

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UNPUBLISHED

October 25, 2011

No. 292097

Oakland Circuit Court

LC No. 2008-090275-NO

ON REMAND

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

PER CURIAM.

This case is before our Court on remand from the Supreme Court for reconsideration in light of *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; ___ NW2d ___ (2011). *Frommert v Teera Constr Co*, 489 Mich 982; 799 NW2d 555 (2011) (*Frommert II*). After considering *Loweke* and the parties' supplemental briefs, we now vacate the trial court's summary dismissal of plaintiff George Frommert's negligence action. As previously noted by Judge Gleicher:

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. [*Frommert v Teera Constr Co*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 292097) (*Frommert I*) (Gleicher, J., dissenting), slip op at 1.]

Given the factual issues remaining in this case, we similarly reject Teera's alternate proposed grounds to support the summary disposition order.

I. BACKGROUND

Kasco, Inc.¹ was the general contractor on an urban loft development project. Frommert worked as a laborer for Talon Construction, a carpentry subcontractor employed by Kasco. Teera served as Kasco's masonry subcontractor. Frommert was injured when he stepped off an aerial lift truck onto scaffolding erected by Teera, in order to retrieve a tile of Styrofoam insulation that had blown away during the course of his work. Teera employees had recently moved the scaffolding from a different location on the perimeter of the building, and had yet to completely stabilize the structure. Frommert stepped onto an unsecured plank, which gave way, and, because he was not wearing a safety tether, he fell twenty feet to the ground below.

The trial court relied on *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), and dismissed Frommert's negligence action, concluding that Frommert "had not articulated a duty owed by Teera that is separate and distinct from the contractual duties set forth in Teera's subcontract" with Kasco. In the alternative, the court determined that Teera had not violated its "common law duty to exercise ordinary care to another subcontractor." The court further ruled that "it cannot be said that it was foreseeable that someone would step on to the platform of the scaffolding without permission and without a safety devise [sic]."

In a split opinion, this Court affirmed the dismissal limited to the trial court's *Fultz* analysis. See *Frommert I*. Frommert applied for leave to appeal to the Supreme Court (*Frommert II*), but while that application was pending, that Court decided the factually and legally similar case of *Loweke*. In lieu of granting leave in this case, the Supreme Court directed us to reconsider, in light of *Loweke*, whether Frommert articulated a duty on the part of Teera that was "separate and distinct" from its contractual duty to Kasco. As we conclude that Frommert did raise a separate and distinct legal duty, we must also consider whether the trial court properly concluded that Teera had not violated its common law duty of reasonable care and that the risk in this case was unforeseeable.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any

¹ The trial court summarily dismissed Frommert's "common work area" claim and Frommert has not appealed that judgment.

material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (internal quotations and citations omitted).]

Frommert's claim against Teera sounds in negligence.

To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. [*Loweke*, 489 Mich at 162.]

III. TEERA OWED FROMMERT A COMMON LAW DUTY OF CARE SEPARATE AND DISTINCT FROM THE KASCO-TEERA CONTRACT

A defendant cannot be held liable to a plaintiff for negligence absent a legal duty; therefore, the first question that must be resolved in any negligence action is whether such a duty exists. *Loweke*, 489 Mich at 162; *Fultz*, 470 Mich at 463. Whether a legal duty exists is a question of law to be decided by the trial court. *Loweke*, 489 Mich at 162. However, the question of duty can be murky. Where there is conflicting evidence underlying the duty question, the jury must review the facts and determine whether a duty exists. As noted by the Supreme Court in *Smith v Allendale Mut Ins Co*, 410 Mich 685, 714-715; 303 NW2d 702 (1981):

It is for the court to determine, as a matter of law, what characteristics must be present for a relationship to give rise to a duty the breach of which may result in tort liability. It is for the jury to determine whether the facts in evidence establish the elements of that relationship. Thus, the jury decides the question of duty only in the sense that it determines whether the proofs establish the elements of a relationship which the court has already concluded give rise to a duty as a matter of law.

In the current case, just as in *Loweke* and *Fultz*, the relevant legal inquiry for this Court is "when two parties enter into a contract and a noncontracting third party, i.e., one who is a stranger to the contract, is injured, under what circumstances does a duty of care arise between the contracting party and the third party?" *Loweke*, 489 Mich at 162-163.

In *Fultz*, our Supreme Court acknowledged the common law principle that the voluntary performance of an act may create a duty to perform that act "in a nonnegligent manner." *Fultz*, 470 Mich at 465. Where the performance of an act arises out of a contract, there "is a common-law duty to perform with ordinary care the thing agreed to be done," and the failure to use ordinary care (to act negligently), "constitutes a tort as well as a breach of contract." *Id.*, quoting *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). Historically, Michigan courts distinguished between misfeasance (negligent performance) of a contractual duty and nonfeasance (failure to perform), allowing a separate tort action to lie only where the defendant negligently performed the contracted-for act. *Fultz*, 470 Mich at 465-466. In an attempt to simplify and explain the misfeasance/nonfeasance dichotomy, the *Fultz* Court focused on prior judgments allowing "a tort action stemming from misfeasance of a contractual obligation" when

there exists a “violation of a legal duty separate and distinct from the contractual obligation.” *Id.* at 467, quoting *Rinaldo’s Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). As summarized by *Fultz*, “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*, 470 Mich at 467.

Following *Fultz*, courts began dismissing negligence actions “on the basis of a lack of duty if a third-party plaintiff allege[d] a hazard that was the subject of the defendant’s contractual obligations with another,” rather than determining whether the defendant owed any duty (contractual, common law or statutory) to the injured plaintiff. *Loweke*, 489 Mich at 163. In *Frommert I*, for example, the majority opined:

In order to determine whether a duty is separate and distinct from the contract, the language of the contract at issue must be scrutinized. Where the contracting party takes action not within the scope of the contract and such action creates a dangerous condition to third persons, which condition should have been anticipated, a separate and distinct duty running from the contracting party to the third party may be found. However, a failure to act in a manner anticipated under the contract does not give rise to a separate legal duty in tort. [*Frommert I*, slip op at 3 (internal citations omitted).]

The *Frommert I* majority reasoned that Teera took action within the scope of its subcontract with Kasco to “us[e] proper . . . scaffolding . . . in construction.” Teera was contractually required to maintain proper scaffolding, and any duty flowing to Frommert in this regard was contractual. Accordingly, the *Frommert I* majority affirmed the trial court’s dismissal of Frommert’s negligence claim.²

The Supreme Court fanned the flames of confusion by entering two peremptory orders, implying that no separate and distinct legal duty exists when the complained-of “hazard was the subject of the . . . contract.” *Banaszak v Northwest Airlines, Inc*, 477 Mich 895; 722 NW2d 433 (2006) (reinstating summary dismissal of the noncontracting plaintiff’s negligence claim where the defendant subcontractor failed to adequately cover an opening in the floor, which was a subject of its subcontract). See also *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087; 729 NW2d 225 (2006) (reinstating summary dismissal of the noncontracting plaintiff’s tort claim where the defendant negligently performed its subcontract to remove snow from a parking lot and created a new ice hazard). Following these orders, many panels of this Court felt bound to follow the misinterpretation of *Fultz*. See, e.g., *Carrington v Cadillac Asphalt, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 9, 2010 (Docket No. 289075).

² For other examples of this Court’s misapplication of the *Fultz* principle see *Thompson v Kramer-Triad Mgt Group, LLC*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2011 (Docket No. 295190); *Lane v Fairway Sales Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2010 (Docket No. 293775); *Lenz v Michigan Multi-King, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2009 (Docket No. 283312).

In *Loweke*, a panel of this Court followed the Supreme Court’s lead in *Banaszak* and *Mierzejewski* in affirming the trial court’s dismissal of a plaintiff’s negligence claim. *Loweke*, 489 Mich at 161-162. The plaintiff worked for an electrical subcontractor at an airport construction site. The plaintiff was injured when several cement boards fell onto him, pinning his leg. The defendant, a carpentry and drywall subcontractor, had leaned the boards against a wall at some point before the accident. The *Loweke* trial court summarily dismissed the plaintiff’s negligence claim, ruling that his complaint involved the defendant’s breach of its subcontract, under which the defendant was “responsible for ‘unloading, moving, lifting, protection, securing and dispensing of its materials.’” *Id.* at 160-161. As the duty arose from the contract, the trial court concluded that the plaintiff’s tort claims were insupportable. The Court of Appeals affirmed the trial court’s dismissal, holding that the defendant was required by its subcontract to secure materials such as the cement board and its negligent performance of that duty “had not presented any unique risk that was not contemplated by the contract.” *Id.* at 161.

The Supreme Court reversed, holding that both the *Loweke* trial court and Court of Appeals panel had misinterpreted and too broadly applied *Fultz*. *Loweke*, 489 Mich at 163, recognized that lower courts had repeatedly misinterpreted *Fultz* “as rejecting accepted tort-law principles and creating a legal rule ‘unique to Michigan tort law,’ which bars negligence causes of action on the basis of a lack of duty if a third-party plaintiff alleges a hazard that was the subject of the defendant’s contractual obligations with another.” This misinterpretation of *Fultz* had created an unanticipated “form of tort immunity that bars negligence claims raised by a noncontracting third party.” *Id.* at 168. Under a correct interpretation of *Fultz*, a court should analyze a tort action “based on a contract and brought by a noncontracting third party,” by focusing on whether the named defendant owed any duty at all to the plaintiff, and whether the defendant was under any tort or legal “obligation to act for the benefit of the plaintiff.” *Id.*

Loweke clarified that the *Fultz* test of duty did not eliminate a defendant’s preexisting common law duty of care. *Id.* at 169. Rather,

Fultz’s directive is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant’s contractual obligations to another. As this Court has historically recognized, a separate and distinct duty to support a cause of action in tort can arise by statute, or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties, and the generally recognized common-law duty to use due care in undertakings. [*Id.* at 169-170 (internal citations omitted).]

As between a contractor and other individuals on a construction site, “the duty ‘imposed by law’ [is] ‘[t]he 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’” *Id.* at 170, quoting *Ferrett v Gen Motors Corp*, 438 Mich 235, 245-246; 475 NW2d 243 (1991). Put simply, regardless of the existence of a contract for services, there is “‘a preexisting obligation or duty to avoid harm when one acts.’” *Loweke*, 489 Mich at 170, quoting *Rinaldo’s Constr*, 454 Mich at 84. The *Loweke* Court concluded that the existence of a contract does “not extinguish the simple idea that is embedded deep within the American common law of torts: if one having assumed to act, does so negligently, then liability exists as to a third party for

failure of the defendant to exercise care and skill in the performance itself.” *Id.* at 170-171. *Loweke* summarized its holding as follows:

[W]hether a particular defendant owes any duty at all to a particular plaintiff in tort is generally determined without regard to the obligations contained within the contract. Accordingly, with the aforementioned principles in mind, we clarify that when engaging in the separate and distinct mode of analysis in *Fultz*’s analytical framework, *courts should not permit the contents of the contract to obscure the threshold question of whether any independent legal duty to the noncontracting third party exists*, the breach of which could result in tort liability. Instead, in determining whether the action arises in tort, and thus whether a separate and distinct duty independent of the contract exists, the operative question under *Fultz* is whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort, including those duties that are imposed by law. [*Id.* at 171 (internal citations and quotations omitted) (emphasis added).]

In determining whether there exists a common law duty of care to support a negligence action, the court must ask whether “an actor has a legal obligation to so govern his actions as not to unreasonably endanger the person or property of others,” or “to conform to the legal standard of reasonable conduct in the light of the apparent risk.” *Schultz v Consumers Power Co*, 443 Mich 445, 449-450; 506 NW2d 175 (1993) (internal citations and quotations omitted). As a general rule, “the immediate employer of a construction worker is . . . responsible for job safety.” *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 12; 574 NW2d 691 (1997). Yet, this facet of the common work area doctrine does not eliminate all duty on the part of subcontractors. A subcontractor on a worksite maintains “a common-law duty to act in a manner that does not cause unreasonable danger to the person or property of others.” *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 466; 708 NW2d 448 (2005); see also *Loweke*, 489 Mich at 170. As stated by this Court in *Johnson v A & M Custom Built Homes of West Bloomfield, PC*, 261 Mich App 719, 723; 683 NW2d 229 (2004):

[A]s between two independent contractors who work on the same premises, either at the same time or one following the other, each owes to the employees of the other the same duty of exercising ordinary care as they owe to the public generally. Thus, where a subcontractor actually performs an act, it has the duty to perform the act in a nonnegligent manner. [Internal quotation omitted.]

Further, as noted by Judge Gleicher in *Frommert I*, our Supreme Court found a common law duty of care, despite the existence of an underlying contract, in the factually similar case of *Munson v Vane-Stecker Co*, 347 Mich 377; 79 NW2d 855 (1956). Noting that *Frommert* had presented evidence tending to establish that the various subcontractors had a reciprocal agreement to use “each other’s scaffolding, in a manner benefiting all,” *Frommert I*, (Gleicher, J., dissenting), slip op at 2-3, Judge Gleicher reasoned:

In *Munson*[, 347 Mich at 389-390], 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*[, 261 Mich App at 722], “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.” [*Id.* at 3.]

Here, Frommert filed suit against Teera alleging that it acted in a negligent manner by failing to completely stabilize and secure the scaffolding, thereby leaving it in an unsafe condition on the worksite. While Teera had a contractual obligation to Kasco to maintain proper scaffolding, Frommert’s claim was not based on that contractual obligation. Rather, Frommert’s claim was based on the common law duty to use reasonable care to avoid endangering other workers or anyone else lawfully on the worksite. See *Loweke*, 489 Mich at 170. Teera had a preexisting duty to act with reasonable care to avoid harm regardless of its subcontract with Kasco. See *id.* at 170-171. In light of the Supreme Court’s directive following *Loweke*, we now adopt Judge Gleicher’s analysis. We therefore determine that the trial court incorrectly concluded that summary disposition was proper under *Fultz*.

IV. THE RISK TO FROMMERT AND OTHER WORKERS WAS FORESEEABLE

Teera now “hangs its hat” on the trial court’s alternative conclusion that it owed no duty of care to Frommert because it was unforeseeable “that someone would step on to the platform of the scaffolding without permission and without a safety devise [sic].” However, Frommert

presented sufficient evidence to overcome summary disposition on this front. “The foreseeability and nature of the risk” is one factor to consider in determining whether a legal duty of care exists. *Schultz*, 443 Mich at 450; *Ghaffari*, 268 Mich App at 465; *Hughes*, 227 Mich App at 5. In *Schultz*, 443 Mich at 452, quoting *Samson v Saginaw Professional Building, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975), our Supreme Court defined the foreseeability element in the duty of care as follows:

“Foreseeability . . . depends upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions. But the mere fact that an event may be foreseeable does not impose a duty upon the defendant to take some kind of action accordingly. The event which he perceives might occur must pose some sort of risk of injury to another person or his property before the actor may be required to act.” [Alteration in original.]

When viewing the evidence in the light most favorable to the nonmoving party, Frommert created a genuine issue of material fact that “a reasonable man could anticipate” that a worker at this construction site might attempt to use the readily-available scaffolding in furtherance of his or her work. “A reasonable man could [also] anticipate” that a worker who attempted to use the unsecured and instable scaffolding could be injured as a result. Accordingly, Frommert created a question of fact that Teera had a duty of care flowing to him.

As noted, Frommert presented evidence “that Teera invited other subcontractors to use its scaffolding and understood that workers in other trades would access the scaffolding when convenient.” *Ante* at 10, quoting *Frommert I*, (Gleicher, J., dissenting), slip op at 3. Geoff West, Frommert’s supervisor, stated during his deposition that Teera’s foreman gave Talon’s employees express permission to use the scaffolding. Bruce Gomez, a former Talon foreman, confirmed West’s statement in this regard. Gomez further explained that it is common practice for various subcontractors to work off the same scaffolding at a worksite. If one subcontractor erects scaffolding over an area in which other subcontractors must work, the intruding subcontractor simply uses that scaffolding rather than razing the existing equipment merely to erect its own. Teera asserts that Talon’s employees were required to re-seek permission to use the scaffolding after it had been moved. This does not resolve the issue as a matter of law, but rather creates a credibility contest regarding whether Frommert actually had permission to use the scaffolding. A trial court may not resolve such credibility contests in considering a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Absent the trial court’s improper fact finding, the court could not conclude that Teera was unable to foresee the risk to Frommert. Ultimately, “a reasonable man could anticipate” that others might attempt to use the scaffolding such that he would need to completely erect, secure, and stabilize the scaffolding to prevent injury to fellow workers.

Teera complains that it could not anticipate that anyone would step onto the scaffolding from the top, rather than at ground level. However, the photographic evidence shows that the top scaffolding platform was very near the roof. There is at least a question of fact whether Teera could have anticipated that a worker might descend onto the scaffolding from the roof or attempt to use the scaffolding platform from another piece of equipment in order to better reach the roof.

We further reject the trial court's determination that it was unforeseeable that someone would climb onto the scaffolding platform without a safety harness. Frommert acknowledged that a worker must use a safety harness when working at a height over six feet where protective side rails are absent. And, the subject scaffolding was higher than six feet. A review of the photographic evidence shows that the scaffolding platform was almost completely surrounded by a protective railing with an opening that seems only large enough for a worker to climb through. However, even if Frommert was required to use a safety harness, it is foreseeable in any given situation that a person may not follow all safety guidelines. Even if the scaffolding had been fully erected, a person might enter without a safety harness and be injured in a fall. Rather than affecting the foreseeability of the risk, Frommert's alleged failure to follow safety protocols tends to establish his comparative fault, not to disprove the existence of a duty of care. Ultimately, Teera may request that a comparative fault instruction be given to the jury, but the existence of comparative fault does not support summary disposition or negate the common law duty of care.

V. THERE IS RECORD EVIDENCE SUPPORTING THAT TEERA BREACHED ITS DUTY OF CARE

The trial court determined, in the alternative, that Teera's conduct would not have breached a common law duty of care. Again, viewing the evidence in the light most favorable to the nonmoving party, Frommert created a genuine issue of material fact and summary disposition was improperly granted. Teera presented evidence that it placed yellow caution tape around the base of the scaffolding to warn off potential users. Teera also removed the handles from the hydraulic lift to prevent anyone from ascending the scaffolding.

On the other hand, Teera knew that Talon employees were on site, as well as electricians and plumbers. Teera knew that Talon employees were working on the same side of the building as the scaffolding and made no effort to notify them of the scaffolding's dangerous condition. Most importantly, Teera left the scaffolding uncompleted for a number of days on a busy worksite. It took Teera only 30 minutes to move the scaffolding from its former to its new location. Teera moved the scaffolding whole using an all-terrain forklift. Despite his knowledge that the move would cause parts of the scaffolding to shift or become loose, Teera's foreman failed to inspect the equipment and made no attempt to complete its erection. The failure to inspect the scaffolding, standing alone, supports Frommert's claim that Teera breached its duty of care. See *Munson*, 347 Mich at 389-390. Because of his failure to inspect, Teera's foreman was admittedly unaware that the supports for the scaffolding platform were compromised until after the accident.

The finder of fact may ultimately determine that Teera had not given Frommert permission to use the scaffolding or that his use was unforeseeable, thereby negating Teera's duty of care to him. The finder of fact may also determine that Teera acted reasonably to avoid endangering other workers, such that no breach of duty occurred. However, at this time, there remain unresolved questions of fact and issues of credibility that prevent summary disposition.

Accordingly, we vacate the trial court's grant of summary disposition to Teera and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Patrick M. Meter

/s/ Kirsten Frank Kelly