STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK PRICE and STELLA PRICE, Plaintiffs-Appellants,	UNPUBLISHED June 9, 2011
v	No. 296483 Oakland Circuit Court
CITY OF ROYAL OAK and GM & SONS, INC., Defendants,	LC No. 2009-100119-NO
and PAMAR ENTERPRISES, INC., Defendant-Appellee.	

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs Frederick and Stella Price[1] appeal as of right the trial court's order granting summary disposition in favor of defendant Pamar Enterprises, Inc. (Pamar) under MCR 2.116(C)(10). Specifically, plaintiffs argue that the trial court erred when it determined that they failed to identify a duty that was separate and distinct from Pamar's duties under its contract to perform a sewer improvement project for the city of Royal Oak. We conclude that plaintiffs did state a claim that was premised on a duty that was separate and distinct from Pamar's duties under its contract with Royal Oak. For that reason, we reverse the trial court's order dismissing plaintiffs' claim against Pamar and remand for further proceedings.

[1] Stella Price has sued for loss of consortium and was otherwise not involved in the accident at issue. For ease of reference, we shall use "Price" to refer to Frederick Price, but shall use plaintiffs to refer to Frederick and Stella Price collectively.

The present suit has its origins with a bicycle accident. On the night at issue, Price rode his bicycle south along a sidewalk adjacent to Crooks Road in Royal Oak. The area was "dark as dark can be." When Price crossed Vinsetta Street, he rode into an area where the sidewalk had been removed. The gap was approximately 14 inches deep and four to eight feet long. Although there were barrels along the street, Price did not see any sawhorses, barricades, ropes, or tape to block the excavated area. When he rode into the abrupt end to the sidewalk, he flipped over and landed on his face in the excavated area. A passerby who assisted Price after he fell also did not see any signs or barricades that warned of the excavated sidewalk.

Plaintiffs sued Pamar for negligence, alleging in pertinent part, that Pamar breached its duty of care by "creating a dangerous and hazardous defective condition . . . to wit: constructing an[] unsecured and missing unlevel area of sidewalk . . . ." Relying on *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), and the Supreme Court's peremptory orders in *Banaszak v Northwest Airlines, Inc*, 477 Mich 895 (2006), and *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087 (2007), the trial court granted Pamar's motion for summary disposition because it determined that Pamar did not owe Price a duty that was separate and distinct from its contractual duties to remove and repair the sidewalks and to provide barriers, cones, and signage. The trial court also rejected plaintiffs' argument that they were third-party beneficiaries under the contract between Pamar and Royal Oak.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." Whether a duty exists is generally a question of law that this Court reviews de novo. *Fultz*, 470 Mich at 463.

Plaintiffs argue that the trial court incorrectly interpreted and applied *Fultz*, which recognizes that a party to a contract may be liable to a nonparty where it creates a new hazard that harms the third party. *Fultz* involved a claim brought against a snow removal contractor for injuries that the plaintiff sustained while crossing a snow- and ice-covered parking lot. The contractor had an oral contract to provide snow removal and salt services for the lot. *Id*. at 462. At the time the plaintiff fell, the contractor had not plowed the snow for 14 hours and had not salted the lot. *Id*. The plaintiff claimed that the contractor, "by contracting to plow and salt the parking lot, owed a common-law duty to plaintiff to exercise reasonable care in performing its contractual duties." *Id*. at 463-464. The Supreme Court rejected the view that the viability of the tort claim depended on whether there was misfeasance or nonfeasance of a duty undertaken. The Court stated that "the 'slippery distinction' between misfeasance and nonfeasance of a duty undertaken obscures the proper inquiry: Whether a particular defendant owes any duty at all to a particular plaintiff." *Id*. at 467. The Court commented that "there can be no breach of a nonexistent duty." *Id*. For a tort action based on duties arising under a contract and brought by a plaintiff who is not a party to the contract, "the threshold question is whether the defendant owed a duty that is separate and distinct from the defendant's contractual obligations." *Id*.

This "separate and distinct" analysis was also used in *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997), which the Court in *Fultz* cited with approval. In *Rinaldo's*, as in *Fultz*, the Court discussed the difficulty of using misfeasance and nonfeasance to determine whether a tort action may arise from a contractual promise. The Court addressed and quoted at length from *Hart v Ludwig*, 347 Mich 559; 79 NW2d 895 (1956):

> The [*Hart*] Court noted those cases where misfeasance on a contract was found to support an action in tort as follows:
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> > "[I]n each a situation of peril [was] created, with respect to which a tort action would lie without having recourse to the contract itself. Machinery [was] set in motion and *life or property [was] endangered*. . . . In such cases . . . we have a 'breach of duty distinct from . . . contract.' Or, as Prosser puts it . . . 'if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not.'"
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> In other words, the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation. [*Rinaldo's*, 454 Mich at 83-84, quoting *Hart*, 347 Mich at 565.]

The Court then explained why, under that analysis, the plaintiff in *Hart* was unsuccessful in arguing that a tort claim could be based on the defendant's failure to adequately care for an orchard:

> The plaintiff's action in *Hart* failed to state a cause of action in tort because "[t]he only duty, other than that voluntarily assumed in the contract to which the defendant was subject, was his duty to perform his promise in a careful and skillful manner without risk of harm to others, the violation of which [was] not alleged." [*Hart*, 347 Mich at 565]. The only other duty—to perform the promise—arose from the contract and could not support an action in tort. *Id*. at 565-566.
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> Prosser and Keeton discuss the distinction further:
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> > "*Misfeasance or negligent affirmative conduct in the performance of a promise generally subjects an actor to tort liability as well as contract liability for physical harm to persons and tangible things.* Generally speaking, there is a duty to exercise reasonable care in how one acts to avoid physical harm to persons and tangible things. Entering into a contract with another pursuant to which one party promises to do something does not alter the fact that there was a preexisting obligation or duty to avoid harm when one acts. [*Rinaldo's*, 454 Mich at 84 (citation omitted).]

Accordingly, in *Rinaldo's*, our Supreme Court clearly recognized that a plaintiff may not rely on a duty that arose solely from a promise made in a contract. Nevertheless, the Court also recognized that the fact that a party takes action in furtherance of a promise under a contract does not relieve that party of its common law duty to act reasonably. And a plaintiff, such as the plaintiff in *Hart*, could sue in tort for a breach of this common law duty to perform in a careful and skillful manner.

The *Fultz* decision is consistent with this analysis. The Court in *Fultz* explained that the plaintiff claimed that the contractor breached its contract by failing to perform its obligation to plow and salt the parking lot, but she had not alleged a duty owed to her by the contractor that was separate and distinct from the contract—she did not allege that the contractor took an affirmative act that caused her injury. *Fultz*, 470 Mich at 468.

As in *Rinaldo's*, the *Fultz* Court recognized that negligent performance of a contractual duty may be actionable in tort. The Court discussed *Osman v Summer Green Lawn Care*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999), as an example of a case involving a duty that was separate and distinct from a contractual duty. *Fultz*, 470 Mich at 468-469. The plaintiff in that case also sought to recover from a snow removal contractor for injuries she sustained when she fell on ice. However, the plaintiff did not claim that the defendant failed to perform, as in *Fultz*, but rather that it had created "a *new* hazard" by its placement of the snow. *Id*. at 469. The *Fultz* Court emphasized that the defendant created a new hazard by placing snow where it would melt and freeze into ice on an abutting sidewalk, steps, and walkway. *Id*. The Court explained that by creating this new hazard, the defendant in *Osman* breached a duty that was separate and distinct from its contractual duty. *Id*.

In *Boylan v Fifty-Eight Ltd Liability Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 291141, issued September 7, 2010), this Court recognized the continuing viability of *Osman,* and observed that the tort duty in that case stemmed from two sources—the contract and the "common-law duty to perform with ordinary care the things agreed to be done." *Boylan*, slip op at 5, quoting *Osman*, 209 Mich App at 707-708. The latter duty was "'separate and apart from the contract itself' as part of 'a general duty owed by [the defendant] to the public of which [the] plaintiff is a part.'" *Boylan*, slip op at 5, quoting *Osman*, 209 Mich App at 710.

Although the trial court in this case reasoned that the peremptory orders in *Mierzejewski*, 477 Mich 1087, and *Banaszak*, 477 Mich 895, both indicate that a tort duty does not arise from the creation of a new hazard if the defendant creates the hazard during the performance of its contractual duties, these orders must be interpreted in a manner consistent with *Fultz*. The key to understanding the peremptory orders is that the defendants in those cases did not create a new hazard.

Mierzejewski involved a claim for negligent snow removal that was similar to the claims in *Osman*. But whereas the plaintiff in *Osman* claimed that the defendant negligently moved the snow to an area where it would melt, run off, and freeze on *abutting* areas, the plaintiff in *Mierzejewski* claimed that the defendant negligently piled snow on landscaped curb islands in the parking lot, where it melted and refroze in areas that people used to access their vehicles. The

Supreme Court, citing *Fultz*, disagreed with this Court's conclusion that the defendant created a new hazard:

> The Court of Appeals erred in reinstating the plaintiffs' claim on the basis of a duty owed by the defendant to the plaintiffs. The defendant did not owe any duty to the plaintiffs separate and distinct from the contractual promise made under its snow removal contract with the premises owner. [*Mierzejewski*, 477 Mich 1087.]

Despite the factual similarity between *Mierzejewski* and *Osman*, the Supreme Court's order in *Mierzejewski* did not address, much less distinguish, the *Osman* decision that the Court had discussed approvingly in *Fultz*. We conclude that *Mierzejewski* may be reconciled with *Osman* on the basis that the defendant in *Mierzejewski* did not owe a duty that was separate and distinct from the contract because the alleged hazard created by the defendant was not "new"; the ice and snow in the parking lot was the same hazard that the defendant was hired to clear. In contrast, the new hazard in *Osman* involved ice on "the abutting sidewalk, steps, and walkway[.]"

In *Banaszak*, 477 Mich 895, the Supreme Court rejected this Court's decision that the defendant created a new hazard while working in the construction of a new airline terminal. The Supreme Court set forth the pertinent facts as follows:

> Otis entered into a contract to install moving walkways in a new airport terminal. As part of that contract, Otis was required to provide a cover over the "wellway," an opening at the end of the moving walkway that contains the mechanical elements. The purpose of the cover was to protect persons using that area. The plaintiff was injured when she stepped on an inadequate piece of plywood covering the "wellway." [*Id.*]

The Supreme Court reasoned that "the *hazard* was the subject of the Otis contract. As a result, Otis owed no duty to plaintiff that was 'separate and distinct' from its duties under the contract." *Banaszak*, 477 Mich 895 (emphasis added). Significantly, the Court did *not* reject the claim because the alleged negligent *conduct* was the subject of the contract. Such a determination would not have been consistent with *Fultz*'s recognition in the discussion of *Osman* that a defendant who creates a new hazard during the performance of contractual duties owes a duty that is separate and distinct from the contractual duties. The Court's order in *Banaszak* may be reconciled with *Fultz* on the basis that the defendant did not create a new hazard. Although the Court did not explicitly identify the hazard, the hazard that caused the plaintiff's injuries was an opening in the floor. The defendant did not create that hazard; rather, the hazard already existed and "was the subject of the Otis contract." That is, the defendant was hired, in part, to rectify an existing hazard and, because it had no duty to rectify a hazardous condition absent its contractual promise, there was no duty separate and distinct from its contractual duties.

In its discussion of *Osman*, the Court in *Fultz* recognized that a defendant may be held liable in tort for creating a new hazard in the course of performing its contractual duties; the creation of a new hazard is the "breach[] [of] a duty [that is] separate and distinct from its contractual duty." *Fultz*, 470 Mich at 469. The peremptory orders in *Mierzejewski* and *Banaszak* did not eliminate the duty to "exercise reasonable care in how one acts to avoid

physical harm to persons and tangible things" as a separate and distinct duty that could support an action in tort as recognized in *Fultz* and *Rinaldo's. Rinaldo's*, 454 Mich at 84 (quotation marks and citation omitted). Where a defendant breaches that duty by creating a new hazard, the fact that the breach occurred in the performance of the contract does not preclude liability in tort.

Applying *Rinaldo's*, *Osman*, *Fultz*, and their progeny, we conclude that the trial court erred in granting summary disposition to Pamar. Although the trial court compared the hazard created by Pamar's excavation to the hazard of placing an inadequate covering over a wellway in *Banaszak*, the key distinction between this case and *Banaszak* is that defendant excavated the sidewalk and thereby created a new hazard, whereas the defendant in *Banaszak* allegedly failed to adequately cover an existing hazard (the floor openings). *Banaszak* would be analogous to a case in which a contractor was hired to repair holes in a sidewalk. A pedestrian who fell in one of the holes would not have an action in tort against the contractor for failure to fill the holes, or for inadequately barricading the area, because the defendant did not create the hazard. In this case, however, defendant excavated the sidewalk, thereby creating a new hazard and it had a common law duty to ensure that the general public was adequately safeguarded from that hazard until repaired.

The fact that defendant created the new hazard in the course of performing its contractual obligations does not preclude liability in tort. The defendant in *Osman* created the new hazard on the abutting sidewalks and stairs in the course of performing its contractual obligation under a snow removal contract. The snow removal contract was not the source of the duty owed to the plaintiff, and it was also not a basis for nullifying the duty owed to the plaintiff. Similarly, although Pamar here created the new hazard by excavating the sidewalk as part of its contractual duties, that contract is neither the source of the duty owed to Price nor a basis for nullifying that duty.

In summary, the trial court erred in determining that Pamar did not owe Price a duty separate and distinct from its contractual duties, and in granting summary disposition to defendant where plaintiffs demonstrated that Pamar created a new hazard by excavation of the sidewalk. Accordingly, we reverse the trial court's summary disposition order.

Plaintiffs also argue that the trial court erred in rejecting their argument that Price was a third-party beneficiary of the contract between Pamar and Royal Oak. Under MCL 600.1405, a person will not qualify as a third-party beneficiary of a contract unless the contract establishes that the promisor has undertaken a promise "directly" to or for that person. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003). "[A] court should look no further than the 'form and meaning' of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of § 1405." *Id*. "A third-party beneficiary may be a member of a class if the class is reasonably identified. *Brunsell v Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002). The class must be more limited than the public as a whole "because the public as a whole is too expansive a group to be considered 'directly' benefited by a contractual promise." *Id*. at 298; *Schmalfeldt*, 469 Mich at 429.

Plaintiffs do not identify any provision of the contract at issue that designates Price or any reasonably identified class as an intended third-party beneficiary of the contract. Price's status as a member of the public is not adequate for him to be considered a third-party beneficiary of the contract. *Brunsell*, 467 Mich at 298. "Only intended beneficiaries, not incidental beneficiaries, may enforce a contract under ¶ 1405." *Schmalfeldt*, 469 Mich at 429. Therefore, the trial court correctly rejected plaintiffs' argument concerning Price's purported status as a third-party beneficiary.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing parties, plaintiffs may tax their costs. See MCR 7.219(A).

/s/ Jane M. Beckering
/s/ Michael J. Kelly