

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE FROMMERT,

Plaintiff-Appellant,

v

TEERA CONSTRUCTION COMPANY,

Defendant/Cross-Defendant-
Appellee,

and

KASCO, INC.,

Defendant/Cross-Plaintiff.

UNPUBLISHED

December 21, 2010

No. 292097

Oakland Circuit Court

LC No. 2008-090275-NO

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

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

I respectfully dissent. Record evidence gives rise to a genuine issue of material fact that defendant Teera Construction Company negligently constructed a scaffold and invited plaintiff George Frommert to use it. Under these circumstances, Teera breached a common-law duty of care. Teera's failure to employ due care in the construction of the scaffold bore no relationship to the contractual duties it owed Kasco, Inc., the general contractor. Consequently, I disagree with the majority's conclusion that *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), bars plaintiff's negligence claims in this case.

The majority opines, "Plaintiff's tort claim stems from Teera's alleged misfeasance of its contractual duty under the Kasco contract." *Ante* at 4. The majority reasons, "Because Teera was required under the terms of the contract to use proper scaffolding at the construction site, plaintiff's negligence claim regarding the scaffolding is based on the requirements of the contract. Thus, the duty at issue is contractual." *Ante* at 5. In my view, the majority has fundamentally misapprehended the nature of plaintiff's negligence claim. Despite the majority's acknowledgement that "summary disposition is not proper if factual questions exist regarding the characteristics giving rise to the alleged duty," *ante* at 4, the majority ignores critical facts of record reflecting that plaintiff grounded his negligence claims on the well-established duty "impose[d] on every person engaged in the prosecution of any undertaking an obligation to use

due care, or to so govern his actions as not to unreasonably endanger the person or property of others.” *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).

Plaintiff worked for Talon Construction. Early in the morning of February 22, 2007, plaintiff and his foreman, Geoff West, stood in a man lift while they insulated beams on the third floor of a building under construction. When the wind carried a piece of Styrofoam insulation away from their man lift, plaintiff and West maneuvered the lift into position near scaffolding belonging to Teera, a bricklaying subcontractor. Plaintiff stepped onto the scaffolding in pursuit of the Styrofoam, but fell to the ground when planks forming the base of the scaffolding gave way. Plaintiff contends that the planks gave way because metal pieces supporting the planks, called outriggers, had not been fully extended.

West testified that Teera had expressly permitted Talon’s workers to use the scaffolding. According to West, Teera’s foreman had offered, “If you ever need it go ahead and use it, it’s not [a] problem.” Bruce Gomez, Talon’s foreman until January 1, 2007, confirmed that Teera had invited Talon’s workers to use the scaffolding. He further explained:

Q. On this job do you know if Talon put up scaffolding or if other people put up scaffolding?

A. We put up scaffolding and other trades put up scaffolding.

Q. If other trades put up scaffolding would you customarily or usually use that scaffolding?

A. If it’s in an area where our work necessarily needs to be done before their work is we all cooperate with each other and use each other’s scaffold.

Q. You wouldn’t take down somebody else’s scaffolding and put yours up?

A. No, that would be non-productive.

Q. Do you ever recall working on the brick layer’s scaffolding?

A. Yes.

Q. Did you work side by side with the brick layers by any chance?

A. Yes, I did.

Q. Were you ever given permission, by the way, to use the brick layer’s scaffolding on this job?

A. Yes.

Q. If Talon had put up scaffolding, would brick layers on occasion use Talon's scaffolding?

A. Yes, if their work was there, yes.

Q. Now, when you would want to use the scaffolding from the brick layers or the block sub, why would you need to use their scaffolding?

A. Typically they have, their scaffolding is set up there already and they are bricking up the building. And if we have some work that is needed to be done before they can continue their work, the subcontractors work side by side and let each other use the scaffolding so they can do their work, so they can get their work right afterwards without tearing one down and put one up.

This evidence reasonably tends to establish that the subcontractors working on the building site reciprocally used each other's scaffolding, in a manner benefitting all. In *Munson v Vane-Stecker Co*, 347 Mich 377, 389-390; 79 NW2d 855 (1956), our Supreme Court elaborated on the common-law duties inherent in exactly the same situation, holding that because the plaintiff qualified as an invitee of the defendant subcontractor, the defendant owed a duty of reasonable care:

The test to be applied in a case of this character in determining whether a plaintiff was a licensee or an invitee is whether there existed mutual interests and mutual advantages to the parties concerned from the use of the equipment belonging to one party and left for use by another in the carrying on of a project in which both were interested. Generally speaking, this is an issue of fact and there is sufficient testimony in the record to support a finding that the plaintiff here was, insofar as defendant Vane-Stecker is concerned, an invitee with the incident rights and duties recognized in *Nezworski v Mazanec*, 301 Mich 43[; 2 NW2d 912 (1942)], and other decisions of this Court of like character. *Included in such duties owing by Vane-Stecker was that of reasonable and proper inspection of the scaffolding at the time it was erected.* There is proof in the record to support the finding by the jury that such duty was not observed, and that the injuries to plaintiff followed proximately from such breach of duty. [Emphasis added.]

The evidence here shows that Teera invited other subcontractors to use its scaffolding and understood that workers in other trades would access the scaffolding when convenient. As the Supreme Court's decision in *Munson* confirms, Teera owed workers like plaintiff a common-law duty to exercise reasonable care in constructing and maintaining the scaffolding, and to warn of unseen, unanticipated dangers. By extending permission to use the scaffolding, Teera assumed the obligation of constructing and maintaining the scaffolding in a nonnegligent manner. As this Court observed in *Johnson v A & M Custom Built Homes of West Bloomfield, PC*, 261 Mich App 719, 722; 683 NW2d 229 (2004), "nothing in our state's jurisprudence absolves a subcontractor—or anyone on a construction job—of liability under the common-law theory of active negligence."

Because Teera owed a common-law duty to avoid active negligence, the majority misplaces its analysis and conclusion on *Fultz*, 470 Mich 460. The plaintiff in *Fultz* slipped and fell in an icy parking lot owned by Comm-Co Equities. *Id.* at 461. Comm-Co had contracted with Creative Maintenance Limited (CML) for snow removal services. *Id.* at 461-462. The plaintiff sued both Comm-Co and CML, claiming that CML's negligent failure to plow or salt the parking lot caused her fall. *Id.* The plaintiff theorized that CML owed her "a common-law duty ... to exercise reasonable care in performing its contractual duties," and that CML breached this duty "by failing to perform its contractual duty of plowing or salting the parking lot." *Id.* at 463-464, 468. The Supreme Court observed that the plaintiff had "allege[d] no duty owed to her independent of the contract," but instead relied on "common-law tort principles expressed in Restatement Torts, 2d, § 324A" *Id.* at 464, 468.

The Supreme Court held that as a matter of law, CML "owed no contractual or common-law duty to plaintiff to plow or salt the parking lot." *Fultz*, 470 Mich at 463. In reaching this conclusion, the Supreme Court rejected that a common-law duty to the plaintiff arose solely from CML's breach of its contract with Comm-Co. The Court instructed lower courts to instead analyze tort claims brought by third parties to a 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 468.

The "separate and distinct" duty analysis described in *Fultz* refutes the majority's view that because Teera's contract with Kasco required it to use proper scaffolding at the construction site, "the duty at issue is contractual." *Ante* at 5. Rather, *Fultz* specifically contemplates that notwithstanding the existence of a contract, tort duties to third parties may simultaneously lie.

If [the] defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no 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 469-470.]

Stated differently, tort liability may attach in the presence of a duty that arises separately and distinctly from the contractual agreement.

The subject of Teera's contract with Kasco was the brickwork for the exterior of a new building. By virtue of the contract, Teera assumed a duty to apply bricks according to certain detailed specifications. One contractual term obligated Teera to supply its own scaffolding. *Fultz* teaches that no duty to perform the brickwork contract extended from Teera to third parties to the agreement, including Talon. Alternatively phrased, plaintiff would have no cause of action had his injury occurred because Teera did not perform the obligated brickwork, or had failed to erect its own scaffolding. However, separate and distinct from the contract between Teera and Kasco, *Munson*, 347 Mich at 389-391, instructs that Teera bore a duty to exercise reasonable care when it invited other workers to use its already-erected scaffolding. Teera's contract with Kasco for the building's exterior brickwork neither created this separate duty of care nor eliminated it.

The majority holds that because Teera's contract with Kasco dictated that Teera "use proper scaffolding," Teera's duty qualifies as solely contractual. *Ante* at 5. I respectfully disagree with the notion that *Fultz*, 470 Mich 460, establishes a form of tort immunity for every aspect of negligence tangentially related to a contractual relationship. The Supreme Court explained in *Fultz*, 470 Mich at 467-470, that no cause of action exists where the *sole* duty claimed by the injured third party arises from the failure to carry out a contractual obligation purportedly owed to a third party. *Fultz* simply does not supplant the most basic tenet of tort law, that actors owe a duty to use due care when performing tasks that foreseeably subject others to a risk of personal injury. For example, if Teera had negligently placed bricks that subsequently gave way, injuring a pedestrian walking on the street, *Fultz* would not operate to excuse Teera's negligence. "The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person." Prosser & Keeton, Torts (5th ed), § 93, p 668.

Here, in contrast with the facts described in *Fultz*, 470 Mich 460, plaintiff's tort claim against Teera does not arise solely from Teera's performance under its contract with Kasco. Irrespective of the existence of a contract that mentions scaffolding, Teera's invitation to Talon's workers triggered a separate and distinct common-law duty of reasonable care. On the basis of the existence of this duty, I would reverse the circuit court's grant of summary disposition to Teera.

/s/ Elizabeth L. Gleicher