STATE OF MICHIGAN

COURT OF APPEALS

BRANDON CARRINGTON,

Plaintiff-Appellant,

v

CADILLAC ASPHALT, LLC,

Defendant/Cross-Plaintiff,

and

WEST SIDE CONCRETE COMPANY,

Defendant/Cross-Defendant-Appellee.

UNPUBLISHED
February 9, 2010

No. 289075
Wayne Circuit Court
LC No. 07-707096-NO

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant West Side's motion for summary disposition. Because we are bound by our Supreme Court's decisions in *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087; 729 NW2d 225 (2007), and *Banaszak v Northwest Airlines, Inc*, 477 Mich 895; 722 NW2d 433 (2006), we affirm the trial court for the reasons set forth in this opinion.[1] This appeal has been decided without oral argument pursuant to MCR 7.214(E).

[1] Were we not bound by *Mierzejewski* and *Banaszak*, we find the reasoning of our brethren on the Sixth Circuit regarding the application of *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004) in *Davis v Venture One Construction, Inc*, 568 F3d 570 (CA 6, 2009), compelling and would adopt that portion of the opinion where Judge Kennedy eloquently wrote:

> After these machinations, we return to where we began with a fuller understanding of the rule in *Fultz*. A contract itself does not give rise to a duty of a contracting party to a third party to perform the services described by the

(continued…)

Plaintiff fell when he stepped into a hole adjacent to a newly-poured concrete curb that was part of a paving project for which the state was identified as the owner. Cadillac Asphalt, the general contractor, is not part of this appeal. West Side Concrete had the subcontract to do the actual curb work. Under the contract, West Side was required to:

> provide all equipment, labor, materials, and supervision necessary to:
>
> - remove and replace concrete curb
>
> - remove and replace concrete sidewalk
>
> - remove and replace concrete pavement
>
> - perform all excavation and placement of aggregate base

(…continued)

> contract. A duty, "separate and distinct" from the duty to perform the contract, arises between a contracting party and a third party when the contracting party creates a "new hazard." *Fultz*, 683 N.W.2d at 593. However, "new hazard" does not mean a "hazard not contemplated by the contract" as argued by Venture One. Venture One claims that we should read the contract, note the safety precautions required by the contract, and determine that Pilot employee safety is considered by the contract, and thus risk of injury to them is not "new." The requirement of a "separate and distinct" duty from a contractual duty refers to a "separate and distinct" legal duty, not a "separate and distinct" task or warranty as outlined in contract. A "new hazard" is an inherent possibility in the performance of a contract. One who assumes to act—where "to act" means more than making a contract—must exercise care and skill in taking such action. . . . A duty to act with due care is owed by a contracting party to third parties at risk of reasonably foreseeable harm stemming from the performance of the contract. *See Valcaniant v. Detroit Edison Co.*, 470 Mich. 82, 679 N.W.2d 689, 693 (2004) (citing *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928) (Cardozo, J.)). [*Davis*, 568 F3d at 575-576.]

In *Davis*, our brethren on the Sixth Circuit found that the creation of a new hazard distinguished that case from *Fultz*, thereby creating a new duty in tort. However, when this Court has ventured into similar analysis, as was the case in both *Mierzejewski* and *Banaszak*, our Supreme Court has made clear that such distinctions are not allowed under the majority's interpretation of *Fultz* when determining what constitutes a "separate and distinct" duty. Therefore, while we find the analysis in *Davis* persuasive, (especially that portion of the opinion where Judge Kennedy asserts that "A contract between two parties does not determine those parties' obligations with respect to the rest of the world. Contractual duties do not limit separately existing common law tort duties. The Court in *Fultz* did not wipe away fifty years (at minimum) of precedent on this point. The majority in *Fultz* might call this the creation of a "new hazard," *Fultz*, 683 N.W.2d at 593, and the concurrence might call it Restatement (Second) of Torts § 324A(a), *id*. at 594 (Kelly, J., concurring)," *Davis*, 568 F3d at 575), we are bound by the decisions of our Supreme Court in *Mierzejewski* and *Banaszak*.

- restore areas along new curb and sidewalk

West Side had finished pouring the curb but had not completely backfilled the area, and there was a rather deep gap between the curb and the grass between the curb and sidewalk. The accident occurred after dark and there were no streetlights nearby. Plaintiff did not see the hole when he stepped up over the curb. Plaintiff's injury required back surgery.

In the trial court, the parties focused on two issues: whether West Side owed plaintiff a common law duty that was separate and distinct from its contractual duties, and whether liability could be avoided on the theory that the condition was open and obvious with no special aspects rendering it unreasonably dangerous. The trial court agreed with West Side that the case was controlled by *Banaszak v Northwest Airlines, Inc*, 477 Mich 895, and that under *Banaszak*, summary disposition had to be granted for West Side.

On appeal, plaintiff argues that West Side owed the public and plaintiff a duty separate and distinct from the contractual duty. The contract did not specify a timeframe; under those provisions, the backfilling could be done at any time. However, because of the danger to pedestrians created by the deep hole and the darkness, West Side had a common law duty to *immediately* refill the hole or otherwise prevent a pedestrian from stepping into the hole by means of ropes, barricades, or lights. Its failure to do so created a new hazard.

West Side argues that it owed no separate duty. Under *Fultz v Union-Commerce Associates*, 470 Mich 460, 467; 683 NW2d 587 (2004), it could only be held liable for injuries resulting from a duty to plaintiff that is "separate and distinct" from its contractual obligations. The duty that plaintiff alleges was breached here—the duty to properly and carefully remove the forms and backfill the surrounding area—emanated from the contract itself. The rule in *Fultz* has been further explained by later Michigan Supreme Court reversals of this Court's finding that a "new hazard" had been created and had given rise to an extra-contractual duty. For example, in *Mierzejewski*, where the plaintiff asserted the defendant created a new hazard by piling snow on the "islands" of a parking lot and breached its common law duty to act with reasonable care, the Court stated: "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." *Id*. In *Banaszak*, our Supreme Court found no new hazard was created when the defendant inadequately protected the work area. *Banaszak*, 477 Mich at 895. Plaintiff's complaint alleges at best a breach of contract.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Based on our review of prior cases where this Court has found that a new hazard was created and our Supreme Court has consistently reversed those findings, we must conclude that the trial court properly granted defendant's motion. The basic rule under *Fultz* provides:

> If [a] defendant negligently performs a contractual 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*, 470 Mich at 469-470.]

Fultz explains that "a subcontractor breaches a duty that is 'separate and distinct' from the contract when it creates a 'new hazard' that it should have anticipated would pose a dangerous condition to third persons." *Id*. at 468-469. Thus, a subcontractor has a common law duty to use due care or to act in a manner that does not cause unreasonable danger to the person or property of another. *Ghaffari v Turner Construction Co (On Remand)*, 268 Mich App 460, 466; 708 NW2d 448 (2005) (citing *Johnson v A &M Custom Built Homes of West Bloomfield, LPC*, 261 Mich App 719, 722; 683 NW2d 229 (2004)). However, "a failure to act does not give rise to a separate legal duty in tort." *Ghaffari*, 268 Mich App at 467 (citing *Fultz*, 470 Mich at 469).

In *Banaszak*, the defendant's work involved "wellways": deep holes in the walkway in which machinery for moving walkways was placed. The defendant insufficiently covered one of the wellways and the plaintiff, walking over the flimsy cover, broke through and fell into the hole. This Court held that the defendant created a new risk by using insufficient covers. *Banaszak v Northwest Airlines, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 263305). But our Supreme Court reversed, stating:

> [The defendant] was required to provide a cover over the "wellway," an opening at the end of the moving walkway that contains the mechanical elements. The purpose of the cover was to protect persons using that area. The plaintiff was injured when she stepped on an inadequate piece of plywood covering the "wellway." This hazard was the subject of the [defendant's] contract. As a result, [the defendant] owed no duty to plaintiff that was "separate and distinct" from its duties under the contract. [*Mierzejewski*, 477 Mich at 895.]

In *Mierzejewski*, the defendant plowed a parking lot, piling snow onto the curbed "islands" in the lot, and melting runoff from the piles made icy patches, on which the plaintiff slipped. This Court first noted the "open and obvious" hazard doctrine did not apply because the defendant did not possess the premises and then found that the defendant had created a new hazard, breaching its duty of care owed to the general public. However, our Supreme Court reversed, finding no duty was owed separately from the contractual duties. *Mierzejewski*, 477 Mich at 1087.

The contract between West Side and Cadillac Asphalt does not have an express provision regarding public safety. But it does require West Side to adhere to the terms of Cadillac Asphalt's contract with the state, which, in turn, requires the contract performer to take precautions to protect the safety of the public. Therefore, public safety measures are by reference a part of the contract. Under *Fultz* and its progeny, West Side's digging and

backfilling activities involved only contractual duties; hence we are not able to find that a separate duty was owed to plaintiff.[2]

Although the parties also dispute whether the condition presented an open and obvious hazard, that doctrine is inapplicable here. It is specifically applicable to the duty owed by a premises possessor. *Ghaffari v Turner Construction Co*, 473 Mich 16, 23; 699 NW2d 687 (2005). The doctrine's analysis requires a determination of whether the plaintiff is a trespasser, a licensee, or an invitee of the premises possessor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). That determination only makes sense in the context of a defendant who possesses the premises. In *Ghaffari*, our Supreme Court explained that the defendant subcontractor could not be held liable under this theory because it was neither a general contractor nor a property owner. *Ghaffari*, 473 Mich at 31 n 7. Plaintiff here makes no allegations that West Side possessed the premises, nor does he identify any facts supporting that. In the absence of any support for this necessary element, the "open and obvious hazard" doctrine does not apply.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello

[2] See footnote 1, *infra.*