 NW2d 219 (1990). One purpose of the doctrine is to give finality to a judgment or order. *VanderWall, supra* at 198. It operates to preclude parties and their privies from relitigation of the facts and law. *Hackley v Hackley*, 426 Mich 582, 584; 395 NW2d 906 (1986). "[T]he principles of res judicata require that a party bring in the initial appeal all issues which were then present and could have and should have been raised." *VanderWall, supra* at 201; see also *Will H Hall & Son, Inc v Ace Masonry Const, Inc*, 260 Mich App 222, 227; 677 NW2d 51 (2003).

An appellate court's decision binds the trial court because a lower tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Grievance Administrator, supra* at 260. The trial court also may not take action on remand that an appellate

court could not take and, as noted above, an appellate court cannot modify its judgment except upon reconsideration. *Grace, supra*; *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 653; 625 NW2d 40 (2000). But res judicata will not preclude a party from seeking relief from a final judgment or order in the original action based on newly discovered evidence or the other grounds set forth in MCR 2.612(C). *South Macomb Disposal Auth, supra* at 654; *VanderWall, supra* at 203.

Here, it is clear from defendants' response to plaintiff's second motion for summary disposition that they sought relitigation of this Court's interpretation of the contract terms in the prior appeal on the basis that consideration of bidding and purchase order documents would tell a "different story." We conclude that res judicata applies here as defendants' argument concerning the meaning of the contract was previously decided by this Court in an appeal from a final order. *Andrews, supra*; see also, *VanderWall, supra*.

Further, the additional evidence offered by defendants on remand did not permit the Court of Claims to reconsider whether a genuine issue of material fact existed with respect to how the contract should be construed because defendants failed to argue, let alone demonstrate, the requirements for relief from judgment based on newly discovered evidence. As set forth in *South Macomb Disposal Auth, supra* at 655, these requirements are:

- (1) the evidence, not simply its materiality, must be newly discovered, (2) the evidence must not be merely cumulative, (3) the newly discovered evidence must be such that it is likely to change the result, and (4) the party moving for relief from judgment must be found to have not been able to produce the evidence with reasonable diligence.

Here, the record lacks support for the fourth requirement, in particular, because the purchase order documents were part of the record before the first appeal and the invitation to bid had been conducted by defendant Department of Management and Budget. There is no basis for concluding that defendants, with the exercise of reasonable diligence, could not have produced the bidding documents when responding to plaintiff's first motion for summary disposition. Therefore, we reject defendants' argument that res judicata did not preclude consideration of their "new issues" predicated on additional evidence.

Because we conclude that res judicata applies, it is unnecessary to address defendants' argument based on the law of the case doctrine. Turning to defendants' other arguments on appeal, we first note that our review of a trial court's decision on a summary disposition motion is de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence, to the extent they would be admissible in evidence, in a light most favorable to the nonmoving party. *Id.* at 56; see also MCR 2.116(G)(5). Summary disposition should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Medical Ctr, supra* at 56. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West, supra* at 183. "When deciding a motion for summary disposition in a claim for breach of contract, a court may interpret the

contract only where the terms are clear. If the terms are ambiguous, a factual development is necessary to determine the intent of the parties, and summary disposition is inappropriate.” *Michaels v Amway Corp*, 206 Mich App 644, 649; 522 NW2d 703 (1994).

Defendants argue that summary disposition under MCR 2.116(C)(10) was premature because discovery was incomplete. We disagree. Absent a scheduling order, a motion under MCR 2.116(C)(10) may be raised at any time. MCR 2.116(D)(4). A party opposing summary disposition on the ground that discovery is incomplete must at least assert that a factual dispute exists and present independent evidence to support the allegation. *Bellows v Delaware McDonald’s Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). Under MCR 2.116(H)(1), “[a] party may show by affidavit that the facts necessary to support the party’s position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure.” See also *Coblentz v City of Novi*, 475 Mich 558, 570-571; 719 NW2d 73 (2006).

In this case, defendants failed to file an affidavit that satisfied MCR 2.116(H). “Therefore, they cannot complain that discovery was prematurely ended.” *Coblentz, supra* at 571. Further, defendants’ claim that summary disposition was premature relates to the meaning of the contract; defendants sought discovery of extrinsic evidence to support their position that the contract should be construed as precluding plaintiff from processing USDA pork into sausage rolls until it received a purchase order for delivery, and that defendants were, therefore, only obligated to pay for sausage rolls that were actually ordered for delivery. However, this Court previously determined that plaintiff was obligated by the contract to process the pork “upon receipt and without further authorization from defendants,” and “to store the processed pork until such time as it was ordered by defendants,” and that “[a]t the same time, defendants were obligated to order sausage rolls and remit payment for plaintiff’s service.” *J & B Sausage Co, Inc, supra*, slip op at 5, 7. The parties’ obligations under the contract having been determined, the material issue on remand was whether defendants breached their duty under the contract to order, and pay for, the processed sausage rolls. Defendants do not assert that they sought additional discovery relative to this issue, as defined by this Court’s prior opinion.

Defendants cannot escape liability to plaintiff through nonperformance. Where performance is due, nonperformance constitutes a breach of contract. *Woody v Tamer*, 158 Mich App 764, 771-772; 405 NW2d 213 (1987); see also *LaMothe v Auto Club Ins Ass’n*, 214 Mich App 577, 587; 543 NW2d 42 (1995). Defendants have failed to show a genuine issue of material fact with respect to their nonperformance. Thus, defendants have not demonstrated any basis for disturbing the Court of Claims’ decision to grant plaintiff’s motion for summary disposition under MCR 2.116(C)(10) with respect to defendants’ liability for breach of contract or the amount of damages resulting from that breach.

We decline to address defendants’ additional theory that plaintiff, through a course of performance, waived the right to process the pork upon receipt. The record indicates that the argument raised by defendants on remand was not that the parties’ course of dealings should be considered a waiver, but that it should be considered as evidence of the parties’ reasonable expectations under the contract. As to that argument, the rule of reasonable expectations, as an aid in interpreting a contract, was rejected by our Supreme Court in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003), because it has no place in construing an unambiguous contract and adds nothing to the way in which Michigan courts construe contracts. But, more importantly here, a waiver of a contractual right is an affirmative defense, not a rule of

interpretation. See *Dykema Gossett, PLLC v Ajluni*, 273 Mich App 1, 16; 730 NW2d 29 (2006), rev'd in part on other grounds 480 Mich 913 (2007) ("Had [defendant] taken this conversation to mean [that plaintiff] had waived its rights under the contract, he should have pled waiver as an affirmative defense."); see also *Rory v Continental Ins Co*, 473 Mich 457, 470 n 23; 703 NW2d 23 (2005) (waiver is a traditional contract defense). Because defendants neither pleaded waiver as an affirmative defense to plaintiff's amended complaint, nor raised this issue in response to plaintiff's second motion for summary disposition, defendants' waiver theory is not properly before us and we decline to address it. *Keenan, supra* at 681; MCR 2.111(F)(2) and (3).

Finally, defendants claim the Court of Claims erred in apportioning the judgment equally between them to comply with MCL 600.6458, without conducting an evidentiary hearing. We disagree.

Our primary task in construing a statute is to discern and give effect to the legislative intent. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). We begin with the statutory language, giving undefined words their plain and ordinary meaning. *Healing Place at North Oakland Medical Ctr, supra* at 58-59; *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 52; 731 NW2d 94 (2006). "Effect is to be given to every provision, and the whole statute is to be considered in order to achieve a harmonious and consistent result." *Id.* If there is no ambiguity, the statute is applied as written. *Healing Place at North Oakland Medical Ctr, supra* at 59.

Contrary to defendants' argument, MCL 600.6458 does not require a trial court to apportion a judgment between two state entities based on fault or causation. "It is inappropriate to read into a statute something that was not intended." *Miller v Miller*, 474 Mich 27, 33; 707 NW2d 341 (2005). MCL 600.6458(1) only requires that the trial court specify in the judgment "the department, commission, board, institution, arm, or agency from whose appropriation that judgment shall be paid." The statute as a whole "explains how a judgment against a state entity in the Court of Claims should be paid." *Manuel v Gill*, 481 Mich 637, 651; 753 NW2d 48 (2008). It is part of the enforcement mechanism provided by the Legislature for money judgments against state agencies. *City of Adrian v State of Michigan*, 420 Mich 554, 561-565; 362 NW2d 708 (1984).

We note, however, that this statutory enforcement mechanism is distinguishable from the determination of damages in the underlying action. There being no statutory requirement of apportionment in MCL 600.6458, we look to the underlying action to determine if there is a basis for apportionment. In a breach of contract action where there are joint obligors, each may be liable for the whole performance due under the contract. See Restatement Contracts, 2d, § 289(1) ("Where two or more parties to a contract promise the same performance to the same promisee, each is bound for the whole performance thereof, whether his duty is joint, several, or joint and several"); see also *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 642; 734 NW2d 217 (2007) (contract terms, not fault, determine whether parties are jointly and severally liable for contract damages). In this case, the Court of Claims' equal division of the judgment is not inconsistent with each defendant being liable for the whole contract. Further, defendants do not address any contractual basis for a different division nor the need for an evidentiary hearing regarding that question. As stated in *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

We affirm. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Richard A. Bandstra  
/s/ William C. Whitbeck  
/s/ Douglas B. Shapiro