

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re Estate of STEPHEN E. RICHARD.

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WILLIAM RICHARD, Personal Representative  
for the Estate of STEPHEN RICHARD,

Plaintiff-Appellant,

v

COMPASSIONATE CARE HOME HEALTH  
SERVICES, INC.,

Defendant-Appellee,

and

REGION 9 AREA AGENCY ON AGING a/k/a  
NORTHEAST MICHIGAN COMMUNITY  
SERVICE AGENCY, INC.,

Defendant.

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UNPUBLISHED  
September 9, 2014

No. 311767  
Alpena Circuit Court  
LC No. 11-003918-NH

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

On appeal, plaintiff challenges the trial court's grant of summary disposition to defendant Compassionate Care Home Health Services, Inc. pursuant to MCR 2.116(C)(10).<sup>1</sup> We reverse and remand for further proceedings consistent with this opinion.

Defendant provides various in-home care services to clients with medical conditions to assist them in living independently. Plaintiff's decedent had several medical conditions, including Type I diabetes. In December 2009, defendant agreed to provide basic in-home services to plaintiff's decedent on a twice-daily basis. The "Purchased Services Agreement"

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<sup>1</sup> While this case initially involved two defendants, we will refer to defendant Compassionate Care Home Health Services, Inc. as the singular "defendant" for ease of discussion.

indicates that defendant was only obligated to perform simple household chores for plaintiff's decedent. But a separate document defendant furnished to decedent titled "Care Outline" provides that in addition to these simple household chores, defendant would also ensure that plaintiff's decedent regularly monitored his blood sugar.<sup>2</sup> Evidence was also presented in the form of 86 "Daily Care Logs" that before the instant event, defendant consistently fulfilled the obligation it undertook in the Care Outline.

On the morning of February 7, 2010, one of defendant's employees arrived at plaintiff's decedent's apartment as routinely schedules. According to the employee, plaintiff's decedent appeared to be sleepy. The employee told plaintiff's decedent, "It's time to get up," but he simply responded, "Okay," and returned to sleep. The employee repeated her attempt to awake plaintiff's decedent at least two additional times, but he apparently provided similar responses before again returning to sleep. The employee left plaintiff's decedent's apartment after a few hours, after a supervisor had told her that plaintiff's decedent had been "really tired" in recent visits.

Later in the afternoon, another employee of defendant arrived at the apartment of plaintiff's decedent. This employee found plaintiff's decedent in serious need of medical attention. The employee promptly requested emergency medical assistance. Plaintiff's decedent ultimately died on February 15, 2010, as a result of a diabetic coma that ensued on February 7, 2010.

Plaintiff sued defendant for negligence, alleging that defendant breached its duty to plaintiff's decedent to monitor his blood sugar. Plaintiff further alleged that defendant breached its duty to plaintiff's decedent by failing to recognize the early symptoms of a diabetic coma, which apparently include heavy sleep.

The trial court eventually granted defendant's motion for summary disposition, explaining that defendant only had a limited duty to perform basic household services for plaintiff's decedent. The trial court stated that defendant's duty did not include monitoring plaintiff's decedent's blood sugar or recognizing that sleepiness indicates a diabetic coma. Thus, the trial court concluded that plaintiff could not establish a negligence claim because plaintiff could not show that defendant had more than a limited duty.

On appeal, plaintiff argues that the trial court erred in determining that defendant did not have a duty to plaintiff's decedent to monitor his blood sugar or recognize the early symptoms of a diabetic coma. We agree.

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<sup>2</sup> From the record on appeal, it is unclear whether the Care Outline is a contract, internal document, receipt, or something else. Because plaintiff has not established that the pertinent promise contained in the "special instructions" of the Care Outline was supported by separate consideration on the part of decedent, we find that plaintiff has not established that this second document constituted a separate contract for purposes of deciding this issue. See *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000).

This Court reviews de novo the trial court's decision to grant or deny a motion under MCR 2.116(C)(10) for summary disposition. *Calhoun Co v Blue Cross & Blue Shield*, 297 Mich App 1, 11; 824 NW2d 202 (2012). The existence of a duty is a question of law, reviewed de novo. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). "Whether an offer has been accepted and a contract formed involves a factual determination." *In re Costs and Attorney Fees*, 250 Mich App 89, 97; 645 NW2d 697 (2002). But whether the facts create a contract is an issue of law reviewed de novo. *Bracco v Michigan Technological Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998). So too is the construction of a contract a question of law reviewed de novo. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010).

To establish a negligence claim, a plaintiff must prove four elements: (1) a duty exists, (2) the breach of that duty, (3) causation, and (4) damages. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 281; 807 NW2d 407 (2011). "'Duty' is a legally recognized obligation to conform to a particular standard of conduct toward another so as to avoid unreasonable risk of harm." *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). "A legal duty or obligation may arise by contract, statute, constitution, or common law." *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 311; 583 NW2d 548 (1998).

We first conclude that plaintiff cannot show that a duty to monitor decedent's blood sugar levels arose from the contract between defendants. This contract contained nothing to suggest that defendant-appellee undertook a specific duty to monitor decedent's blood sugar levels. As noted above, this service, along with other medical services, were not checked in the document outlining defendant-appellee's duty. Ascertaining the intent of the parties is the cardinal rule of interpreting a contract. *Shay*, 487 Mich at 660. "Generally, if the language of a contract is unambiguous, it is to be construed according to its plain meaning." *Id.* Here, no explicit duty exists in the language of the contract requiring defendant to test or monitor decedent's blood sugar levels. The trial court correctly determined that no genuine material question of fact exists concerning defendant's duty under the language of the contract itself.

Whether plaintiff can otherwise rely on this contract to establish a claim of negligence generally is a closer question. Our Supreme Court has held that a nonparty to a contract may maintain an action in tort for failing to perform the contract only when there is a violation of a duty "separate and distinct from the defendant's contractual obligation." *Fultz v Union-Commerce Assocs*, 470 Mich 460, 467; 683 NW2d 587, 592 (2004). Our Supreme Court later clarified *Fultz* and held that "a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 159; 809 NW2d 553 (2011). The Court further explained:

[C]ourts should not permit the contents of the contract to obscure the threshold question of whether any independent legal duty to the noncontracting third party exists, the breach of which could result in tort liability. Instead, in determining whether the action arises in tort, and thus whether a separate and distinct duty independent of the contract exists, the operative question under *Fultz* is whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort, including those duties that are imposed by law. [*Id.* at 171.]

In *Loweke*, the Court found that a subcontractor could be found liable under the common-law duty to exercise reasonable care and avoid harm when one acts. *Id.* at 171-172, citing *Clark v Dalman*, 379 Mich 251, 261, 150 NW2d 755 (1967), and *Rinaldo's Constr v Mich Bell Tel Co*, 454 Mich 65, 84, 559 NW2d 647 (1997).

Thus, the question becomes whether, apart from the duties outlined in the contract, defendant-appellee owed decedent any other duty. Because no statute is involved, or at least has not been argued to apply, plaintiff must rely on the common law.

Generally, a person does not have an affirmative legal duty to aid or protect another person. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). Still, a duty to aid or protect may arise by operation of statute, common law, or contractual relationship. *Id.* at 660-661. A legal duty to aid or protect may arise if there is a special relationship between the plaintiff and the defendant. *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8; 492 NW2d 472 (1992). "Some generally recognized 'special relationships' include common carrier-passenger, innkeeper-guest, employer-employee, landlord-tenant, and invitor-invitee." *Id.* The underlying rationale for imposing a duty of care when a special relationship exists is the element of control. "Thus, the determination whether a duty-imposing special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself." *Id.* at 9.

Whether the social benefits of imposing a duty outweigh the social costs of doing so is the ultimate question in determining whether a legal duty should be imposed. *Hill*, 492 Mich at 661. Factors that are relevant to the determination whether a legal duty exists include "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). When either the parties do not have a relationship or the harm is not foreseeable, other factors need not be considered because no duty may be imposed. *Hill*, 492 Mich at 661. Moreover, when the parties have only a limited relationship, only a limited duty may be imposed, and it is unnecessary to consider the remaining factors. *Id.* at 662.

We conclude that the parties only had a limited relationship, so only a limited duty could be imposed. *Id.*; *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 507; 740 NW2d 206 (2007). This limited duty, as evidenced by the contract between defendants, does not include the duty to recognize the early symptoms of a diabetic coma, as this duty would impose a requirement of specialized medical knowledge.<sup>3</sup> The record shows that defendant was hired to provide basic household services. In effect, the only evidence of the "formal" relationship with the decedent indicates that defendant's relationship with plaintiff's decedent was limited to non-medical services. Thus, defendant did not have an

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<sup>3</sup> For instance, if plaintiff's decedent had started vomiting in Jennifer Dubois's presence, it is clear that she would have had a duty to seek medical assistance. But the issue here is whether, due to the parties' relationship, defendant's employee had a duty to recognize an approaching diabetic coma, or whether she had a duty to wake plaintiff's decedent against his will for a blood-sugar test.

obligation arising out of a special relationship that required defendant to provide decedent with specialized medical services for Type I diabetic. For the same reason, defendant did not have a duty arising out of a special relationship to provide its employees with the specific medical training necessary to recognize an approaching diabetic coma.

Nonetheless, this Court has imposed a duty where a defendant voluntarily assumed a function that it was under no legal obligation to assume. *Baker v Arbor Drugs*, 215 Mich App 198, 205-206; 544 NW2d 727 (1996) (pharmacy assumed a duty to monitor customer medications for possible adverse interactions). And, in *Sponkowski v Ingham Co Rd Comm*, 152 Mich App 123, 127; 393 NW2d 579 (1986), the Court observed that when “a person voluntarily assumes the performance of a duty (e.g., to lead another motor vehicle to an unfamiliar destination), he is required to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task.”

Here, plaintiff presented evidence in the form of the Care Outline, including the “Special Instructions,” and the 86 “Daily Care Logs” that could support a finding that defendant voluntarily assumed the duty to monitor decedent’s blood sugar levels. The logs, in particular, indicate that defendant was actually performing this duty consistently. Given the evidence presented, we conclude that defendant voluntarily assumed the duty to monitor decedent’s blood sugar levels, or at least to ensure that decedent monitored them himself, the breach of which was arguably a proximate cause of decedent’s death. We thus reverse the trial court’s finding that defendant did not owe a duty to decedent.

Plaintiff also argues that he has presented sufficient evidence to create a question of fact concerning whether defendant acted reasonably and whether the action, or inaction, was a proximate cause of decedent’s death. Because the trial court did not reach these issues, we will not decide them. The trial court may do so on remand.

We reverse and remand for further proceedings consistent with this opinion. As the prevailing party, plaintiff may tax costs. MCR 7.219. We do not retain jurisdiction.

/s/ Michael J. Riordan  
/s/ Jane E. Markey  
/s/ Kirsten Frank Kelly