STATE OF MICHIGAN

COURT OF APPEALS

ROBYN DERBABIAN and JOHN DERBABIAN, Plaintiffs-Appellees, v MARINER'S POINTE ASSOCIATES LIMITED PARTNERSHIP, Defendant/Third-Party Plaintiff, and S & C SNOWPLOWING, INC., Defendant/Third-Party Defendant-Appellant.	FOR PUBLICATION February 12, 2002 9:00 a.m. No. 216024 Macomb Circuit Court LC No. 96-001674-NO Updated Copy May 10, 2002

Before: White, P.J., and Wilder and Zahra, JJ.

WHITE, P.J. (*dissenting*).

I respectfully disagree with the majority's determinations regarding whether defendant had a duty of care, possession and control of the parking lot, and constructive notice of the condition of the parking lot, and therefore dissent.

I

Plaintiff adequately established defendant's common-law duty of care arising from the contract. I observe that plaintiffs did not plead a breach of contract action, and the case was at all times a negligence action. Thus, the issues stressed by defendant[1]—whether plaintiff could sue for breach of contract as a third-party beneficiary and whether the contract expressly placed

[1] As subarguments to the possession and control argument, defendant asserts that its contract with Mariner's Pointe did not confer third-party beneficiary status on plaintiff, did not place liability for injury to third parties on defendant, and did not guarantee that the parking lot would be free from snow and ice at all times.

liability for injury to third persons on defendant—are not relevant to the case before us. Nevertheless, as the trial court recognized, the existence and terms of the contract were not irrelevant to the negligence action.

In *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967), the Supreme Court noted:

> [W]hile this duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract. But it must be kept in mind that the contract creates only the relation out of which arises the common-law duty to exercise ordinary care. Thus in legal contemplation the contract merely creates the state of things which furnishes the occasion of the tort. This being so, the existence of a contract is ordinarily a relevant factor, competent to be alleged and proved in a negligence action to the extent of showing the relationship of the parties and the nature and extent of the common-law duty on which the tort is based.

In *Clark*, a contractor repaired, cleaned, and painted a city water storage tank and applied a slippery substance to the ladder and surface of the tank, when the contractor knew or should have known that an inspector would later inspect the project. The inspector fell from the ladder and sustained injuries. The trial court directed a verdict of no cause of action on both the plaintiff 's contract and tort counts, concluding regarding the latter that tort may not be founded on the failure to perform a contract. *Id.* at 259. The Supreme Court affirmed with regard to the contract count "since the plaintiff was not a party to the contract in any sense of the term, [and thus could not] enforce an obligation created by it," but reversed on the tort count:

> A favorable-to-plaintiff view of the evidence indicates that pursuant to the contract between defendant and the city of Otsego, plaintiff was the duly authorized inspector of the project with obligations of general inspection as well as the specific duty of inspecting the various stages of the repair operation before defendant was authorized to proceed to the next step in the repair work. Far from being a trespasser on the premises, plaintiff was at least a licensee, or possibly an invitee. The general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors or inspectors, or anyone else lawfully on the site of the project, is well settled. [*Id.* at 262].

See also *Garden City Osteopathic Hosp v HBE Corp*, 55 F3d 1126 (CA 6, 1995) (quoting portions of the above paragraph from *Clark, supra*).

Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 212; 565 NW2d 907 (1997), quoting *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 708; 532 NW2d 186 (1995), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich

446, 455-456, n 2; 597 NW2d 28 (1999). Contrary to defendant's assertions, plaintiff need not be a third-party beneficiary to the contract, and no special relationship is required.[2]

In *Osman*, the defendant snow-removal company sought summary disposition on the grounds that it did not own the premises and its contract with the owner stated that it assumed no duties of the owner. This Court reversed the circuit court's grant of summary disposition, concluding that the contract did not absolve the defendant of liability for its own negligence and that the duty to provide snow-removal services in a reasonable manner was established not only by the terms of the contract, but also by the common law. Defendant's effort to distinguish *Osman* on the basis that the defendant snow-removal company's liability in *Osman* was based on its contractual assumption of liability is unpersuasive. The *Osman* Court explained:

> The trial court incorrectly interpreted the terms of this contract to limit the duty defendant owed to plaintiff. Not only did the contract articulate that defendant would remain liable for its negligent conduct, but such duty also arose out of defendant's undertaking to perform the task of snow plowing. The duty allegedly owing is that which accompanies every contract, a common-law duty to perform with ordinary care the things agreed to be done. . . .
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> Defendant argues that plaintiff was not in privity of contract with defendant and the premises owner, and therefore was owed no duty. While it may be true that plaintiff is not owed a duty under the contract itself, the contract is the basis out of which arises defendant's common-law duty to plaintiff. . . .
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> . . . Even if the language [of the contract] were able to shift liability to [the owner], defendant would still owe plaintiff a common-law duty separate and apart from the contract itself. Duty of care not only arises out of contractual relationship, but it also arises by operation of law, a general duty owed by defendant to the public of which plaintiff is a part. *Clark, supra* at 260-261. Therefore, even though plaintiff was not in privity of contract, she was owed a duty of ordinary care by defendant. [209 Mich App 707-710.]

II

The trial court did not err in concluding that the contract granted defendant the requisite possession and control for purposes of snow removal to impose on it a duty of care.[3]

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[2] Defendant's reliance on *Krass v Tri-County Security, Inc*, 233 Mich App 661; 593 NW2d 578 (1999), is misplaced. *Krass* rejected the notion that the plaintiff was a third-party beneficiary of the security contract. However, the instant case does not rest on a third-party beneficiary theory. Additionally, *Krass* rejected the notion of common-law tort liability because under *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988), there was no duty to protect the plaintiff from the criminal acts of a third party in the absence of special circumstances. No such criminal acts of a third party are involved here.

The contract S & C and Mariner's Pointe entered into for snowplowing and salting services provided that Mariner's Pointe would pay S & C a flat fee for snowplowing for the 1995-96 season. Salting was addressed in the contract separately from the flat snowplowing fee; the contract specified that salting of the parking areas would be billed at $90 a ton of salt and that salt application was "by Contractor discretion," rather than "by Customer request." The contract also provided that all work was "to be completed in a professional manner according to standard practices."

Pat Cimino, one of defendant's owners, testified at deposition that he and his son-in-law, Paul Sifford, incorporated S & C around 1980. Cimino responded affirmatively when asked at deposition whether it was his understanding that S & C had "total discretion as to when you would salt the lots at Mariner's Point," and that either he or Sifford would make the decision after talking to each other, using weather conditions as the criterion. Paul Sifford testified at deposition that he interpreted the contract language that left salt application to S & C's discretion as meaning that Mariner's Pointe could also call S & C and request salting.

Alene Chernick, the property manager and part owner of Mariner's Pointe, and the person who negotiated the instant contract with defendant was deposed before trial and testified at trial. Chernick testified that Mariner's Pointe hired defendant to remove snow and ice from the parking lot, that defendant had sole responsibility for snow and ice removal, and total control of the parking lot for the purposes of removing snow and ice, and that under the contract defendant had discretion to determine when to apply salt to the parking lot. On the basis of the contract language stating that defendant would apply salt "by Contractor discretion," and a discussion at the time the contract was signed that defendant would keep track of the need to salt, Chernick assumed that defendant would inspect the premises and salt when and where needed. Chernick discussed with defendant the fact that Kroger opened early in the morning and the resultant need for early morning inspection and action by defendant, and expected defendant to inspect the parking lot before the stores in the mall opened when there was a period of rain and freezing temperatures. Chernick testified that defendant was paid to do so.

Chernick testified that her office was in Southfield, that Mariner's Pointe did not have personnel on-site at the shopping center, although she visited the shopping center at least once a week, and that inspections were left to defendant. Chernick did not keep a log of her visits to the shopping center and could not say whether she had been there in the days before plaintiff's fall. In general, if Chernick saw on one of her visits to the shopping center that the parking lot was snowy or icy, she would call S & C. Chernick testified that S & C was recommended to her and that she relied on defendant's experience and knowledge of snow removal and salting.

The majority seizes upon a definition of "possession" that includes the concept of exclusive authority. Black's Law Dictionary (7th ed). However, this is the second definition set forth in Black's, and the first definition, "[t]he fact of having or holding property in one's power;

(…continued)

[3] The question whether Mariner's Pointe could relieve itself from liability through its contract with defendant is a separate question that has no relevance to defendant's liability.

the exercise of dominion over property," does not include the exclusivity aspect. Regarding control, there was sufficient evidence that defendant had the power or authority to manage, direct, or oversee the parking lot for purpose of snow removal and salting.

III

I also disagree with the majority's determination that plaintiff failed to present sufficient evidence that defendant had constructive notice of the condition of the parking lot to survive summary disposition. There was sufficient evidence both in response to the motion for summary disposition and at trial that defendant should have known of the hazardous condition.

S & C invoices submitted below indicated that S & C plowed and salted on February 14, 1996, following 4 1/2 inches of snowfall, dropping five tons of salt on the parking lot; salted on February 15, 1996, dropping 3 1/2 tons of salt on the parking lot; and salted on February 16, 1996, dropping 4 1/2 tons of salt on the parking lot. In answers to requests for admission, defendant stated that it applied salt to the parking lot at issue on February 18, 1996, and admitted that no salt was applied from February 19 to 23, 1996. Plaintiff was injured on February 22.

Paul Gross, plaintiffs' meteorological expert, testified that on the day before plaintiff fell, February 21, 1996, it rained continuously from approximately 8:00 a.m. until 2:30 p.m., and the temperature dropped to freezing around 9:00 p.m. and remained at or below freezing through the night. Gross testified that on February 22, 1996, the temperatures remained at or below freezing until about one hour before plaintiff fell, and that at the time of the fall, the temperature went up to thirty-three degrees. He testified that the ice would have begun forming at approximately 9:00 to 11:00 p.m. on the evening of February 21, 1996, and would have existed on the morning of plaintiff's fall, "it did not develop moments before the incident." Gross testified that for the parking lot to be safe to pedestrian traffic, it would have had to have been inspected before the Kroger employees started arriving around 6:30 a.m. that day. Gross testified that salt applied to ice under these circumstances would have been highly effective at diminishing the ice area. Steven Ziemba, a safety specialist, testified that ice will look dark if the pavement below is dark, and that a reasonable inspection should not be conducted from a truck. Ziemba testified that defendant's conduct was not reasonable because it did not conduct a proper inspection and did not apply salt.

I conclude that the evidence could support reasonable inferences that defendant should have known of the icy condition and failed to take reasonable measures.

/s/ Helene N. White