STATE OF MICHIGAN

COURT OF APPEALS

TARIEN A. HATCHER, Individually and as Personal Representative of the Estate of KIMORA N. HATCHER, Deceased, MARKQUITA FREDERICK, Individually and as Personal Representative of the Estate of KIMORA N. HATCHER, Deceased, TARIEN A. HATCHER, as Next Friend of LATARIEA HATCHER, YVETTE HATCHER, ISABEL L. KUHLMAN and JOSEPH EARLE,

Plaintiffs-Appellants,

v

SENIOR HOME HEALTH CARE INC,

Defendant-Appellee.

UNPUBLISHED
August 19, 2010

No. 289208
Macomb Circuit Court
LC No. 2007-001452-NO

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this cause of action arising from an apartment fire. The trial court granted defendant's motion for summary disposition after determining that the negligence cause of action was barred by our Supreme Court's decision in *Fultz v Union Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004). Additionally, following oral argument in this Court, plaintiffs brought a motion to amend their complaint pursuant to MCR 7.216(A)(1). We affirm the trial courts grant of summary disposition, deny the motion to amend the complaint and remand for the trial court to determine the propriety of such an amendment.

This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997). Furthermore, this case involves a determination of whether defendant owed plaintiffs a duty. The trial court's determination that no duty existed is subject to de novo review. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).

Plaintiff's decedents were victims of a fire in their apartment building caused by the actions of Mr. Renwick, to whom defendant provided oxygen pursuant to Renwick's physician's orders. Specifically, the apartment fire began as a result of Renwick smoking in the presence of the oxygen canisters. Renwick was subsequently convicted of manslaughter pursuant to MCL 750.321. The trial court's grant of summary disposition was the result of the court's conclusion that *Fultz* barred a finding of liability. In *Fultz*, the plaintiff slipped and fell in an icy parking lot. She subsequently brought a negligence cause of action against the landowner and a contractor. The landowner had hired the contractor to plow and salt the parking lot and, on the day in question, the contractor had allegedly failed to fulfill its contractual duties. *Fultz*, 470 Mich at 461-462. Our Supreme Court held that no cause of action could be brought against the contractor. The Court stated that the contractor owed no duty to the plaintiff where the plaintiff failed to specify a duty that was separate and distinct from the contractual agreement with the landowner. The Court explained:

> Accordingly, the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. [Id. at 467.]

In the present case, the trial court determined that like in *Fultz*, plaintiffs failed to allege that a duty separate and distinct from the contract was breached. The court stated that no cause of action could be maintained because plaintiffs were merely alleging that defendant had negligently performed its contract. In order to ascertain whether the trial court's determination was proper, this Court must determine whether defendant owed a duty to plaintiffs and, if so, whether that duty was separate and distinct from its contractual obligations to Renwick.

"Whether a defendant owes a plaintiff a duty of care is a question of law for the court." *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). A duty can be created by a contractual relationship, a contract or an application of the common law. *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). "Among strangers who lack a special relationship to one another, the duty owed is most basic, that of reasonable conduct under the circumstances." *Valcaniant*, 470 Mich at 89. As our Supreme Court has stated, "whether a duty is owed depends on whether harm is reasonably foreseeable." *Valcaniant v Detroit Edison Co*, 470 Mich 82, 90; 679 NW2d 689 (2004).

In arguing whether defendant owed plaintiffs a duty under the common law, the parties each devote a significant portion of their briefs to this Court's decision in *Terry v Detroit*, 226 Mich App 418; 573 NW2d 587 (1997). The parties' reliance on *Terry* is misplaced. The plaintiff in this case has pled that defendant "owed a duty to either terminate deliveries or notify Renwick's physician, the fire department, or the apartment manager about the extreme fire hazard and risk of harm to apartment residents." Essentially this was a duty to warn or otherwise protect a third party. This Court has clearly defined when such a duty exists stating that, there is a "general common-law rule that no individual has a duty to protect another who is endangered by a third person's conduct absent 'a 'special relationship' either between the defendant and the victim, or the defendant and the third party who caused the injury.'" *Beaudrie v Henderson*, 465 Mich 124, 141; 631 NW2d 308 (2001), quoting *Murdock v Higgins*, 454 Mich 46, 54; 559

NW2d 639 (1997). Public policy determines whether a special relationship exists. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). The Courts of Michigan have recognized several special relationships. Among those relationships are the relationships between a common carrier and its passengers, an innkeeper and his guests, *Id.*, a proprietor and her patron, *Graves v Warner Bros*, 253 Mich App 486, 494; 656 NW2d 195 (2002), a rescuer and a victim, *Madley v Evening News Ass'n*, 167 Mich App 338, 341; 421 NW2d 682 (1988), and a physician and her patient, *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20; 780 NW2d 272 (2010).

> Our Supreme Court has previously explained that:
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> > The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety. [*Williams*, 429 Mich at 499.]

Consequently, "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." *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 9; 492 NW2d 472 (1992). As the Court in *Dykema* explained, a number of factors are relevant when determining whether a special relationship exists:

> [T]his Court has held that it is necessary to:
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> > "balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties.... Other factors which may give rise to a duty include the foreseeability of the [harm], the defendant's ability to comply with the proposed duty, the victim's inability to protect himself from the [harm], the costs of providing protection, and whether the plaintiff had bestowed some economic benefit on the defendant." [*Id*., quoting *Roberts v Pinkins*, 171 Mich App. 648, 652-653, 430 NW2d 808 (1988).]

We acknowledge that there was a severe risk of harm in this case due to the volatile nature of the materials that defendant delivered to Renwick. Defendant's agent testified to his observation of Renwick's hazardous use of the oxygen while smoking. He also noted that there was evidence that Renwick was a careless smoker. These observations support the likelihood of a fire or explosion while Mr. Renwick received oxygen from both defendant's predecessor medical supplier and defendant for 17 months before the deadly fire. The principles of science render the harm arising form the combination of careless smoking and oxygen use foreseeable. We further note that plaintiffs lacked any control over the danger that ultimately caused their injuries and that the alleged duty would have imposed only minimal cost and hardship on defendant. If this were not a circumstance where Renwick and defendant had a contract, public policy might well support a finding that a special relationship existed that would give rise to a duty of care. However, under *Fultz*, defendant can only be subject to a duty that is separate and distinct from the duties owed under its contract with Renwick. It is clear that the only reason

that defendant could have owed a duty to plaintiff was because of the contractual delivery of oxygen to the criminally negligent Renwick. As a result, any alleged duty to protect was not separate and distinct from the contract. Therefore, plaintiffs are not entitled to relief on that theory of duty.

Plaintiffs further assert in their brief on appeal that a separate and distinct duty existed pursuant to the doctrine of negligent entrustment. In *Moning v Alfono*, 400 Mich 425; 245 NW2d 759 (1977), our Supreme Court quoted Restatement 2d, Torts, § 390, which provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

While the theory of negligent entrustment certainly appears to be applicable to defendant's conduct, plaintiffs' reliance on the theory on appeal is misplaced. Negligent entrustment is not properly classified as a duty. As indicated in *Allstate Ins Co v Freeman*, 160 Mich App 349, 357; 408 NW2d 153 (1987), negligent entrustment is a distinct and unpled tort action.

Plaintiffs also argue that defendant owed plaintiffs a separate and distinct duty because defendant's conduct created a new hazard. As stated in *Fultz*, "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." *Fultz*, 470 Mich at 468-469. Our Supreme Court has limited the concept of the creation of a new hazard. In both *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), the Supreme Court refrained from finding that the defendants had created new hazards.

In *Banaszak*, the defendant was contracted to install a moving walkway in an airport terminal. In reversing this Court's holding in favor of the plaintiff, the Supreme Court explained that, pursuant to the contract:

> [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. [*Banaszak*, 477 Mich at 895.]

In *Mierzejewski*, the Supreme Court reversed this Court after concluding that "[t]he 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." *Mierzejewski*, 477 Mich at 1087. The Supreme Court's order was one paragraph and contained no description of the underlying facts of the case. Therefore, in order to contextualize the Supreme Court's order, it is necessary to reference this Court's unpublished opinion in that case. That opinion

demonstrates that the defendant was hired "to plow the snow to the outer perimeter of the parking lots 'in a manner as not to interfere with parking or roadways.'" *Mierzejewski v Torre & Bruglio, Inc*, unpublished per curiam opinion of the Court of Appeals, issued September 26, 2006 (Docket No. 269599). The defendant did not comply with the contractual terms and plowed the snow to a landscaped island in the parking lot. The snow subsequently melted and froze again, which created an icy patch on which the plaintiff slipped. *Id*. This Court initially held that the ice constituted a new hazard under *Fultz*. *Id*. By holding that there was no separate and distinct duty, the Supreme Court implicitly held that the patch of ice did not constitute a new hazard. However, plaintiffs urge us to consider *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995). In *Osman* a snow removal contractor moved snow from one portion of the owners property and placed it on another portion where it was alleged to have melted and refrozen on abutting sidewalks steps and sidewalks, causing a danger to third parties. *Id.* at 704. Both *Banaszak* and *Mierzejewski* involve incidents that arose within the physical scope of the contract performance. *Osman*, on the other hand, concerned harms to persons outside of the area of contractual performance. The plaintiffs in this case, like *Osman* were not in the physical space of contractual performance. However, as both *Fultz* and *Osman* note, it was the action of the defendant in *Osman* that transported the snow beyond the contractual performance space. The medical supplier in this case performed its contractual duties by delivering the oxygen. It was not until Renwick acted that the inchoate risk became a reality outside the apartment walls. Consequently, defendant's conduct in the present action is not analogous to the defendant in *Osman*.

Further, *Banaszak* and *Mierzejewski* broadly applied the rule from *Fultz*. Our Supreme Court's broad application of that rule demonstrates that where an injury is caused by a hazard that is even remotely connected to a contractual relationship, Michigan law bars any cause of action. Consequently, plaintiffs cannot establish that defendant's conduct created a new hazard where defendant's conduct was consistent with its contractual obligations.

Because plaintiffs have not established that defendant owed them a duty that was separate and distinct from the contract, and because plaintiffs have failed to show that defendant created a new hazard, it follows that the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) was proper. Plaintiffs are not entitled to relief.

Plaintiffs also argue on appeal that the Supreme Court's decision in *Fultz* should be reversed. However, as is well established, this Court is bound by the decisions of our Supreme Court. *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009). While there may be legitimate reason to question the wisdom of *Fultz* and its progeny, this Court is not in a position to disregard that binding precedent.

Finally, as stated above, plaintiffs also present this Court with a motion to amend their complaint. During plaintiffs' oral argument regarding their appeal of the trial court's grant of summary disposition, this Court observed that plaintiffs' complaint failed to allege a cause of action for negligent entrustment. Subsequently, plaintiffs filed a motion seeking to amend their complaint in order to add such a count. Plaintiffs argue that this Court has the power to grant their motion pursuant to MCR 7.216(A)(1), which provides that this Court may, in its discretion, "exercise any or all of the powers of amendment of the trial court or tribunal." Because the trial court has not been afforded an opportunity to consider plaintiffs' motion to amend their complaint, we conclude that it would be an improper use of this Court's discretion to grant

plaintiffs' motion. Consequently, in addition to affirming the trial court's grant of summary disposition, we remand to allow plaintiffs an opportunity to present the trial court with a motion to amend their complaint.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens