STATE OF MICHIGAN

COURT OF APPEALS

ETHEL KAMINSKI,

Plaintiff-Appellant,

v

JAMES HASKINS and KATHLEEN HASKINS,

Defendants,

and

DILUSSO BUILDING COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED
July 22, 2008

No. 275117
Macomb Circuit Court
LC No. 2004-004739-NO

Before: Gleicher, P.J., and O'Connell and Kelly, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I agree with the majority that plaintiff has not established a premises liability claim. However, I respectfully dissent from the majority's conclusion that *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004), affords a basis for granting summary disposition to defendant DiLusso Building Company, Inc.

Plaintiff fell as she ascended a step at her son's home. According to plaintiff, her left foot "caught underneath" the top step leading to the home's doorway, and "zoom, I fell." DiLusso built the home in 2001. A report submitted by plaintiff's expert witness opined that the height and depth of the home's top step exceeded permissible measurements adopted under Michigan's residential building code, MCL 125.1504. Plaintiff's complaint alleged that "as a result of [the building code] violations, Plaintiff's foot became stuck and caused her to fall."

The parties did not address *Fultz* in their appellate briefs, and the trial court did not consider *Fultz* when it granted defendant summary disposition. Although the Michigan Supreme Court's holding in *Fultz* rests on the existence of a contractual relationship, neither this Court nor the trial court has reviewed the contract on which the majority relies. In my view, the majority opinion's "contract" theme, which is solely the majority's creation, has nothing to do with this case.

In *Fultz*, the Michigan Supreme Court held that in tort actions "based on a contract," 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*. Because plaintiff here did not allege that DiLusso breached a duty created by a contract, this simply is not a tort action "based on a contract." However, even if a contract exists that required DiLusso to construct the home in accordance with applicable building codes, this still is not a *Fultz* case.

The central holding in *Fultz* was, "[N]o 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*." *Id*. at 470 (emphasis supplied). Here, however, this Court cannot know whether plaintiff's claim qualifies as "separate and distinct from the promise made" because this Court never read the contract, and therefore, cannot know what promises it contained. But regardless of the language comprising the unread contract, DiLusso's duty to build safe steps for the home did not arise from contractual promises, but by operation of law. Plaintiff alleges that DiLusso bore a distinct legal duty, consistent with Michigan's residential building code, to construct safe steps that conformed to certain size dimensions. DiLusso's duty to craft the steps in compliance with Michigan's building code exists independently of any contract with the homeowners. Thus, even ignoring the fact that the majority has created a ground for summary disposition that cannot be found in the record, *Fultz* does not govern the outcome of this case.

The majority concludes its analysis with the observation that summary disposition is appropriate because "there are no allegations that DiLusso breached any duty owed to [plaintiff] independent of the contract between DiLusso and the Haskinses." With this statement, the majority sua sponte disposes of this case under MCR 2.116(C)(8), without the benefit of briefing or trial court review of the controlling legal question. In my view, should this Court desire to consider issues that reside entirely outside the parties' briefs as a potential basis for granting summary disposition premised on subsection (C)(8), the appropriate course would be to afford plaintiff the opportunity to amend her complaint, pursuant to MCR 2.116(I)(5).

Although the trial court properly dismissed plaintiff's premises liability allegation, I would remand to the trial court to afford plaintiff an opportunity to further develop her claim based on the alleged building code violations.

/s/ Elizabeth L. Gleicher