

STATE OF MICHIGAN
COURT OF APPEALS

LYNNE LANE and FREDERICK ZWIEFEL,

Plaintiffs-Appellants,

v

FAIRWAY SALES COMPANY, INC.,

Defendant,

and

DRUBIN'S LAWN CARE & PAINTING,

Defendant-Appellee.

UNPUBLISHED
November 16, 2010

No. 293775
Tuscola Circuit Court
LC No. 08-024723-NO

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

Lynne Lane (Lane)¹ challenges the trial court's grant of summary disposition in favor of Drubin's Lawn Care & Painting (Drubin) in this action arising from a slip and fall in the parking lot of a store owned by Fairway Sales Company, Inc. (Fairway). Specifically, Lane contends that Drubin's negligent performance of snow removal under its contract with Fairway resulted in the creation of a new hazard that caused Lane's injuries. We affirm.²

Lane fell on a snow-covered drain located in the parking lot of Fairway and incurred serious injuries. Drubin maintained an oral contract with Fairway to plow snow in the parking lot when accumulations exceeded one inch. Drubin plowed the lot on December 16 and 17, 2007. Lane fell in the lot on December 18, 2007. Reportedly, there had been no new snowfall since the last day Drubin had plowed the parking lot. Drubin acknowledged that when plowing the lot it would straddle the area of the drain, which was situated below the lot's surface. Lane

¹ Frederick Zwiefel, as the husband of Lynne Lane, brought a derivative claim for loss of consortium.

² This appeal has been decided without oral argument pursuant to MCR 7.214(E).

contended that Drubin created a new hazard when plowing by covering the drain with snow and masking the depression; making it indiscernible. Lane alleged that Drubin owed her a duty that was separate and distinct from its contract with Fairway. The trial court granted summary disposition in favor of Drubin, holding it did not owe a duty to Lane.

This Court reviews a trial court's decision whether to grant summary disposition de novo.³ Whether a defendant owes a duty of care to a plaintiff comprises a question of law that is also reviewed de novo.⁴

To establish a claim of negligence a party must prove four elements: duty, breach of that duty, causation and damages.⁵ In any negligence action, the initial question to be addressed is whether the plaintiff was owed a duty by the defendant. "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff."⁶ As clarified by our Supreme Court in this type of negligence action, "the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations."⁷ Specifically, 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.⁸ "If no independent duty exists, no tort action based on a contract will lie."⁹

Contrary to Lane's assertions, our Supreme Court has consistently ruled in a manner that serves to limit the concept of the creation of a new hazard and reaffirming its holding in *Fultz*.¹⁰ Specifically, our Supreme Court has refused to find the creation of a "new hazard" where the actions of a defendant were within the course of performance of its contract. In this instance, at its most elemental level, Lane's contention is that Drubin negligently performed his contractual duties to Fairway. Based on Lane's own premise, the hazard purportedly created by Drubin could not comprise a "new hazard" because Drubin's actions were consistent with its contractual obligations to Fairway and did not present any unique risk not contemplated by the contract. Because Lane has not established that Drubin owed her a duty that was separate and distinct

³ *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008).

⁴ *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

⁵ *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

⁶ *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997).

⁷ *Fultz*, 470 Mich at 467.

⁸ *Id.* at 468-469.

⁹ *Id.* at 467.

¹⁰ See *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087; 729 NW2d 225 (2007); *Banaszak v Northwest Airlines, Inc*, 477 Mich 895; 722 NW2d 433 (2006), rev'd in part on other grounds 485 Mich 1038 (2010).

from the contractual agreement with Fairway and has failed to demonstrate that Drubin created a new hazard, the grant of summary disposition was proper.

Affirmed.

/s/ Kathleen Jansen

/s/ Michael J. Talbot