STATE OF MICHIGAN

COURT OF APPEALS

RICHARD LOWEKE and SHERRI LOWEKE, Plaintiffs-Appellants,	UNPUBLISHED April 22, 2010
v	No. 289451 Wayne Circuit Court
ANN ARBOR CEILING & PARTITION COMPANY, INC, Defendant-Appellee.	LC No. 08-115935-NO

Before: MURPHY, C.J., and JANSEN and ZAHRA, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS AND PROCEEDINGS

The facts are not at issue in this case. The accident occurred at a construction site where plaintiff was working for an electrical subcontractor and defendant was a subcontractor for carpentry and drywall. Plaintiff was installing wiring and wall boxes in offices and the hallway. Defendant's employee allegedly left more than 20 sheets of cement board stacked against the hallway wall. For unknown reasons, the cement boards fell on plaintiff while he was working and injured his right leg.

Plaintiff filed suit alleging that defendant negligently stacked the cement boards and created a new hazard that did not previously exist. Defendant moved for summary disposition, arguing that plaintiff was merely alleging that defendant negligently performed its contractual duties and that, under *Fultz v Union-Commerce Associates*, 470 Mich 460; 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 contract with the general contractor provided

[1] Because Sherri Loweke's claims are derivative, "plaintiff" will be used in this report to refer to Richard Loweke.

in relevant part: "The Subcontractor shall be responsible for unloading, moving, lifting, protection, securing, and dispensing of its materials and equipment at the Project Site." Plaintiff responded by analogizing the instant case to that of a taxi driver who is liable for causing an accident even though engaged in contractual duties of safely conveying a passenger.

The trial court agreed with defendant. The trial court noted that the contract stated defendant was responsible for handling the materials and equipment needed for the job: "This is clearly what happened within their obligation under the contract." The trial court accordingly granted defendant's motion for summary disposition.

II. STANDARD OF REVIEW

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). Whether a defendant owes a duty toward a plaintiff is a question of law that we also review de novo. *Fultz*, 470 Mich at 463.

III. ANALYSIS

Plaintiff argues that defendant owes plaintiff a duty that is "separate and distinct" from this contractual duty. We disagree.

In *Fultz*, the Supreme Court stated the basic rule that,

> [i]f [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 further explained 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.

In *Fultz*, the Court considered whether a snowplowing company owed a duty to the plaintiff, who had slipped and fallen in a parking lot the defendant was contractually obligated to plow and salt. The Court disagreed with the plaintiff's contention that the defendant owed her a common law duty to exercise reasonable care in performing its contractual duties, and it stated that, "the former misfeasance/nonfeasance inquiry in a negligence case is defective because it improperly focuses on whether a duty was breached instead of whether a duty exists at all." 470 Mich at 467. The Court held that the plaintiff's claim was, in essence, that the defendant negligently performed its contractual duty of clearing the parking lot.

The Court distinguished *Fultz* from *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 704; 532 NW2d 186 (1995), reversed on other grounds, *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). In *Osman*, the plaintiff fell because the defendant "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.'" The injury in *Osman* resulted from the defendant's piling snow where it should not have been placed, not from a bad job clearing the parking lot. Thus, under *Fultz*, a subcontractor has a common law duty to act in a manner that does not cause unreasonable danger to the person or property of others only when that duty is "separate and distinct" from the contract, such as when the defendant creates a "new hazard" that it should have anticipated would pose a dangerous condition to third persons. *Fultz*, 470 Mich at 468-469.

We conclude that defendant did not create a "new hazard," beyond the requirements of the contract. Defendant allegedly stacked the cement board negligently. The court must look at the terms of the contract and determine whether the defendant's action was required under the contract. The contract specifically required that, "The Subcontractor shall be responsible for unloading, moving, lifting, protection, securing, and dispensing of its materials and equipment at the Project Site." There is little question that defendant was required to secure the cement board at the project site. Thus, plaintiff's claim, no matter how it is termed, is based on defendant's negligence in performing the requirements of its contract.[2] Further, unlike *Osman*, 209 Mich

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[2] We note the above decision is also supported by more recent case law in which our Supreme Court reversed by peremptory order this Court's decisions that the defendants had created a new hazard. *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087; 729 NW2d 225 (2007); *Banaszak v Northwest Airlines, Inc*, 477 Mich 895; 722 NW2d 433 (2006). The *Banaszak* order states:

> [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. [477 Mich at 895.]

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." 477 Mich at 1087. Thus, in both cases our Supreme Court disagreed that a "new hazard" was created where the defendant's actions were within the course of performance of its contract.

App 703, the alleged hazard created by defendant is not a "new hazard." The alleged hazard was not outside of the construction zone and did not present any unique risk not contemplated by the contract.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra