STATE OF MICHIGAN

COURT OF APPEALS

RUTH E. WILLIAMS,

Plaintiff-Appellant,

v

ARAMARK MANAGEMENT SERVICES LIMITED PARTNERSHIP,

Defendant-Appellee.

UNPUBLISHED
March 3, 2009

No. 281741
Wayne Circuit Court
LC No. 06-618398-NO

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Plaintiff, Ruth Williams, appeals the trial court's order that granted summary disposition to defendant, Aramark Management Services Limited Partnership. For the reasons set forth below, we affirm.

I. Facts and Procedural History

On September 12, 2005, plaintiff fell on the cafeteria floor at Baylor-Woodson Elementary School in Inkster. At the time, plaintiff was a member of the Inkster school board and was at the school to help with a district enrollment fair. Immediately before the incident, Debra Payne, an employee of Aramark, had mopped the cafeteria floor. Plaintiff claims she slipped and fell when she stepped on water that remained on the floor after Payne finished mopping. Plaintiff maintains that she sustained a severe ankle fracture that required surgery.

At the relevant time, the Inkster Public Schools contracted with Aramark for Aramark to provide various maintenance services for school buildings in the district. Plaintiff filed her complaint against Aramark and alleged that the company failed to properly maintain the floor or adequately warn of the danger or condition of the wet floor. Plaintiff further alleged that she is an intended third-party beneficiary of the maintenance contract between Aramark and the Inkster Public Schools and that Aramark breached the contract.

Aramark filed a motion for summary disposition under MCR 2.116(C)(10) and argued to the trial judge that plaintiff's case should be dismissed because its contract with the Inkster Public Schools contains no language that created any duty regarding the plaintiff. Aramark maintained that plaintiff's third-party beneficiary claim must also fail because, at best, she was an incidental beneficiary of the maintenance contract, not an intended third-party beneficiary. In

response, plaintiff asserted that, as an elected school board official, she is an intended third-party beneficiary of the maintenance contract. She further argued that Aramark is liable for her injury because Payne created a new hazard or increased the risk of injury when she mopped the floor. The trial court agreed with Aramark and granted its motion for summary disposition.

Thereafter, plaintiff filed a motion for reconsideration and averred that Aramark's attorney made misleading arguments to the trial court. For the first time, plaintiff also asserted the theory that she is a first party to the maintenance contract between Aramark and the Inkster Public Schools . According to plaintiff, as an elected school board official, "she was both a party to the agreement and clearly a 'beneficiary' of that contract." The trial court denied plaintiff's motion for reconsideration by praecipe order on October 12, 2007.

II. Analysis

A. Motion for Reconsideration Regarding Plaintiff's New Legal Theory

Plaintiff concedes that she did not raise her claim that she is a party to the contract between Aramark and the Inkster Public Schools until she filed her motion for reconsideration, but she claims she is nonetheless entitled to relief under that theory. This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Our Court has held that it is not an abuse of discretion for a trial court to reject a claim first raised in a motion for reconsideration. As the Court explained in *Charbeneau v Wayne County Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987):

> Generally, a motion for rehearing or reconsideration must demonstrate a "palpable error by which the court and the parties have been misled." MCR 2.119(F)(3). The grant or denial of a motion for reconsideration rests within the discretion of the trial court. *Id.* We find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order. [See also, *Churchman, supra*; *Woods v SLB Prop Mgt*, 277 Mich App 622, 629-630; 750 NW2d 228 (2008).]

In another premises liability case, *Bentfield v Brandon's Landing Boat Bar*, unpublished opinion per curiam of the Court of Appeals, issued August 31, 2004 (Docket No. 248795), this Court ruled that the trial court wrongly denied the plaintiff's motion for reconsideration though, for the first time in his motion for reconsideration, he raised his argument that defendant owed him a statutory duty under MCL 554.139 to keep the premises in reasonable repair. However, Judge Meter dissented from the majority's holding and opined:

> Plaintiff is not entitled to reversal with respect to this issue. Indeed, he failed to preserve the issue concerning MCL 554.139 because he did not mention the statute, with its corresponding inapplicability of the open and obvious defense, during the summary disposition proceedings, despite the fact that the *Woodbury* decision was released before plaintiff filed his brief in response to defendants' motion for summary disposition. See, generally, *Charbeneau[, supra* at 733]. He raised the issue only in a motion for rehearing and reconsideration. As noted in

> MCR 2.119(F)(3), to be entitled to relief with respect to a motion for rehearing or reconsideration, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." Here, no palpable error occurred, because plaintiff *did not even allege* a violation of MCL 554.139 until he filed his motion for rehearing and reconsideration. See *Charbeneau, supra* at 733 ("[w]e find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order"). Appellate relief is unwarranted. [Emphasis in original.]

In *Bentfield v Brandon's Landing Boat Bar*, 474 Mich 1005; 708 NW2d 108 (2006), our Supreme Court reversed the majority's ruling on the motion for reconsideration and specifically agreed with Judge Meter's reasoning. The above cases establish that a trial court does not abuse its discretion when it denies a claim raised for the first time in a motion for reconsideration. Here, for the same reason, the trial court did not abuse its discretion when it declined to grant plaintiff's motion for reconsideration that contained her new theory of liability, and we need not address her first party theory on appeal.[1]

B. Summary Disposition

Plaintiff avers that the trial court erroneously granted summary disposition under *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004).[2] As our Supreme Court explained in *Fultz, supra* at 463:

> It is well-established that a prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96 n 10; 485 NW2d 676 (1992). The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997).

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[1] We also note that, in the trial court, plaintiff failed to adequately brief her first party argument, thus adding an additional ground for the trial court to reject her claim. In the motion, plaintiff merely asserted that, as a member of the school board, she is a party to the agreement. Plaintiff cited no case law or record evidence to support her assertion and she set forth no legal argument to establish her status as a party to the contract. We further note that the contract at issue is with the public body, the Inkster Public Schools, not individual members that comprise the school board.

[2] This Court reviews a trial court's decision to grant a motion for summary disposition de novo. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008). Whether a defendant owes a duty to the plaintiff is a question of law that this Court also reviews de novo. *Fultz, supra* at 463.

In *Fultz*, the plaintiff slipped and fell while walking on a snow and ice-covered parking lot. The defendant, Creative Maintenance Limited (CML), had contracted with the premises owner to provide snow removal services. *Fultz, supra* at 462. On the day of the plaintiff's fall, CML had not plowed the parking lot in 14 hours and had not laid down salt. *Id*. The plaintiff sued CML, but did not claim she was a third-party beneficiary of the contract between the snow removal company and the premises owner. *Id*. at 463. Rather, she maintained that CML owed her a common law duty to exercise reasonable care in performing its duties under the snow removal contract. *Id*. at 463-464.

The Court clarified that, in this kind of negligence action, "the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Id*. at 467. "If no independent duty exists, no tort action based on a contract will lie." *Id*. According to the plaintiff, CML breached its duty to her by failing to plow and salt as required by the contract. *Id*. at 468. Because the plaintiff failed to allege a duty CML owed to her "independent of the contract," the Court ruled that she failed "to satisfy the threshold requirement of establishing a duty that CML owed to her under the 'separate and distinct' approach . . . ." *Id*. As the Court in *Fultz* further explained:

> [I]f defendant fails or refuses to perform a promise, the action is in contract. If defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made. [*Fultz, supra* at 469-470.]

The *Fultz* Court distinguished the situation in *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446 (1999), because, in *Osman*, the snow removal company "created a new hazard by placing snow 'on a portion of the premises when it knew, or should have known or anticipated, that the snow would melt and freeze into ice on the abutting sidewalk, steps, and walkway, thus posing a dangerous and hazardous condition to individuals who traverse those areas.' " *Fultz, supra* at 469, quoting *Osman, supra* at 704. According to the Court, the defendant in *Osman* breached a duty separate and distinct from its contractual obligations by creating the "new hazard."

Pursuant to *Fultz*, to sustain her claim that Aramark breached a duty to plaintiff, she had to establish that Aramark owed her a duty separate and distinct from its contract with the Inkster Public Schools. Plaintiff has not alleged a duty that is separate and distinct from the maintenance contract. Plaintiff essentially alleges that she was injured because Payne wet-mopped the floor just before she walked across it. But Aramark's duty to wet-mop the floor was specifically contemplated in the contract. Plaintiff alleges that Payne created a "new hazard" by wet-mopping the floor. However, plaintiff does not allege that Payne placed an unusually large amount of water on the floor or any other conduct that would be considered the negligent creation of a new hazard of the kind contemplated in *Osman*.

We further note that, in *Mierzejewski v Torre & Bruglio, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 26, 2006 (Docket No. 269599), this Court considered facts similar to those in *Osman*. In *Mierzejewski*, the plaintiff slipped and fell on ice

in a parking lot. She sued the company that provided snow removal services and alleged that the company "performed its contractual obligation in such a way that it created a new hazard and increased the danger to plaintiff" by piling snow on landscaped curbed islands in and around the parking lot. According to the plaintiff, the mounds of snow melted and refroze, creating frozen puddles in areas frequented by pedestrians. This Court ruled that the trial court erroneously granted summary disposition to the defendant snow removal contractor because the company owed a separate and distinct duty to the plaintiff when it created a new hazardous condition during the performance of its contract. However, our Supreme Court reversed the *Mierzejewski* decision in *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087 (2007) and remanded the case for entry of judgment in favor of the snow removal company. Citing *Fultz*, the *Mierzejewski* Court opined:

> The Court of Appeals erred in reinstating the plaintiffs' claim on the basis of a duty owed by the defendant to the plaintiffs. The defendant did not owe any duty to the plaintiffs separate and distinct from the contractual promise made under its snow removal contract with the premises owner.

Thus, while *this* Court's holding in *Mierzejewski* suggests that, if Payne made the floor wet during the course of Aramark's contractual duty to mop, this may have created a "new hazard" that is separate and distinct from the contract, the Supreme Court repudiated this reasoning and reaffirmed that, under *Fultz*, a defendant performing an obligation under a contract does not owe a duty to an injured plaintiff when the plaintiff alleges no duty independent of the contract with the premises owner.[3] Furthermore, when the conduct alleged was specifically set forth in the agreement—the duty to mop the floor—Payne's conduct cannot be considered the creation of a "new hazard."[4] Aramark contractually agreed to mop the cafeteria floor and it owed no separate and distinct duty to plaintiff.[5]

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[3] The unpublished opinions on which plaintiff relies also suggest that Payne did not create the kind of "new hazard" for which Aramark may be held liable. Plaintiff showed no affirmative conduct by Payne that created a new hazard of the kind contemplated in her cited cases.

[4] Plaintiff also alleges that Payne created a new hazard by failing to place yellow warning signs down to alert people that she had mopped the floor. However, a failure to warn of the performance of her contractual duty to mop the floor is not actionable in tort because it does create a new hazard.

[5] Plaintiff repeatedly asserts that Scott Hamilton's testimony and Thomas Maridada's affidavit establish that the maintenance contract was intended to directly benefit plaintiff and that Maridada's affidavit and that of another witness establish that Aramark created a "new hazard" on the cafeteria floor. However, were we to accept plaintiff's characterization of their testimony, these would represent legal conclusions, not statements of fact. We do not allow witnesses to testify about conclusions of law "because it is the exclusive responsibility of the trial judge to find and interpret the applicable law." *People v Lyons*, 93 Mich App 35, 45-46; 285 NW2d 788 (1979).

Affirmed.

/s/ Henry William Saad
/s/ Deborah A. Servitto