# STATE OF MICHIGAN

# COURT OF APPEALS

SANDRA THOMPSON,

Plaintiff-Appellant,

v

KRAMER-TRIAD MANAGEMENT GROUP, L.L.C., and SIERRA POINT CONDOMINIUM ASSOCIATION,

Defendants,

and

GT LANDSCAPING, INC.,

Defendant-Appellee.

UNPUBLISHED
August 21, 2012

No. 305070
Oakland Circuit Court
LC No. 2008-093653-NO

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying her motion for reconsideration and to amend complaint in this premises liability action. We affirm.

Plaintiff argues that the trial court erred in denying her motion for reconsideration because the trial court should have reanalyzed the case in light of the decision in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011). We disagree.

We review a trial court's ruling regarding a motion for reconsideration for an abuse of discretion. *Estate of Luckow v Luckow*, 291 Mich App 417, 424; 805 NW2d 453 (2011). An abuse of discretion occurs when a trial court's decision falls outside the range of principled outcomes. *Id*. When the issue involves a question of law, we review the ruling de novo. *Id*. The determination of the existence of a duty presents a question of law subject to de novo review. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). The determination of whether the law of the case doctrine applies is reviewed de novo on appeal. *Augustine v Allstate Insurance Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011).

"The law of the case doctrine provides that a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case where

the facts remain materially the same." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010) (internal quotation marks and citations omitted). "[T]he law of the case doctrine does not preclude reconsideration of a question if there has been an intervening change of law after the initial decision on appeal." *Bailey v Oakwood Hosp and Med Ctr*, 259 Mich App 298, 306; 674 NW2d 160 (2003), rev'd on other grounds 472 Mich 685 (2005).

The law of the case doctrine precludes reconsideration of this case. This case arises from injuries sustained by plaintiff when she slipped and fell on an unsalted step in a condominium complex. Defendant had a snow and ice removal contract with the condominium complex manager. Plaintiff's initial complaint alleged that defendant owed plaintiff a duty pursuant to the snow removal contract. To analyze whether defendant owed a duty under the contract, the trial court applied *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004). Under *Fultz*, a noncontracting party only has a cause of action arising from a contract if a defendant owes the noncontracting party a duty that is separate and distinct from its contractual obligations. *Id*. at 467. The trial court held that pursuant to *Fultz*, defendant did not owe plaintiff a separate and distinct duty apart from the snow removal contract. On a prior appeal, this Court affirmed the trial court holding that, pursuant to *Fultz*, defendant did not owe plaintiff a duty under the contract, but remanded the case to the trial court for a determination whether defendant owed plaintiff a common law duty distinct from the contract. *Thompson v Kramer-Triad Mgt Group, LLC*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2011 (Docket No. 295190). Plaintiff now claims that the trial court's holding under *Fultz* must be reanalyzed in light of the decision in *Loweke*, which was released a few days after the trial court's opinion and order denying plaintiff's motion for reconsideration and to amend complaint.

Under the law of the case doctrine, questions of law decided by an appellate court will not be decided differently in a subsequent appeal in the same case. *Shade*, 291 Mich App at 21. In this case, this Court affirmed the trial court's holding under *Fultz*, and, thus, reliance on *Fultz* was the law of the case in this subsequent appeal. Plaintiff argues that *Loweke* constitutes an intervening change in the law that would preclude application of the law of the case doctrine. However, plaintiff's argument fails because *Loweke* does not change the law. In *Loweke*, the Court specifically states that its decision was meant to clarify the decision in *Fultz* and does not overrule *Fultz*. *Loweke*, 489 Mich at 159. On the other hand, the Court stated that *Fultz* had been misconstrued by Michigan courts, so in a practical sense, it could be argued that because *Loweke* changed the way courts would interpret the law, the decision constituted a change in the law. *Id*. at 168. While this is a close question, we hold that *Loweke* was not a change in the law, and, therefore, the law of the case doctrine precludes reconsideration of the issue.

Even assuming the law of the case doctrine does not apply, plaintiff's argument lacks merit because application of *Loweke* would not affect the outcome of the case. A trial court's error in issuing a ruling or order or an error in the proceedings is not grounds for the appellate court to reverse or otherwise disturb the judgment or order unless the court believes that failure to do so would be inconsistent with substantial justice. MCR 2.613(A).

In a negligence claim, a relationship giving rise to a duty can arise from a contract. *Antoon v Community Emergency Med Serv, Inc*, 190 Mich App 592, 595; 476 NW2d 479 (1991). *Fultz* and *Loweke* address tort actions that are based on a contract but brought by a noncontracting third party, and analyze when a duty of care arises between a party to the contract

and a noncontracting third party. *Loweke*, 489 Mich at 162-163. In *Fultz*, the Court held that the question to ask when determining whether a noncontracting third party can bring a tort action pursuant to a contract is "whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Fultz*, 470 Mich at 467.

On June 6, 2011, the Supreme Court released *Loweke* to clarify the decision in *Fultz*. According to *Loweke*, Michigan courts had misconstrued *Fultz* and mistakenly analyzed "whether a defendant's *conduct* was separate and distinct from the obligations required by the contract." *Loweke*, 489 Mich at 168 (emphasis added). The Court clarified that "the operative question under *Fultz* is whether the defendant owed the plaintiff any *legal* duty that would support a cause of action in tort." *Id*. at 171 (emphasis added). The Court explained:

> Determining whether a duty arises separately and distinctly from the contractual agreement, therefore, generally does not necessarily involve reading the contract, noting the obligations required by it, and determining whether the plaintiff's injury was contemplated by the contract. Instead, *Fultz's* directive is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to another. As this Court has historically recognized, a separate and distinct duty to support a cause of action in tort can arise by statute, or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties and the generally recognized common-law duty to use due care in undertakings. [*Id*. at 169; citations omitted.]

Plaintiff's argument that this case requires reconsideration in light of *Loweke* is not persuasive. *Fultz* and *Loweke* address tort actions that are based on a contract but brought by a noncontracting third party. In the lower court, plaintiff admitted in her pleadings that defendant did not have a contractual obligation to remove ice from the steps under the contract. Therefore, defendant's duty was not and cannot be based on the contract. Instead, common law principles of law must be applied to determine if defendant owed a duty to plaintiff. Furthermore, under *Loweke*, the Court instructs lower courts to consider whether a defendant owes a separate and distinct legal duty apart from the contractual obligations. *Id*. at 169. Here, the court, after remand, considered whether defendant owed plaintiff a common law duty. Remanding this case to the trial court for consideration of whether defendant owed a separate and distinct common law duty would, therefore, be futile and repetitive. Plaintiff argues that *Loweke* reaffirmed a common law principle—that all undertakings must be completed with reasonable care. However, plaintiff is incorrect that this rule of law was at some point overruled. This statement of law is a well-established rule of law in Michigan that *Loweke* restated as an example.

Plaintiff next argues that the trial court erred in denying her motion to amend complaint because defendant owed plaintiff a common law duty to use reasonable care in removing ice from the steps. We disagree.

We review a trial court's denial of a motion to amend a complaint for an abuse of discretion. *Shember v Univ of Mich Med Ctr*, 280 Mich App 309, 314; 760 NW2d 699 (2008), vacated on other grounds 485 Mich 915 (2009), mod 485 Mich 1072 (2010). "An abuse of

discretion occurs when a trial court's decision falls outside the range of principled outcomes." *Id*.

To establish a prima facie case of negligence, a plaintiff must prove that: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. *Brown*, 478 Mich at 552. "The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff." *Fultz*, 478 Mich at 463.

"A duty of care may arise from a statute, a contractual relationship, or by operation of the common law, which imposes an obligation to use due care or to act so as not to unreasonably endanger other persons or their property." *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). At common law, "[d]uty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977). In deciding whether a common law duty should be imposed, a court must consider several factors:

> (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the degree of certainty of injury, (4) the closeness of connection between the conduct and injury, (5) the moral blame attached to the conduct, (6) the policy of preventing future harm, and, (7) finally, the burdens and consequences of imposing a duty and the resulting liability for breach. The inquiry is ultimately a question of fairness involving a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution. [*Cummins*, 283 Mich App at 693 (citations omitted).]

Generally, "there is no duty that obligates one person to aid or protect another." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). However, a party may voluntarily assume a function that he is not legally required to perform, and thus assume a legal duty. *Hoffner v Lanctoe*, 290 Mich App 449, 455; 802 NW2d 648 (2010). A duty voluntarily assumed must be performed with some degree of skill and care. *Id*.

"A defendant can plow or salt a sidewalk without assuming a duty, or taking possession or control over the sidewalk." *Id*. In *Hoffner*, the defendant was a business owner that leased the building where he ran his business. *Id*. at 451-452. The defendant occasionally spread salt on the sidewalk outside the building. *Id*. at 455. The plaintiff fell because there was ice on the sidewalk. *Id*. at 451-452. The plaintiff argued that the defendant had assumed a duty to maintain the sidewalk. *Id*. at 455. The Court held that the defendant owed no duty to maintain the sidewalk because there was no evidence to demonstrate that the defendant assumed care of the sidewalk from the property owners, considered the sidewalk to be their responsibility, or endangered customers by occasionally applying salt. *Id*.

The present case is analogous to *Hoffner*. Defendant did not own or have control over the steps where plaintiff fell. Furthermore, as plaintiff admitted, defendant had no obligation under the contract to remove ice from the steps. Defendant only salted the steps in order to do a good job and make the area safer. Defendant stated that it had no obligation to remove ice from

the steps, and, thus, did not consider the steps to be its responsibility. There was also no evidence that defendant endangered anyone by applying salt to the steps— the only evidence plaintiff presented was that defendant endangered plaintiff by *not* applying salt to the second step. Therefore, defendant's act of voluntarily salting the steps was not sufficient to establish that he assumed a duty.

Plaintiff also argues that defendant owed a duty because plaintiff's harm was foreseeable. It is true that foreseeability of harm is a factor to consider when determining if defendant owed plaintiff a duty. *Cummins*, 283 Mich App at 693. However, foreseeability of harm alone is not sufficient to establish a duty. Plaintiff did not establish the existence of any other factor that could lead to a finding of a duty, such as a relationship between the parties.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Mark J. Cavanagh