

STATE OF MICHIGAN
COURT OF APPEALS

YASSER ELSEBAEI and RHONDA ELSEBAEI,
Plaintiffs-Appellees,

UNPUBLISHED
December 27, 2012

and

MAHMOOD AHMED and SAEEDA AHMED,
Plaintiffs,

v

Nos. 303623; 304605
Oakland Circuit Court
LC No. 2008-092207-CZ

PHILIP R. SEAVER TITLE CO., INC., PRS
ASSET, INC., SEAVER TITLE AGENCY,
L.L.C., SEAVER TITLE AGENCY II, L.L.C.,

Defendant-Appellants.

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right from a judgment confirming the arbitration award for plaintiffs Yasser and Rhonda Elsebaei¹ and from a final order dismissing the underlying case.² On appeal, defendants argue that they owed no duty to plaintiffs, and that, therefore, the trial court erred in denying their motion for summary disposition pursuant to MCR 2.116(C)(10) and in granting partial summary disposition to plaintiffs. We vacate and remand for further proceedings.

¹ Because Yasser and Rhonda Elsebaei are the only plaintiffs who are parties to this appeal, they are referred to as “plaintiffs” herein.

² The trial court granted plaintiffs partial summary disposition by finding that defendants owed plaintiffs a duty with regard to plaintiffs’ negligence claim. The case then proceeded to arbitration on the remaining issues, but defendants specifically reserved their right to appeal the earlier ruling of the trial court.

Plaintiffs had entered into a contract with Landmark Construction & Development Corporation (Landmark) for the construction of a house in Farmington Hills. Plaintiffs financed the construction by obtaining construction loans from Charter One Bank. Charter One then contracted with defendants, who, as a part of their obligations to Charter One, would obtain sworn statements and subcontractor lien waivers from Landmark, perform title searches for liens against plaintiffs' property, and send endorsement letters or disbursement letters to Charter One informing Charter One that defendants would insure up to a certain amount of money. Charter One would then send plaintiffs' funds to defendants for disbursement to Landmark.

Landmark admitted to defrauding plaintiffs, and plaintiffs later sued defendants, claiming they breached a fiduciary duty, aided and abetted conversion, and aided and abetted a breach of fiduciary duty.³

We review de novo a trial court's grant or denial of summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Under MCR 2.116(C)(10), summary disposition may be granted if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In reviewing a motion for summary disposition under MCR 2.116(C)(10), we must "determine whether there exists a genuine issue of material fact on which reasonable minds could differ or whether the moving party is entitled to judgment as a matter of law." *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1997). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Ordinarily, "[w]hether a duty exists is a question of law for the court to decide." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d 900 (2005). "However, if factual questions exist regarding what characteristics giving rise to a duty are present, the issue must be submitted to the fact-finder." *Laier v Kitchen*, 266 Mich App 482, 496; 702 NW2d 199 (2005). To the extent that defendants appeal the trial court's grant of plaintiffs' motion for reconsideration, we review a trial court's decision concerning a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Defendants argue that summary disposition should have been granted to them because defendants contracted with Charter One, not plaintiffs, and thus defendant assumed no duty towards plaintiffs. A prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "Generally, duty is any obligation that the defendant has to the plaintiff to avoid negligent conduct." *Krass v Tri-Co Security, Inc*, 233 Mich App 661, 668; 593 NW2d 578 (1999). "The question of duty turns on the relationship existing between the actor and the injured person." *Id.* In *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465; 683 NW2d 587 (2004), the Michigan Supreme Court acknowledged the common-law rule that the voluntary performance of an act may create a duty to perform the act "in a nonnegligent manner." The

³ The parties later stipulated to a dismissal of the aiding and abetting claims.

Fultz Court clarified that in determining whether a duty to a third party arose from a contractual obligation, “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.

Fultz was subsequently misinterpreted, creating an unanticipated “form of tort immunity that bars negligence claims raised by a noncontracting third party,” because courts “misconstrued *Fultz*’s test requiring a ‘separate and distinct duty’ by erroneously focusing on whether a defendant’s conduct was separate and distinct from the obligations required by the contract or whether the hazard was a subject of or contemplated by the contract.” *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 168; 809 NW2d 553 (2011). In *Loweke*, the Michigan Supreme Court held that *Fultz* did not extinguish the common-law rule that “if one having assumed to act, does so negligently, then liability exists as to a third party for failure of the defendant to exercise care and skill in the performance itself.” *Id.* at 170-171 (internal citations and quotation marks omitted). The *Loweke* Court stated that “*Fultz*’s directive is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant’s contractual obligations to another.” *Id.* at 169. The *Loweke* Court stated that the contents of the contract should not be used to obscure the fact that the defendant might also owe a duty to a third party, in addition to the defendant’s obligations to the other party under the contract. *Id.* at 171. “The operative question under *Fultz* is whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort, including those duties that are imposed by law.” *Id.*

Here, as noted, plaintiffs financed the construction of their house by obtaining construction loans from Charter One Bank. Charter One then contracted with defendants, who, as a part of their obligations to Charter One, were to perform certain actions affecting plaintiffs. Defendants voluntarily undertook obligations with respect to the disbursement of funds, and they had a duty to perform them in a nonnegligent manner that extended to third parties. *Loweke*, 489 Mich at 170-171. Defendants’ actions concerned the protection of plaintiffs’ property interests. Defendants thus owed a common-law duty to plaintiffs.⁴

Defendants also argue, however, that they owed no duty to plaintiffs because defendants were acting as a title insurer and a title insurance company contracting with a lender has no separate duty in tort to third parties. We have recognized that “a title insurer should be liable in accordance with the terms of the title policy only and should not be liable in tort.”

⁴ Defendants further argue that they owed no duty to plaintiffs because defendants were in an agency relationship with Charter One, and as agents of Charter One they owed plaintiffs no duty in the absence of an express written contract. We have held that “[a]gency agreements do not create rights in third parties.” *Uniprop, Inc v Morganroth*, 260 Mich App 442, 446; 678 NW2d 638 (2004). Even assuming, without finding, that defendants were agents of Charter One, *Uniprop*’s holding does not bar defendants’ common-law duty to plaintiffs that arose under tort law, not agency or contract law. See, e.g., *id.* at 447. Accordingly, defendants are not entitled to summary disposition based on this argument.

Wormsbacher v Seaver Title Co, 284 Mich App 1, 4; 772 NW2d 827 (2009), quoting *Mickam v Joseph Louis Palace Trust*, 849 F Supp 516, 522 (ED Mich, 1993). Accordingly, if *Wormsbacher*'s holding applies to this case, plaintiffs' negligence claim based on defendants' common-law duty would be barred. The trial court did not explicitly resolve whether defendants were acting solely as a title insurer for Charter One. As defined in the Michigan Insurance Code of 1956, "[t]itle insurer" means, in relevant part, "any domestic, foreign, or alien insurer issuing title insurance, either directly or indirectly, . . . with respect to any real estate located in this state." MCL 500.7301(b). There was evidence that defendants were in control of the disbursement of the loan proceeds to Landmark, and that control may have exceeded the role of a title insurer. See MCL 500.7301(a). The trial court at one point referred to the relationship between plaintiffs and defendants as an "escrow" relationship. However, the *Wormsbacher*/title-insurer issue was not explicitly reached below, and we decline to resolve this issue for the first time on appeal but instead hold that the trial court must analyze this issue on remand.

Defendants also argue that they owed no duty to plaintiffs because Landmark's criminal conduct was unforeseeable. "[A]n individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party." *Graves v Warner Bros*, 253 Mich App 486, 493; 656 NW2d 195 (2002). The basis for this rule is that "[c]riminal activity, by its deviant nature, is normally unforeseeable." *Id.*, quoting *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). Landmark admitted to fraud in obtaining disbursements from plaintiffs' loan proceeds, and those actions fit the elements of criminal larceny by conversion. See, e.g., *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001). Accordingly, defendants' common-law duty to plaintiffs did not extend to Landmark's unforeseeable criminal actions unless defendants had a "special relationship" with plaintiffs. *Graves*, 253 Mich App at 493.

"[T]he 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). There are facts that could potentially show a "special relationship" between defendants and plaintiffs. The fact that Yasser may have signed paperwork making defendants Charter One's title-insurance company and the fact that plaintiffs requested a two-party check-payment system from defendants suggest that plaintiffs may have entrusted themselves and their property to defendants' control. Also, the fact that defendants were responsible for collecting sworn statements and lien waivers from Landmark and the fact that Charter One directed plaintiffs to defendants for the resolution of the subcontractor-liens issue suggest that plaintiffs had lost control of the ability to protect themselves. Moreover, defendants were responsible for the proper disbursement of the loan proceeds to Landmark. Defendants and plaintiffs may have had a "special relationship" in this case applicable to the criminal-actions analysis, but again, this issue was not resolved by the trial court and we decline to resolve it for the first time on appeal. The trial court must address this issue on remand.

We vacate the trial court's grant of partial summary disposition to plaintiffs and direct the court to address the *Wormsbacher*/title-insurer issue and the special-relationship issue on remand.

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder