STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM BOLEN, Personal Representative of the Estate of DERRICK ALLEN GOREE, JR., Deceased,

Plaintiff-Appellant,

v

THE CITY OF GRAND RAPIDS, NANCY DAVIS, SCOTT WEITZEL, DENNIS NEWTON and JOHN DOES 1-5,

Defendants-Appellees.

UNPUBLISHED
May 7, 1999

No. 206448
Kent Circuit Court
LC No. 93-80889-NO

Before: Holbrook, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition. We affirm.

In the early hours of the morning of February 22, 1992, plaintiff's decedent, Derrick Allen Goree, Jr., was attacked and killed by two pit bull dogs inside a house in the City of Grand Rapids. Goree was just two years' old. At the time of the attack, Goree had been left in the care of a baby-sitter. When the baby-sitter discovered the attack, she called the police. Although police arrived while Goree was still alive and fighting to escape the dogs, they were not able to save him.

Plaintiff filed a wrongful death action against the City of Grand Rapids, the first three officers to arrive at the scene, and five unknown officers, alleging that the officers violated a private duty owed to plaintiff's decedent. Defendants moved for summary disposition and the trial court granted their motion pursuant to MCR 2.116(C)(7). On appeal, this Court held that the trial court erred in dismissing plaintiff's case against all defendants except the police chief, who was immune from liability. *Bolen v City of Grand Rapids*, unpublished opinion per curiam of

the Court of Appeals, issue July 18, 1995 (Docket No. 175155). This Court also found that plaintiff "pled facts sufficient to establish that the defendant-officers owed a private duty to the victim." *Id.* Finally, this Court held that the plaintiff should have been allowed to file a third amended complaint. *Id.*

On remand, plaintiff filed a third amended complaint, discovery was conducted, and the remaining defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The trial court granted defendants' motion, reasoning that plaintiff could not establish that the defendant-officers owed a private duty to Goree. Before ruling on defendants' motion for summary disposition, the trial court determined that the law of the case doctrine was not applicable due to an intervening change in the law regarding the scope of the duty owed by police officers to private citizens.

On appeal, plaintiff first argues that the trial court erred in failing to apply the law of the case doctrine on remand. We disagree. A trial court's decision not to apply the law of the case doctrine is reviewed for an abuse of discretion. *Freeman v DEC International, Inc*, 212 Mich App 34, 39; 536 NW2d 815 (1995).

The law of the case doctrine provides that, as a general matter of practice, a ruling by an appellate court on a particular issue binds that court and all lower tribunals with respect to the issue. See *id.* at 37. An exception to the doctrine exists in situations where there has been an intervening change in the applicable law *after* the initial decision by the appellate court. *Id.* at 38; see also *Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 138; 580 NW2d 475 (1998); *Bennett v Bennett*, 197 Mich App 497, 503; 496 NW2d 353 (1992). Here, this Court's prior determination that plaintiff "pled facts sufficient to establish that the defendant-officers owed a private duty to the victim" was explicitly based on the rule announced in *White v Humbert*, 206 Mich App 459, 465; 522 NW2d 681 (1994). One year later, the Michigan Supreme Court reversed *White v Humbert*, *supra*, and adopted a new test. See *White v Beasley*, 453 Mich 308, 319-321 (Brickley, C.J.), 325-326 (Boyle, J.); 552 NW2d 1 (1996). Given the intervening change in the law, it would have been a "form of nonsense" for the trial court to try this case on the now invalid theory this Court relied on in plaintiff's first appeal. See *Freeman*, *supra* at 39. Accordingly, we hold that the trial court's decision not to apply the law of the case doctrine did not constitute an abuse of discretion.

Next, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition on the basis of its determination that, as a matter of law, defendants owed no duty to Goree. We disagree. Because the trial court considered documentary evidence beyond the pleadings, we will address this issue as if summary disposition had been granted pursuant to MCR 2.116(C)(10). See *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 705; 532 NW2d 186 (1995). A trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court must

consider pleadings, affidavits, admissions, depositions, and any other documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

In Michigan, the public-duty doctrine operates to shield government employees from tort liability based solely on their particular job titles. *White v Beasley*, *supra* at 319. In general, the duty imposed upon officers by public authority is a duty owed to the public that must be redressed, if at all, by some form of public prosecution. *Id.* at 316, citing 2 Cooley, Torts (4th ed), § 300, pp 385-386. An exception to the public-duty doctrine exists where there is a "special relationship" between the government employee and the plaintiff (or, in this case, the plaintiff's decedent). *Id.* at 319. For there to be such a "special relationship," all of the following elements must be established:

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
>
> (2) knowledge on the part of the municipality's agent that inaction could lead to harm;
>
> (3) some form of direct contact between the municipality's agents and the injured party; and
>
> (4) that party's justifiable reliance on the municipality's affirmative undertaking . . . . [*Id.* at 320, citing *Cuffy v City of New York*, 69 NY2d 255, 260; 513 NYS 2d 372, 505 NE2d 937 (1987).]

Here, plaintiff cannot meet the fourth prong of the test.

In adopting the four-part "special relationship" test, the Michigan Supreme Court explicitly relied on *Cuffy v City of New York*, *supra*. In that case, the New York Court of Appeals explained the rationale for requiring the element of justifiable reliance:

> [T]he injured party's reliance is as critical in establishing the existence of a "special relationship" as is the municipality's voluntary affirmative undertaking of a duty to act. That element provides the essential causative link between the "special duty" assumed by the municipality and the alleged injury. Indeed, at the heart of most of these "special duty" cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has *lulled the injured party into a false sense of security and has thereby induced him either to relax his own vigilance or to forego other available avenues of protection*. On the other hand, when the reliance element is either not present at all or, if present, is not causally related to the ultimate harm, this underlying concern is inapplicable, and the invocation of the "special duty"

> exception is then no longer justified. [*Cuffy, supra* at 261 (citations omitted; emphasis added).]

In this case, nothing in the record suggests that Goree relied on defendants in this manner. Accordingly, the trial court was correct in granting defendants' motion for summary disposition on this basis.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J Talbot

I concur in the result only.

/s/ William B.Murphy