NO. 2015-C-0204

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

WAYLAND EZEB

VERSUS

SANDOZ PHARMACEUTICALS

IN RE: NOVARTIS PHARMACEUTICALS CORPORATION, ETC.

APPLYING FOR: SUPERVISORY WRIT

DIRECTED TO: HONORABLE TIFFANY G. CHASE
CIVIL DISTRICT COURT, ORLEANS PARISH
DIVISION "A", 1992-20622

WRIT GRANTED; JUDGMENT REVERSED

Relator, Novartis Pharmaceutical Corporation ("Novartis"), seeks review of the trial court's January 23, 2015 judgment granting Plaintiff's motion for partial summary judgment. Upon *de novo* review, we find the trial court erred in granting Plaintiff's motion for partial summary judgment and we reverse the January 23, 2015 judgment.

In or about 1990, Plaintiff filed a petition for damages against numerous doctors, hospitals, and pharmaceutical companies including Sandoz Pharmaceuticals, now known as Novartis. Plaintiff alleges that he was admitted to CPC Coliseum Medical Center in New Orleans under the care of several physicians, including Dr. Patrick J. Dowling. As part of his treatment for paranoid schizophrenia, Dr. Dowling prescribed and administered to Plaintiff a medication called Clorazil, manufactured by Novartis. Plaintiff further alleges that Dr. Dowling communicated with Dr. Michael Krassner, an employee of Novartis, regarding Clorazil dosing information. After being administered an allegedly

increased dosage of Clorazil by Dr. Dowling, Plaintiff claims that he experienced seizures, loss of consciousness, fell into a coma, and was later diagnosed with encephalopathy due to the combination of medication he was administered. Plaintiff's petition specifically asserts claims under the Louisiana Products Liability Act ("LPLA") against Novartis for placing Clorazil on the market and failing to warn of the side effects of the medication.

Plaintiff's petition also named as a defendant Caremark, the company which employed a treating nurse at CPC Coliseum Medical Center where Plaintiff was administered Clorazil. In 2008, Caremark filed a motion for summary judgment which was granted by the trial court on November 14, 2008, and resulted in the dismissal of all Plaintiff's claims against Caremark with prejudice.

On December 4, 2014, Plaintiff filed the motion for partial summary judgment against Novartis. Plaintiff argues that the trial court's November 18, 2008 judgment granting Caremark's motion for summary judgment is now law of the case and that the trial court determined facts that are dispositive as to liability of Novartis. Plaintiff argues that at Caremark's motion for summary judgment the evidence proved and the trial court determined that Novartis, through Dr. Krassner, passed information directly to Dr. Dowling about the dosing of Clorazil.

After a hearing on Plaintiff's motion for partial summary judgment against Novartis, the trial court rendered judgment on January 23, 2015 finding that the law of the case doctrine applies and granting Plaintiff's motion for partial summary judgment.[1]

We review the granting of a motion for summary judgment *de novo*. *Jones v. Buck Kreihs Marine Repair, L.L.C.*, 13-0083, pp. 1-2 (La. App. 4 Cir. 8/21/13), 122 So.3d 1181, 1183. In a *de novo* review of this matter, the Court shall consider

[1] Plaintiff's motion sought partial summary judgment on the issue of liability but the trial court's judgment fails to state whether the motion for partial summary judgment is granted on a particular issue.

the evidence presented to the trial court, the admissibility of such evidence, and whether, after such evidence is reviewed, a genuine issue of material fact remains. *Portfolio Recovery Associates, L.L.C. v. Johnson*, 12-1323, p. 4 (La. App. 4 Cir. 4/10/13), 113 So.3d 499.

With his motion for partial summary judgment and memorandum in support of his motion, Plaintiff submitted the following:

1. A statement of Plaintiff's uncontested facts that establish that Caremark was granted summary judgment on November 14, 2008 and was dismissed from suit.

2. The 2008 motion for summary judgment filed by Caremark seeking dismissal of Plaintiff's claims against it with a rule to show cause scheduled for November 14, 2008 and Carematk's memorandum in support of its motion. Caremark argued that there was no evidence that it breached a duty owed to Plaintiff and that Plaintiff's claims were not based on evidence.

3. The November 14, 2008 judgment granting Caremark's summary judgment and dismissing all claims against Caremark.

4. A comprehensive report conducted by Janet B. Arrowsmith, M.D., who is board certified in internal medicine and an elected Fellow of the American College of Physicians and the American College of Epidemiology. She reiterated the process of approval of a new drug/medication and how the product is investigated, labeled, reviewed, and marketed under the law via the NDA and FDA.

There was no opposition to Caremark's 2008 motion for summary judgment.

With its opposition to motion for partial summary judgment and memorandum in support of its opposition, Novartis submitted the following:

1. A 1990 psychological evaluation of Plaintiff prepared by Dr. Steven York outlining Plaintiff's medical history, treatment, testing, and Dr. York's observations wherein he diagnosed Plaintiff with schizophrenia.

2. A portion of the deposition testimony of Dr. David E. Ross who attests that had Dr. Dowling followed the recommended dosage of Clozaril as to the label he would have started Plaintiff on 25 mg. He also testified that there was no significant medical change in Plaintiff from November 29, 1990 to December 8, 1990.

3. Physician's orders as it pertains to Plaintiff while under the care of the CPC Coliseum Medical Center beginning on September 22, 1990 and ending on December 6, 1990.

4. A description of Clozaril.

5. The affidavit of Dr. Janet B. Arrowsmith that indicates that she is the owner of Arrowsmith Consulting LLC and that she provides regulatory support for companies regulated by the FDA. She asserts that she was asked by Novartis to be an expert witness in the instant case. She further testified that she reviewed the documents and evidence in the instant case and concluded that "Plaintiff's alleged injuries, which developed in December of 1990, were not caused by episodes of hypotension that he may have experienced in October of 1990 or by dosage adjustments that occurred in October of 1990."

6. A portion of the August 11, 2006, deposition testimony of Dr. Patrick Dowling. Dr. Dowling references a brochure he was familiar with that described Clozaril and its side effects. He testified that he included Plaintiff in the decision to use Clozaril and that he knew that there were reports of NMS when taken with lithium. He testified that even if there was a warning that Clozaril would cause encephalopathic syndrome he still would have prescribed it considering Plaintiff's severe and potentially dangerous mental condition.

7. A portion of the November 17, 2006, deposition testimony of Dr. Patrick Dowling. He testified that he learned of Plaintiff's fall on October 21, 1990, at which time he changed the dose of Clozaril. He agreed that although Nurse Gaudet and Dr. Krassner explained that 300 mg. was permissible; he chose to reduce the dose to 200 mg. A hospital order of the adjustment was attached.

8. A portion of the February 22, 2002, deposition testimony of Dr. Michael Bernard Krassner. He testified that he disseminated information for the Medical Services Department and taught sales school. He could not recall any conversations with Dr. Dowling regarding the instant case. Dr. Krassner was then read and shown the reports regarding the conversation about Clozaril in regards to Plaintiff at the time the dose was adjusted.

9. A portion of the deposition testimony of Nurse Kathleen Gaudet on April 3, 1996. She too could not recall the instant case and was shown recorded documentation to jog her memory.

At the hearing, as in the instant writ application, Plaintiff argued law of the case and suggested that considering the 2008 granting of summary judgment in favor of Caremark, the trial court should acknowledge the established facts that form a clear violation of the LPLA. Novartis continued to maintain that it is not the law of the case because in Caremark's judgment all that needed to be established was an absence of proof and that the dose of the medication administered was not material to Caremark's summary judgment. The trial court then advised that

Plaintiff is only asking for partial summary judgment as to a violation of LPLA which was previously decided in Caremark.

> The law of the case doctrine refers to "(a) the binding force of trial court rulings during later stages of the trial, (b) the conclusive effects of appellate court rulings at the trial on remand, and (c) the rule that an appellate court will ordinarily not reconsider its own rulings of law on a subsequent appeal in the same case." *Petition of Sewerage and Water Bd. of New Orleans,* 278 So.2d 81, 83 (La.1973). The doctrine "may bar redetermination of a question of law or a mixed question of law and fact during the course of a judicial proceeding." 1 Frank L. Maraist and Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure,* at § 6.7. The doctrine is discretionary and "applies to parties who have previously had the identical question presented and decided by an appellate court." *Avenue Plaza, L.L.C. v. Falgoust,* 96–0173 (La.7/2/96), 676 So.2d 1077, 1079.

Brown v. Serpas, 2013-1679, p.4 (La. App. 4 Cir. 7/16/14), 146 So.3d 748, 752.

Here, the trial court determined that the law of the case doctrine applied. While case law addressed the doctrine as it applies to appeals, the same standard can be applied in the trial court.

> The "law of the case" doctrine applies to all prior rulings or decisions of an appellate court or the Supreme Court in the same case, not merely those arising from the full appeal process. *See Pumphrey v. City of New Orleans*, [20]05–0979 (La.4/4/06), 925 So.2d 1202. This policy applies to parties who were parties to the case when the former decision was rendered and who thus had their day in court. The reasons for the "law of the case" doctrine is to avoid relitigation of the same issue; to promote consistency of result in the same litigation; and to promote efficiency and fairness to both parties by affording a single opportunity for the argument and decision of the matter at issue. *Day v. Campbell–Grosjean Roofing and Sheet Metal Corp.*, 260 La. 325, 256 So.2d 105 (1971). This doctrine is not an inflexible law; thus appellate courts are not absolutely bound thereby and may exercise discretion in application of the doctrine. It should not be applied where it would accomplish an obvious injustice or where the former appellate decision was manifestly erroneous.

Rain CII Carbon LLC v. ConocoPhillips Co., 2012-0203, pp.4-5 (La. App. 4 Cir. 10/24/12), 105 So. 3d 757, 760.

Although the trial court inquired whether the negligence claim against Caremark in light of La. C.C.P. art. 2315, Liability for acts causing damages, and the LPLA claim against Novartis were separate and distinct issues, ultimately it

concluded that the material facts in the evidence submitted with Plaintiff's motion did not change and that such evidence should be used in ruling on Plaintiff's partial motion for summary judgment. On motion for summary judgment, the burden of proof remains with the movant. *Luther v. IOM Co. LLC*, 2013-0353, p.5 (La. 10/15/13), 130 So. 3d 817.

The trial court stated that is was "going to grant the motion for partial summary judgment, finding that the law of the case doctrine does, in fact apply". The trial court cited *Bank One, Nat. Ass'n v. Velten*, 2004-2001 (La. App. 4 Cir. 8/17/05), 917 So.2d 454, in support of applying the law of the case doctrine to the instant matter. In *Bank One*, a foreclosure proceeding was filed against Marjorie Velten who filed a preliminary injunction prior to the sheriff's sale of her property. On appeal, although this Court did not find that the law of the case doctrine applied, it affirmed the trial court's judgment allowing Bank One to convert the original executory proceeding to ordinary proceeding thus granting Bank One's motion for summary judgment.

Here, we find that the trial court erroneously applied the law of the case doctrine. The evidence submitted by Plaintiff establish that in 2008 Caremark was released from liability because it was determined that the only role Caremark played in the matter was that Caremark's representatives, Dr. Krassner and Nurse Gaudet, passed on information to Dr. Dowling. As noted above, the law of the case doctrine applies to the same parties. Here, Novartis is a separate and distinct defendant from Caremark. Further, the doctrine is used to avoid litigation of the same issues. Caremark's issue was negligence, the issue before the trial court is Novartis' failure to warn. The purpose of the doctrine, to avoid relitigation; here, the trial court has not previously ruled upon Novartis' acts under the LPLA.

Based upon our review of the evidence presented on Plaintiff's motion for partial summary judgment, we find that Plaintiff failed to establish a *prima facie*

case by relying on the facts established in the Caremark case. "The mover for summary judgment must make a prima facie showing of each fact necessary to prove his case; if a prima facie case is made, the burden shifts to the opposing party to raise genuine issues of material fact to preclude the granting of summary judgment." La. C.C.P. art. 966(B); *U.S. Risk Mgmt., L.L.C. v. Day*, 11–533, p. 5 (La. App. 4 Cir. 9/28/11), 73 So.3d 1100, 1103.

Plaintiff failed to offer any evidence with his motion for partial summary judgment that Novartis failed to warn medical professionals and consumers of any dangers of Clozaril. Plaintiff submitted into evidence a list of uncontested facts, which Novartis ultimately opposed, along with the pleadings and the judgment in the Caremark case from 2008. Outside of relying solely on the Caremark case, Plaintiff also offered a report by Janet B. Arrowsmith, M.D. The report only reiterated how a drug is marketed for approval by the NDA and FDA. The report did not contain any assertions that established a *prima facia* case as to failure to warn. Therefore, Plaintiff lacked sufficient evidence to establish that Novartis is liable under the LPLA.

For the reasons stated above, we grant Relator's writ and reverse the trial court's January 23, 2015 judgment granting Plaintiff's motion for partial summary judgment.

New Orleans, Louisiana this **17th** day of **June, 2015**.

JUDGE SANDRA CABRINA JENKINS

DYSART, J., CONCURS IN THE RESULT

JUDGE DANIEL L. DYSART

LANDRIEU, J., CONCURS WITH REASONS

JUDGE MADELEINE M. LANDRIEU

WAYLAND EZEB	*	**NO. 2015-C-0204**
VERSUS	*	**COURT OF APPEAL**
SANDOZ PHARMACEUTICALS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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DYSART, J., CONCURS IN THE RESULT

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LANDRIEU, J., CONCURS WITH REASONS

Although I agree with the result reached by the majority, I write separately to note that the trial court's judgment lacks the necessary decretal language. Decretal language is required to place the parties on notice as to what issues the judgment resolved. "A valid judgment must be precise, definite, and certain. . . ., and it must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied." *State v. White*, 05-718, p. 2 (La. App. 3 Cir. 2/1/06), 921 So.2d 1144, 1146. Moreover, a judgment cannot require reference to extrinsic documents or pleadings in order to discern the court's ruling. *Vanderbrook v. Coachmen Indus., Inc.*, 01-0809, p. 12 (La. App. 1 Cir. 5/10/02), 818 So.2d 906, 913. While the cited cases address final judgments, the same rule applies, in my view, to interlocutory judgments.

This case illustrates the reason for the rule. In this case, the Relator has filed both an application for supervisory writ and an appeal arguing that it is unable to determine from the language of the trial court's judgment what relief was granted to the plaintiff and whether the judgment is a final or an interlocutory one. The judgment reads as follows:

> The trial court finds that the Law of the Case Doctrine applies (see, *Bank One, N.A. v. Velten,* 2004-CA-2001 (La. App. 4 Cir. 8/17/05) 917 So. 2d 454), Therefore,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that:

1. Defendant's Motion to Continue Hearing on Plaintiffs Motion for Partial Summary Judgment be and the same is hereby DENIED;
2. Defendants Motion to Stay be and the same is hereby DENIED;
3. Plaintiff's Motion for Partial Summary Judgment be and the same Is hereby GRANTED; Defendant has violated the Louisiana Products Liability Act, LSA-R.S. §9:2800.54(A)(3).

I agree with Novartis that it is impossible to determine exactly what the trial court considers to be law of the case and what provision of the LPLA the court found the defendant to have violated.

As the majority notes, the plaintiff filed this suit in 1990 against several defendants for injuries he alleges he sustained from being prescribed Clozaril, a medication indicated for treatment resistant schizophrenia. Caremark, one of the defendants, was sued by the plaintiff in negligence. The Relator, Sandoz (now Novartis), was sued on multiple theories including violation of the Louisiana Products Liability Act ("LPLA") based on a "failure to warn" theory.

It appears from the record that the claim against Caremark was that a nurse employed by Caremark was somehow responsible for the plaintiff receiving the wrong dose of Clozaril, a medication manufactured by Sandoz. At the time, Clozaril was a new drug on the United States market. According to the motion for summary judgment Caremark filed in 2008, a known side effect of Clozaril was the risk of a patient developing agranulocytosis, the depletion of the white blood cells due to bone marrow suppression, which reduces the body's ability to fight infection. In order to protect against this side effect, Sandoz, the manufacturer of Clozaril,[1] required all patients receiving the medication to be enrolled in the "Clozaril Patient Monitoring System" ("CPMS"). The CPMS ensured that all patients receiving Clozaril had their blood drawn regularly. If the patient's white blood cell count was above a level designated by Sandoz, Sandoz would release

[1] Sandoz was the manufacturer of Clozaril at the time suit was filed. Novartis stands in its shoes.

the recommended dosage of the medication to the patient's physician. The physician could then prescribe to the patient either that dosage or a lower dosage.[2] Caremark was the company hired by Sandoz's CPMS program to monitor the plaintiff's blood levels to ensure that his white blood cell count was at an acceptable level. If it was, Caremark, through its nurse, advised Sandoz, and Sandoz would dispense the medication to plaintiff's treating physician.

After sixteen years of litigation, Caremark, in 2008, filed a motion for summary judgment. Caremark alleged that the plaintiff had been unable to establish any fact or produce an expert to establish any negligence on Caremark's part. The plaintiff did not oppose that motion, and the trial court granted it in 2008. No appeal was taken from the ruling dismissing Caremark.

In December 2014, the plaintiff, citing the 2008 summary judgment ruling in Caremark's favor as law of the case, filed a motion for partial summary judgment against Novartis. Agreeing with the plaintiff, the trial court found that the law of the case doctrine applied and granted the plaintiff's motion for partial summary judgment. In support, the trial court cited *Bank One, N.A. v. Velten*, 04-2001 (La. App. 4 Cir. 8/17/05), 917 So.2d 454.

The trial court's reliance on the law of the case doctrine is misplaced. There is no prior ruling or judgment against Novartis; the prior ruling on which the trial court relies is the 2008 ruling granting Caremark's motion for summary judgment. Caremark's motion, however, involved different parties—Caremark and the plaintiff—and a different theory of liability—negligence as opposed to liability under LPLA. According to the record, the trial court made neither factual nor legal findings in granting Caremark's motion other than to find that there were no material issues of fact in dispute as to Caremark's liability. The judgment granting Caremark's motion under these circumstances has no significance as to Novartis'

[2] Although this may be a disputed fact, it is immaterial to the issue presented in this writ.

liability. There is nothing in Caremark's 2008 motion for summary judgment that establishes Novartis' duty under the LPLA, and the trial court made no such finding. The absence of material issues of fact as to Caremark's liability does not become law of the case as to Novartis, an entirely different defendant.

For these reasons, I concur in the granting of the writ application and the reversal of the trial court's January 23, 2015 ruling granting the motion for partial summary judgment. Because the disposition of this writ application renders the simultaneous appeal filed by Novartis moot, I would grant the plaintiff's pending motion to dismiss Novartis' appeal.[3]

[3] The appeal has been lodged. *Ezeb v. Sandoz Pharmaceuticals*, 2015-CA-0530.