STATE OF MICHIGAN

COURT OF APPEALS

TITAN INSURANCE COMPANY,

Plaintiff-Appellant,

v

JACK L. SEIFERT and CINDY LYNN LaBELLE,

Defendants-Appellees.

UNPUBLISHED
November 6, 2001

No. 230956
Houghton Circuit Court
LC No. 97-010227-CZ

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff Titan Insurance Company appeals as of right a judgment entered following a jury verdict declaring that it must defend and indemnify its insured defendant Cindy LaBelle in an automobile negligence action filed by defendant Jack L. Seifert.[1] We affirm.

I

Titan first argues that the trial court failed to follow the law of the case doctrine when it instructed the jury on remand. We disagree. This Court reviews instructional errors de novo, examining the jury instructions as a whole to determine if there is error requiring reversal. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). This Court will reverse for instructional error where the failure to do so would be inconsistent with substantial justice. MCR 2.613(a); *Johnson v Corbet*, 423 Mich 304, 326; 377 NW2d 713 (1985).

Titan's argument is without merit. When this Court reverses a case and remands it for trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits. *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995), citing *Borkus v Michigan Nat'l Bank*, 117 Mich App 662, 666; 324 NW2d 123 (1982). See also *In re Forfeiture of $19,250*, 209 Mich App 20, 30; 530 NW2d 759 (1995). The trial court did not err in directing the jury to make determinations additional to those this Court required on remand.

[1] This case was previously before this Court when Titan successfully appealed the trial court's June 17, 1998, order granting defendants' motion for summary disposition. *Titan Ins Co v Seifert*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2000 (Docket No. 212840).

Furthermore, we note plaintiff concedes that the following first special verdict question to the jury was proper: "Did Ms. LaBelle intend and expect to collide her vehicle with that of Mr. Seifert?" Because the jury answered "no," error, if any, in giving the objected-to second question was harmless. MCR 2.613(A); *People v Graves*, 458 Mich 476, 485-486; 581 NW2d 229 (1998). As the Supreme Court reiterated in *Graves*, because jurors are presumed to follow their instructions, there is no basis to assume that the jury's verdict was a product of compromise. On the basis that the jury's answer to the first special verdict question resolved the dispositive factual issue of the case, even if the second question was erroneous, error requiring reversal did not occur. *Id.*

II

Titan next argues the trial court committed error requiring reversal in allowing Seifert to testify briefly regarding his injuries. We disagree. This Court reviews evidentiary issues for an abuse of discretion. *Tobin v Providence Hosp*, 244 Mich App 626, 638; 624 NW2d 548 (2001). An abuse of discretion occurs only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 282; 608 NW2d 525 (2000).

Only relevant evidence is admissible. MRE 402; *Tobin*, *supra* at 637. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Tobin*, *supra* at 637, citing MRE 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403; *Roulston*, *supra* at 282-283.

The main issue at trial was whether LaBelle intended and expected to collide her vehicle into Seifert's vehicle. LaBelle's insurance policy specifically excludes coverage for any person "intentionally causing bodily injury or property damage." Seifert's injuries were simply not relevant in determining LaBelle's coverage under the Titan insurance policy because those injuries did not tend to make the existence of a fact of consequence more or less probable.

However, when viewed in the overall context of this trial, the testimony regarding Seifert's injuries was brief and passing – consisting of only two pages of the trial transcript. In addressing plaintiff's motion in limine to exclude any evidence regarding Seifert's injuries, Seifert's counsel represented, "Your Honor, I think that the injuries which can be covered in a fairly brief and summary fashion are part of the res gestae of the entire incident." The trial judge denied plaintiff's motion but cautioned that personal injury damages were not at issue and therefore should be addressed only briefly:

> *The Court:* . . . Obviously, this trial isn't one in which Mr. Seifert will be getting any damages once the jury returns a verdict, so it's certainly not necessary to spend a half a day on it. But I think in fairness that you should have the opportunity to explain to the jury what it is that occurred to him as a result of this collision.

At oral argument in this Court, Seifert's counsel further argued that in order for the jury to understand why Mr. Seifert was a party defendant in the action between Titan Insurance

Company and its insured, it was necessary for the jury to know that Seifert was alleging personal injuries arising out of the automobile accident. Although Seifert's injuries were technically not relevant, we agree that some background information in this regard was helpful to the jury's understanding of the case. In this regard, the United States Supreme Court advisory committee note to FRE 401 (which is identical to MRE 401) recognizes the admissibility of background evidence: "Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding." Under these circumstances, we conclude that the trial judge did not abuse his discretion with regard to this evidentiary ruling. *Tobin, supra; Roulston, supra.* In addition, because the personal injury testimony was "covered in a fairly brief and summary fashion," if error occurred, it was harmless. MCR 2.613(A). *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 328-330; 454 NW2d 610 (1990); *Henson v Veteran's Cab Co of Flint*, 384 Mich 486, 494; 185 NW2d 383 (1971).

III

Plaintiff Titan also contends the trial court erred by not giving two requested jury instructions. We disagree. Generally, this Court reviews claims of instructional error de novo, *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 694; 630 NW2d 356 (2001). However, we review a trial court's determination whether supplemental instructions are applicable and accurate for an abuse of discretion. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). After reviewing Titan's requested jury instructions, we find that the trial court did not abuse its discretion because the requested instructions were not supported by the evidence. *Hilgendorf, supra* at 694-695.

IV

Finally, plaintiff Titan argues that the trial court erred when it failed to grant its renewed motion for summary disposition. We disagree. This Court reviews a trial court's grant or denial of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The evidence must be viewed in a light most favorable to the non-moving party. *Cole v LadBroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000). A party bringing a motion under MCR 2.116(C)(10) must specifically set forth the issues where no genuine issue of material fact is alleged. MCR 2.116(G)(4). When this is done, the non-moving party must, by affidavits or otherwise, set forth specific facts showing there is a genuine issue for trial. *Cole, supra* at 7. The non-moving party cannot merely rest on allegations or denials. *Id*. In determining whether to grant summary disposition, the trial court must consider all affidavits, pleadings, depositions, admissions, and other documentary evidence filed or submitted with the motion and answer. MCR 2.116(G)(5); *Roberson, supra* at 324-325.

Summary disposition is rarely appropriate in cases involving questions of credibility, intent, or state of mind. *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). Viewing the evidence in a light most favorable to the non-moving party, we hold that the trial court did not err by denying Titan's motion for summary disposition

because there was contradictory evidence presented regarding whether Ms. LaBelle intended and expected to collide her vehicle with that of Mr. Seifert.

Affirmed.

/s/ Richard Allen Griffin
/s/ Jane E. Markey
/s/ Patrick M. Meter