STATE OF MICHIGAN

COURT OF APPEALS

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	UNPUBLISHED June 9, 2011 No. 296483 Oakland Circuit Court LC No. 2009-100119-NO

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

WHITBECK, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that the trial court properly rejected plaintiffs Frederick and Stella Price's argument that Frederick Price was a third-party beneficiary of a contract between defendants Pamar Enterprises, Inc. and the city of Royal Oak. However, I respectfully dissent from the majority conclusion that the Prices properly stated a claim premised on a duty separate and distinct from Pamar's duties to perform a sewer improvement project under the contract with Royal Oak. Rather, I would conclude that the Prices did not properly state a claim because I believe that they failed to identify a duty that was separate and distinct from Pamar's duties under its contract with Royal Oak. Accordingly, I would affirm the trial court's order dismissing the Prices' claim against Pamar.

I. FACTS

As the majority states, this suit stems from an accident in which Frederick Price rode his bicycle into an excavated area of a sidewalk located in Royal Oak. Frederick and Stella Price sued for negligence, alleging that Pamar breached its duty of care by creating and failing to correct the hazardous condition caused by the excavated area of the sidewalk.

Pamar moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that it was entitled to dismissal of the Prices' claim because, pursuant to *Fultz v Union-Commerce Assoc*[1] and its progeny, Pamar owed no duty to Frederick Price. The trial court agreed and granted Pamar's motion on the ground 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 the Prices' argument that Frederick Price was a third-party beneficiary under the contract between Pamar and Royal Oak.

II. MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

The Prices argue that the trial court erred in granting Pamar's motion for summary disposition because, in doing so, the trial court incorrectly interpreted and applied *Fultz*.

Where, as here, the trial court grants a motion for summary disposition brought pursuant to both MCR 2.116(C)(8) and (C)(10), and it is clear that the trial court looked beyond the pleadings, this Court "will treat the motions as having been granted pursuant to MCR 2.116(C)(10)," which "tests whether there is factual support for a claim."[2] Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. This Court reviews de novo a trial court's decision on a motion for summary disposition.[3] Also, whether a duty exists is generally a question of law that this Court reviews de novo.[4]

B. LEGAL PRINCIPLES

In a negligence action based upon a contract brought by a plaintiff who is not a party to the contract, the Michigan Supreme Court has held that a contractor owes no duty to the plaintiff, unless the plaintiff can plead and prove that the contractor owed a duty separate and distinct from its contractual obligations.[5] In *Fultz v Union-Commerce Assoc*, the plaintiff was injured while crossing a snow- and ice-covered parking lot.[6] The plaintiff then sued the snow removal contractor, who had an oral contract to provide snow removal and salt services for the lot owner.[7] At the time that the plaintiff fell, the contractor had not plowed the snow for 14 hours and had

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[1] *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004).

[2] *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

[3] *Roberts v Titan Ins Co*, 282 Mich App 339, 348; 764 NW2d 304 (2009).

[4] *Fultz*, 470 Mich at 463.

[5] *Id.* at 461-462, 469-470.

[6] *Id.* at 462.

[7] *Id.*

not salted the lot.[8] The plaintiff claimed that, by contracting to plow and salt the parking lot, the contractor "owed a common-law duty to [the] plaintiff to exercise reasonable care in performing its contractual duties."[9]

In determining the duty owed, the Supreme Court concluded that the proper inquiry was "[w]hether a particular defendant owes any duty at all to a particular plaintiff."[10] The Court commented that "there can be no breach of a nonexistent duty[.]"[11] For a tort action based on duties arising under a contract and brought by a third-party, "the threshold question is whether the defendant owed a duty that is separate and distinct from the defendant's contractual obligations."[12] According to the *Fultz* Court, "If no independent duty exists, no tort action based on the contract will lie."[13] And in applying its analysis to the underlying facts, the *Fultz* Court held that, by alleging that the contractor failed to perform its contractual duty of plowing or salting the parking lot, the plaintiff alleged no duty owed to her by the snow removal contractor that was separate and distinct from its contract with the lot owner.[14] Therefore, the snow removal contractor could not be liable.[15] That is, the contractor could not have breached a duty that it did not owe.[16]

To clarify its holding, the *Fultz* Court discussed *Osman v Summer Green Lawn Care*[17] as an example of a case involving a duty that was separate and distinct from a contractual duty.[18] As in *Fultz*, the plaintiff in *Osman* also sought to recover from a snow removal contractor for injuries that she sustained when she fell on ice.[19] However, the plaintiff in *Osman* did not claim that the defendant failed to properly perform its snow removal duties in the subject parking lot. Rather, the plaintiff in *Osman* claimed that the defendant had created "a *new* hazard" by its placement of the snow.[20] That is, the defendant created a new hazard by placing snow where it

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[8] *Id*.

[9] *Id*. at 463-464.

[10] *Id*. at 467.

[11] *Id*.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 468.

[15] *Id.* at 469.

[16] *Id.*

[17] *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).

[18] *Fultz*, 470 Mich at 468-469.

[19] *Id.* at 468.

[20] *Id*. at 469.

would melt and freeze into ice onto a sidewalk, steps, and walkway that abutted the parking lot.[21] The *Fultz* Court explained that by creating this new hazard, the defendant in *Osman* breached a duty that was separate and distinct from its contractual duty.[22]

Conversely, in a post-*Fultz* decision, *Banaszak v Northwest Airlines, Inc*,[23] the Michigan Supreme Court rejected this Court's decision that the defendant contractor created a new hazard while installing moving walkways during the construction of a new airline terminal. As part of its contract, the contractor was required to cover an opening (the "wellway") at the end of the moving walkway.[24] The plaintiff was injured when she stepped on an inadequate piece of plywood that was covering the wellway.[25] 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."[26]

And in another post-*Fultz* decision, *Mierzejewski v Torre & Bruglio, Inc*,[27] the Michigan Supreme Court reversed this Court's decision that the defendant snow removal contractor created a new hazard in the course of performing its work under a snow removal contract. The plaintiff claimed that the contractor negligently piled snow on landscaped curb islands located in a parking lot.[28] The snow then melted off the islands and refroze in the parking lot.[29] The plaintiff was injured when she slipped and fell on the ice in the parking lot.[30] Without elaboration, the Supreme Court held that the contractor "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."[31]

C. APPLYING THE PRINCIPLES: NO SEPARATE AND DISTINCT DUTY

The proper question to be resolved in this matter is whether the Prices have an independent negligence action against Pamar, separate and distinct from its sewer contract with

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[21] *Id*.

[22] *Id*.

[23] *Banaszak v Northwest Airlines, Inc*, 477 Mich 895 (2006).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087 (2007).

[28] *Mierzejewski v Torre & Bruglio, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 26, 2006 (Docket No. 269599), reversed by 477 Mich 1087 (2007), slip op p 2.

[29] *Id.*

[30] *Id.* at slip op p 1.

[31] *Mierzejewski*, 477 Mich 1087.

Royal Oak. Or, more specifically, the question is whether, while completing its duties under the sewer improvement contract, Pamar created a new hazard, thereby giving rise to a duty separate and distinct from its contractual duty. I would conclude that Pamar did not create a new hazard and, accordingly, owed no separate and distinct duty to the Prices.

I agree with the majority that *Mierzejewski* can be reconciled with *Osman* on the ground 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." In *Mierzejewski*, the ice that formed in the parking lot was the same type of hazard that the defendant was hired to clear. In contrast, the "new" hazard in *Osman* involved ice that was created when the contractor plowed the snow from a parking lot into an area where the ice to melted onto an "abutting sidewalk, steps, and walkway[.]" That is, plowing the snow in such a way that caused ice to form in an area outside the boundaries of the parking lot was outside the scope of the contractor's duties to maintain the parking lot.

However, I disagree with the majority's interpretation of *Banaszak*. The majority distinguishes the present case from *Banaszak* on the ground that the defendant in that case allegedly failed to adequately cover an *existing* hazard (the floor openings). The majority concludes that this case differs because Pamar created a *new* hazard by excavating the sidewalk. According to the majority,

> *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.

Like the trial court below, I see no distinction between the hazard created by Pamar's excavation of the sidewalk to the hazard of placing an inadequate covering over the wellway in *Banaszak*. In *Banaszak*, the contractor owed a contractual duty to cover the wellway. Here, pursuant to the sewer improvement contract, Pamar's was required to remove and replace various sidewalks and roadways so that the sewers could be replaced and repaired. In their complaint, the Prices merely allege that Pamar failed to properly remove and replace the subject sidewalk portion pursuant to its duties under the sewer project contract. But, as such, the duties that the Prices allege Pamar breached are the same duties that directly emanate from the contract between Pamar and Royal Oak. Although Pamar actively removed portions of the sidewalk, instead of merely failing to cover an existing hole in the sidewalk, the fact remains that Pamar removed that specific portion of the sidewalk in order to perform a contractual duty. That is, Pamar was required to remove the sidewalk in order to perform the sewer work that it was contracted to complete. Therefore, it did not create a new hazard that was *separate* and *distinct* from the duties that it was contractually bound to undertake.

In sum, I believe that the trial court properly dismissed the Prices' claim pursuant to *Fultz* and its progeny. Pamar owed no duty to Frederick Price that was separate and distinct from its

contractual duties owed pursuant to the Pamar's contract with Royal Oak to perform the sewer project.

Accordingly, I would affirm.

/s/ William C. Whitbeck