STATE OF MICHIGAN

COURT OF APPEALS

LAURA WULFF, Plaintiff-Appellant,	UNPUBLISHED September 6, 2011
v	No. 297317 Oakland Circuit Court
OTIS ELEVATOR COMPANY, Defendant-Appellee.	LC No. 2009-103757-NO

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Plaintiff Laura Wulff appeals as of right the trial court's order granting summary disposition for defendant Otis Elevator Company with respect to plaintiff's negligence claim. We affirm.

I

In 2007, defendant entered into a contract with Henry Ford Health. Under the contract, defendant agreed to maintain a Dover hydraulic elevator at the Henry Ford Maplegrove Medical Center in West Bloomfield, Michigan. Defendant's maintenance service included "inspection, lubrication, adjustment, and, [when necessary], repair or replacement of" the elevator's parts.

On January 28, 2009, the medical center contacted defendant and requested service for the elevator. The medical center complained that the elevator's floor was not level with the building's floor and that the elevator's doors would not open. Defendant dispatched its elevator mechanic, Andrew Davis, to the medical center. Davis inspected the elevator and noticed "a little carbon buildup" on the electrical contacts of the electrical relays that were responsible for opening and closing the elevator's doors. So, Davis cleaned and adjusted the electrical contacts. Davis and the medical center then placed the elevator back into operation. According to Davis, the elevator was "running fine" when he left the medical center.

At about 7:00 a.m. the next morning, plaintiff, a nurse at the medical center, got onto the elevator and pushed a button to go to the second floor. The elevator's doors opened on the second floor, and plaintiff began to walk out of the elevator. However, plaintiff "[t]ripped, fell and went flying" onto the floor, injuring her right shoulder, ankle, knee, and hip. Plaintiff looked back at the elevator and noticed that the elevator's floor was about five or six inches below the building's floor.

Later that morning, the medical center contacted defendant and requested service for the elevator. The medical center told defendant that the elevator made a "loud bang" and stopped between the building's floors. Davis responded to the service call and inspected the elevator. Davis discovered that the elevator's U1 relay needed to be replaced. According to Davis, he replaced the relay and "it ran fine." Nonetheless, the medical center contacted defendant again after Davis left. The medical center complained that the elevator's doors took too long to open and that there was a "bouncy ride when landing and starting."

On January 30, 2009, Davis returned to the medical center to service the elevator. Davis checked the "switches in the hatch," the door lock, and the pickup roller clearances. Davis replaced the UL, DL, U2, and D2 relays; the doorjamb (a guide on the bottom of the door); a cracked reflector on the front doorjamb; the door roller on the front door; and the battery pack for the emergency lights. Davis also cleaned the "car top and [the] pit."

On February 6, 2009, Davis replaced 18 of the elevator's relays. And, on February 11, 2009, Davis replaced 17 additional relays.

In September 2009, Plaintiff sued defendant for negligence. Plaintiff alleged that defendant failed to maintain and repair the elevator to ensure proper leveling, negligently repaired a previous leveling problem with the elevator, created a new and worsened elevator operation affecting its height and leveling, failed to prevent its use until safe, failed to warn plaintiff that the elevator had not been maintained appropriately and not to use it, failed to hire and train competent, careful, and knowledgeable employees who could properly maintain the elevator, and performed other acts of negligence not yet known.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10) in November, 2010. Citing *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004) and its progeny, defendant argued that it did not owe plaintiff a duty that was "separate and distinct" from its obligations to Henry Ford Health under the maintenance contract, and that no new hazard was created because defendant's actions were the subject of the maintenance contract. In her brief in opposition to the motion for summary disposition, plaintiff argued that the motion was premature because discovery had not yet been completed. In its reply brief, defendant argued that discovery was unnecessary because "[t]he duties that Plaintiff seeks to impose are not cognizable under Michigan law." Oral argument on defendant's motion was postponed several times over the course of four months and did not take place March 17, 2010, nine days before the close of discovery. A week before the hearing, plaintiff submitted a supplemental brief in answer to the motion for summary disposition withdrawing her objection based on discovery completion and attaching the affidavit and curriculum vitae of Clarence C. Fox, a certified elevator inspector, as well as the deposition transcript of Andrew Davis, the primary elevator service repairman for the medical center.[1] At the motion hearing, defendant argued that in addition to the cases cited in its brief, the Court of Appeals recently held in *Carrington v Cadillac Asphalt, LLC*, an unpublished opinion per curiam of the Court of Appeals,

[1] Plaintiff mailed her supplemental brief on March 9, 2010, and it was not received for filing by the court until March 16, 2010, one day before the hearing.

issued February 9, 2010 (Docket No. 289075), that *Mierzejewski v Torre & Bruglio, Inc.*, 477 Mich 1087; 729 NW2d 225 (2007) and *Banaszak v Northwest Airlines, Inc.*, 477 Mich 895; 722 NW2d 433 (2006), were binding precedent and stood for the proposition that even if one were to accept Fox's opinion that in servicing the relay defendant's technician might have bumped a relay, causing misleveling, no new hazard was created because his actions were the subject of the maintenance contract. The trial court agreed and granted defendant's motion for summary disposition.

II

We review a trial court's summary disposition ruling de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10), the trial court and the parties relied on matters outside of the pleadings; therefore, we apply the standard of review for a motion under MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Human Servs Dep't*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

To establish a prima facie case of negligence, a plaintiff must prove four elements: duty, breach, causation, and damages. *Fultz*, 470 Mich at 463. Thus, the proper initial inquiry in a negligence claim is "[w]hether a particular defendant owes any duty at all to a particular plaintiff." *Id.* at 467. Before our Supreme Court's decision in *Fultz*, the Court recognized "the basic rule of the common law [that] imposes 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). This common-law rule arose "out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another." *Id.* "Such a duty of care . . . arises by operation of law [and] may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done." *Id.* When "defining the contours of this common-law duty," courts distinguished misfeasance (action) from nonfeasance (inaction) in tort actions based on a defendant's contractual obligations, stating that "a tort action will not lie when based solely on the nonperformance of a contractual duty." *Fultz*, 470 Mich at 465-466. In *Fultz*, however, our Supreme Court abandoned the distinction between misfeasance and nonfeasance. *Id.* at 467. The *Fultz* Court explained that the distinction obscured the initial inquiry of whether a duty exists because the distinction did not focus on whether a defendant owed a duty to a plaintiff; rather, the distinction focused on whether a duty was breached. *Id.* The *Fultz* Court then replaced the distinction between misfeasance and nonfeasance with the following rule:

> [If a] defendant fails or refuses to perform a promise, the action is in contract. If [a] 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.

Thus, the *Fultz* Court instructed courts to make the following inquiry in a tort action where a defendant negligently performs a contract in which the plaintiff is not a party to determine whether the defendant owed the plaintiff a duty of care: "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 . . . will lie." *Id.* at 467. The Court cited *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), as an example of a case where a defendant *breached* a duty that was separate and distinct from the defendant's contractual obligations. The *Fultz* Court explained that the defendant in *Osman* contracted with a premises owner to provide snow removal services. *Id.* at 469. The defendant placed snow onto "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 [the plaintiff] who traverse[d] those areas." *Id.* The *Fultz* Court emphasized that the defendant in *Osman* created a "*new* hazard." *Id.*

Recently, our Supreme Court revisited *Fultz* in *Loweke v Ann Arbor Ceiling & Partition Co*, ___Mich___; ___NW2d___ (2011). The Court reaffirmed "*Fultz's* directive . . . to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to another." *Loweke*, slip op at 12. The Court stated that "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.* (internal citations omitted). Furthermore, the Court opined that "entering into a contract with another pursuant to which one party promises to do something does not alter the fact that there exists a preexisting obligation or duty to avoid harm when one acts." *Id.* at 12-13. Thus, the Court summarized that "in determining . . . 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 13-14.

Plaintiff argues that defendant owed her a duty that was separate and distinct from defendant's contractual obligations to Henry Ford Health because, under *Clark*, defendant had a common-law duty to exercise reasonable care when it performed its contractual obligations. Defendant, however, asserts that *Fultz* abrogated the common-law duty to perform a contract with ordinary care. We agree with plaintiff's contention that defendant owed her a duty that was separate and distinct from defendant's contractual obligations because defendant had a "common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings," i.e., when Davis serviced the elevator on

January 28, 2009.[2] *Id.* at 14-15. Contrary to defendant's assertion, "*Fultz* did not extinguish the simple idea that . . . 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 13 (internal quotations omitted). As the *Loweke* Court emphasized, "while the mere existence of a contractual promise does not ordinarily provide a basis for a duty of care to a third party in tort, the existence of a contract also does not extinguish duties of care otherwise existing," including "those duties that are imposed by law." *Id.* at 13-14 (internal quotations omitted). Moreover, it was foreseeable to defendant that Davis's elevator maintenance on January 28, 2009, could create an unreasonable risk of harm to plaintiff—a nurse working at the medical center. *Ghaffari v Turner Constr Co*, 268 Mich App 460, 465; 708 NW2d 448 (2005).

Nonetheless, we conclude that plaintiff has failed to create a genuine issue of material fact as to whether defendant breached its duty of care by creating a "new and worsened elevator operation such that the height of misleveling was increased from where it misleveled previously," i.e., a new hazard under *Fultz.* Plaintiff's only evidence in support of her theory was the affidavit of Fox. In his affidavit, Fox stated in pertinent part:

> 3. I have reviewed the deposition of plaintiff and the deposition of Otis Elevator maintenance route mechanic Andrew Davis.
>
> 4. I have reviewed documents from Otis Elevator including the maintenance contract, on-line history reports, machine room record and testing report.
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> 5. It is my understanding from my review that plaintiff Laura Wulff tripped over the threshhold [sic] of the Henry Ford Maplegrove elevator upon

[2] While we find that defendant owed plaintiff a duty of care on this basis, we reject plaintiff's alternative, unpreserved argument that defendant owed her a duty of care on the basis that she was an intended beneficiary of the contract between defendant and Henry Ford Health. Under MCL 600.1405, "[a] person is a third-party beneficiary of a contract only when that contract establishes that a 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). "[T]he Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Id.* The maintenance contract does not establish that defendant undertook a promise to directly benefit plaintiff; indeed, the contract does not even refer to plaintiff or a class that includes plaintiff, i.e. the medical center's employees or the elevator's occupants. *Id.*; *Koenig v City of South Haven*, 460 Mich 667, 679-680; 597 NW2d 99 (1999) (recognizing that a third-party beneficiary may be one of a class of persons). Rather, defendant's maintenance contract specified that its purpose was to "protect [Henry Ford Health's] investment, extend equipment life, and provide a high level of performance and reliability" (Otis Maintenance Contract, Exhibit A[2] of Plaintiff's Brief in Support of Plaintiff's Answer to Defendant's Motion for Summary Disposition, p 1). Therefore, plaintiff was not an intended third-party beneficiary of the maintenance contract.

exiting it on January 29, 2009, because the elevator doors opened while the elevator floor was not level with the building floor.

6. It is my further understanding from my review that defendant's employee, Andrew Davis conducted a routine maintenance check the day before on January 28, 2009 during which he cleaned the electrical contacts of external relays, which are responsible for opening and closing the elevator doors, by removing carbon buildup.

7. Based upon on my review of these documents and based upon my professional experience, I have concluded more probably than not, that when Andrew Davis cleaned the OC, OR and CR relay contacts that he bumped other relays and caused them to become dislodged.

8. As a result of this dislodging, the relays which would prevent the elevator from opening, prior to leveling with the building floor, became interrupted and failed to function at the time of plaintiff's incident.

9. This dislodging was a new problem or hazard which was not present prior to January 28, 2009.

While the task of weighing the opinion of a qualified expert is for the jury, provided the expert's opinion meets the evidentiary requirements, we unavoidably conclude that Fox's affidavit was deficient because it was entirely speculative in nature. Therefore, it could not be considered for purposes of summary disposition. Under MCR 2.116(G)(6), affidavits supporting or opposing a motion under MCR 2.116(C)(10) "shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." Thus, "[s]ummary disposition is not precluded simply because a party has produced an expert to support its position. The expert's opinion must be admissible." *Amorello v Monsanto Corp*, 186 Mich App 324, 331; 643 NW2d 487 (1990). "For an expert's opinion to be admissible, the court must determine whether the opinion will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 331-332. Moreover, an expert's opinion must be based upon sufficient facts or data. *Id.*; MRE 702; see also *Skinner v Square D Co*, 445 Mich 153, 173; 516 NW2d 475 (1994) ("[T]here must be facts in evidence to support the opinion testimony of an expert."). Additionally, MCR 2.119(B) requires that an affidavit supporting or opposing a motion must both "state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion" and "show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit."

In the present case, Fox attested that he reviewed plaintiff's deposition, Davis's deposition, the maintenance contract, the on-line history reports, the machine room record, and a "testing report." On the basis of "[his] review of these documents and . . . [his] professional experience," Fox "concluded more probably than not that when . . . Davis cleaned the OC, OR and CR relay contacts that [Davis] bumped other relays and caused them to become dislodged." Fox's affidavit, however, does not contain any facts providing a basis for Fox's opinion that Davis bumped and dislodged the relays. *Amorello*, 186 Mich App at 331-332; MRE 702. More specifically, the Fox affidavit does not state what facts in the documents, if any, he relied upon to

form his opinion. An affidavit "must set forth with particularity such facts as would be admissible as evidence," not merely an opinion. *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). While great detail is not necessary, a sufficient factual basis for an expert's conclusion is. Fox's opinion does not provide any explanation for his conclusion that Davis bumped and dislodged the relays, other than the fact that after Davis cleaned some of the relays, the elevator continued to mislevel, the same reason Davis was summoned to service the elevator in the first place. As such, Fox's opinion was speculative and inadmissible. *Amorello*, 186 Mich App at 331; *Ghaffari*, 268 Mich App at 464 (stating that speculation is insufficient to create an issue of fact). Accordingly, because the substance of the Fox affidavit was inadmissible, the affidavit failed to meet the requirements of MCR 2.116(G)(6) and MCR 2.119(B) to merit consideration for summary disposition. [3]

Viewing the remaining evidence in a light most favorable to plaintiff, plaintiff failed to establish a genuine issue of material fact with respect to whether defendant breached its duty of care to plaintiff by creating a new hazard. The evidence demonstrates that the elevator was not leveling on January 28, 2009. After Davis serviced the elevator that same day, the elevator still had leveling problems on January 29, 2009, the date of plaintiff's injury. Furthermore, there is no evidence supporting plaintiff's allegation that "the height of misleveling was increased from where it misleveled previously." The only evidence concerning the distance between the elevator's floor and the building's floor is that the elevator's floor was five to six inches below the building's floor on January 29, 2009. Plaintiff did not present any evidence regarding the distance between the elevator's floor and the building's floor before Davis serviced the elevator on January 28, 2009. Therefore, there is no evidence that defendant breached its "common-law duty to use due care in [its] undertakings" by creating a new dangerous and hazardous condition that injured plaintiff. *Loweke*, slip op at 9-10, 12; *Fultz*, 470 Mich at 466-469. Rather, the evidence illustrates that defendant merely failed to perform its contractual task of repairing the elevator, for which defendant cannot be liable in tort.[4] *Fultz*, 470 Mich at 466-469. Thus, defendant was entitled to judgment as a matter of law.

Accordingly, the trial court properly granted summary disposition for defendant pursuant to MCR 2.116(C)(10), albeit for the wrong reason. "[W]e will not reverse the [trial] court's

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[3] At oral argument, plaintiff asserted that because the trial court granted defendant's motion for summary disposition based solely a skewed interpretation of *Fultz*, which has since been clarified by the Supreme Court in *Loweke*, we should simply remand the case and refrain from evaluating the sufficiency of Fox's affidavit. Citing *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005)(a trial court's ruling may be upheld on appeal where the right result was rendered, albeit for the wrong reason), defendant has raised the speculative nature of the affidavit as an alternative ground for affirmance. Because the affidavit is speculative, plaintiff withdrew her objection to the motion for summary disposition based on the completeness of discovery, and plaintiff presented no other evidence to support her allegation of a new hazard, a remand would be futile.

[4] Plaintiff's claims associated with the safety of the premises are the responsibility of the premises owner or possessor.

order when the right result was reached for the wrong reason." *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Affirmed.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens