STATE OF MICHIGAN

COURT OF APPEALS

BRIAN K. WALLINGTON,

Plaintiff-Appellee,

v

CITY OF MASON, ELM INVESTMENTS, INC., ELM INVESTMENTS I, INC., MILLENIUM DIGITAL MEDIA SYSTEMS, and MISS DIG SYSTEM, INC.,

Defendants,

and

WOLVERINE ENGINEERS AND SURVEYORS,

Defendant-Appellant.

UNPUBLISHED
December 28, 2006

No. 263758
Ingham Circuit Court
LC No. 03-001882-NO

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Wolverine Engineers and Surveyors (defendant Wolverine) appeals by leave granted an order denying its motion for partial summary disposition. This dispute arises out of injuries plaintiff sustained during the course of his employment. We reverse and remand for further appropriate proceedings.

Elm Investments I, Inc. (defendant Elm) entered into a contract with the city of Mason (defendant Mason) for the construction of a water main. Defendant Elm was named the general contractor and defendant Wolverine the "consulting engineer" for the project. Defendant Elm subcontracted with Underground Drilling and Boring, Inc. (Underground Drilling) for the latter to dig a trench and install the water main. Plaintiff was an employee of Underground Drilling. During the course of installing the water main, plaintiff was injured when the walls of the trench in which he was working caved-in and buried him under several feet of dirt. Plaintiff claimed he was injured because there was no appropriate shoring or bracing in the area where he was working.

Defendant Wolverine argues the trial court erred in denying its motion for summary disposition on plaintiff's negligence claims to the extent they derive from the contract between

defendant Elm and defendant Mason (Water Main Contract). We agree. We review summary disposition rulings de novo. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). A motion pursuant to MCR 2.116(C)(10) entitles the movant to summary disposition where there is no genuine issue of material fact. *Nastal v Henderson & Assoc*, 471 Mich 712, 721; 691 NW2d 1 (2005). Also, the existence of a duty in a negligence action is a question of law we review de novo. See *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004).

To sustain a negligence action, a plaintiff must establish duty, breach, causation, and damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004) (citation omitted). Duty in a negligence action may arise by contract. *Joyce v Rubin*, 249 Mich App 231, 244; 642 NW2d 360 (2002). But a tort action may arise from the failure to perform a contract only where there exists a legal duty that is "separate and distinct" from the contractual obligation. *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 83-84; 559 NW2d 647 (1997). Consequently, a court must

> 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. [*Fultz, supra* at 467.]

Pursuant to *Fultz*, we conclude the trial court erred in failing to grant defendant Wolverine summary disposition. Plaintiff was not a party to the Water Main Contract. But plaintiff's allegations against defendant Wolverine stem entirely from the latter's ostensible duties under this contract. Plaintiff has failed to allege or present evidence of a duty defendant Wolverine owed him independent of the contract. *Id.* at 468. Under plaintiff's theory of the case, defendant Wolverine owed plaintiff no "separate and distinct" duty. Rather, the substance of plaintiff's allegations is defendant Wolverine's failure to act in a variety of ways under the terms of the contract. "[N]o 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." *Id.* at 470.

In *Fultz*, our Supreme Court observed that the viability of tort actions based on a contract had traditionally been analyzed under a "nonfeasance/misfeasance dichotomy," where the latter was and the former was not held to impose a duty in tort. *Id.* at 465-466. The Court rejected this in favor of the "separate and distinct" inquiry. *Id.* at 467. It noted the traditional principle that where "one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner." *Id.* at 465. And in reconciling this principle with its "separate and distinct" analysis, the Court reasoned as follows:

> Like the plaintiff here, the plaintiff in *Osman* [*v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999)] was injured when she fell on a patch of ice. Also, like the defendant here, the defendant in *Osman* had contracted to provide snow removal services to the

premises owner. In that case, however, the defendant had breached a duty separate and distinct from its contractual duty when it 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, thus posing a dangerous and hazardous condition to individuals who traverse those areas.
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> In this case, . . . defendant['s] . . . failure to carry out its snow-removal duties owed to . . . [the parking lot owner] created no new hazard to plaintiff. Thus, plaintiff alleges no duty owed to her by defendant . . . separate and distinct from its contract with [the parking lot owner. Defendant] . . . could not logically breach a duty that it did not owe. The Court of Appeals erred in holding that defendant . . . was responsible for plaintiff's injuries solely on the basis of the contract . . . . [*Id.* at 468-469 (citations omitted).]

This reasoning further indicates that plaintiff's action on the contract cannot be maintained. Plaintiff has not alleged that defendant Wolverine actively engaged in misconduct. Instead it asserts that Wolverine failed to properly fulfill its duties under the contract. Plaintiff's arguments on appeal all concern this alleged failure. Yet this failure created "no new hazard" for which defendant Wolverine would independently owe a duty of care. *Id.* at 469. Plaintiff's claims all stem from defendant Wolverine's alleged want of action. Yet independent of the contract, plaintiff has proffered no duty, the breach of which, defendant Wolverine could be held liable.

We conclude the trial court erred in failing to grant summary disposition as to plaintiff's negligence and gross negligence claims to the extent they relied upon defendant Wolverine's duties under the contract. It is unclear, however, whether plaintiff could otherwise allege a "separate and distinct" duty sufficient to hold defendant Wolverine liable. The parties have not addressed this argument. Accordingly, while we find it clear that Wolverine should have been granted summary disposition on plaintiff's claims to the extent they relied on the Water Main Contract, we cannot conclude from this record that defendant Wolverine is necessarily entitled to full summary disposition.

We therefore reverse the denial of the partial summary disposition motion at issue and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder