

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

UNITED SERVICES AUTOMOBILE  
ASSOCIATION CASUALTY INSURANCE,

Plaintiff-Appellant,

v

JCS FIREPLACE, INC.,

Defendant-Appellee,

and

KW YODER CONSTRUCTION COMPANY,  
INC.,

Defendant.

UNPUBLISHED  
December 22, 2011

No. 299195  
Cass Circuit Court  
LC No. 09-000005-NZ

---

RICHARD BURNS,

Plaintiff-Appellant,

v

JCS FIREPLACE, INC.,

Defendant-Appellee,

and

KW YODER CONSTRUCTION COMPANY,  
INC.,

Defendant.

No. 299196  
Cass Circuit Court  
LC No. 09-000094-NZ

---

Before: HOEKSTRA, P.J., and K.F. KELLY and BECKERING, JJ.

PER CURIAM.

In this consolidated appeal, plaintiff Richard Burns and plaintiff United Services Automobile Association Casualty Insurance Company (USAA), challenge an order of the Cass Circuit Court, which granted summary disposition in favor of defendant-appellee JCS Fireplace, Inc. We reverse and remand for further proceedings.

## I. BASIC FACTS

Burns lost his home to a fire caused by an improperly installed fireplace on the lower level of his home. He subsequently contracted with the original builder, defendant KW Yoder Construction Company, Inc., to rebuild the home. Yoder subcontracted the fireplace installation to JCS Fireplace. On February 9, 2007, the newly constructed home was destroyed by fire. An investigation revealed the cause of the fire to be heat generated by the first floor fireplace, with the fire originating within the wood hearth extension of that fireplace. Thereafter, Burns and his insurer, USAA, sued Yoder and JCS Fireplace in the Cass Circuit Court. The cases were consolidated.

JCS Fireplace moved for summary disposition, arguing that plaintiffs' claims sounded strictly in negligence and, in keeping with *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), it owed no duty to plaintiffs. While the Burns selected the type of fireplace unit to purchase, they did not have a contract with JCS Fireplace to purchase or install the unit. JCS Fireplace argued, "even accepting Plaintiffs' allegations of negligence as true, the failure to perform a contractual duty cannot give rise to a tort claim unless the Plaintiffs allege and proffer evidence of a duty 'separate and distinct' from the underlying contractual obligations JCS Fireplace owed to KW Yoder. Stated otherwise, 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."

Plaintiffs responded that JCS Fireplace breached a duty separate and distinct from its contractual obligation with Yoder and that it created a new hazard by failing to properly install the fireplace.

The trial court granted JCS Fireplace's motion pursuant to MCR 2.116(C)(8) and (C)(10), finding that it was constrained to do so under *Fultz*. Plaintiffs filed applications for leave to appeal to this Court on April 14, 2010. On June 25, 2010, and while these applications remained pending, the circuit court dismissed the complaints against Yoder with prejudice, upon stipulation of the parties. On July 16, 2010, both Burns and USAA claimed appeals as of right from the order of dismissal. The prior applications for leave to appeal were dismissed. *United Servs Auto Assoc Cas Ins Co v JCS Fireplace, Inc*, unpublished order of the Court of Appeals, entered August 12, 2010 (Docket No. 297535); *Burns v JCS Fireplace Inc*, unpublished order of the Court of Appeals, entered August 12, 2010 (Docket No. 297536).

## II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition. This Court also reviews de novo questions of law. Whether a defendant is under a legal obligation to act for a plaintiff's benefit—i.e., whether a defendant owes a particular plaintiff a duty—is a question of law." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 141168, decided June 6, 2011), slip op p 2.

### III. ANALYSIS

Plaintiff argues that the trial court erred in granting summary disposition. While we agree, it is not quite fair to say that the trial court *erred* in granting summary disposition where it was clear that the trial court was attempting to follow *Fultz* and its progeny. Nevertheless, based on our Supreme Court's recent decision in *Loweke*, JCS Fireplace was not entitled to summary disposition.

In *Loweke*, our Supreme Court sought to “clarify *Fultz*'s ‘separate and distinct’ mode of analysis.” *Loweke*, slip op p 1. Recognizing that *Fultz* and its progeny had caused confusion, the Court adopted the reasoning in *Davis v Venture One Constr, Inc*, 568 F3d 570, 575, 577 (CA 6, 2009) and held “that a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract.” *Id.* Our Supreme Court admonished that it is error to focus only on a contract in determining whether a defendant owes a legal duty to a plaintiff. Rather, in determining whether a legal duty exists, *Fultz* directs courts to look to whether a “separate and distinct” duty independent of the contract exists, utilizing “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.” *Loweke*, slip op p 5. The Court wrote:

Stated another way, under the “separate and distinct mode of analysis,” “[e]ntering 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.” *Rinaldo's Const*, 454 Mich at 84, quoting Prosser & Keeton, Torts (5th ed), § 92, pp 656–657; see, also, *Davis*, 568 F3d at 575, 577.

Thus, under *Fultz*, 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...” 1 Torts: Michigan Law and Practice, § 10.18, p.10–25; see, also, *Fultz*, 470 Mich at 468–469. *Fultz* did 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.’” *Davis*, 568 F3d at 575, quoting *Hart*, 347 Mich. at 564.

In summary, “[w]hether a particular defendant owes any duty at all to a particular plaintiff [in tort],” *Fultz*, 470 Mich at 467 (emphasis added), is generally determined without regard to the obligations contained within the contract, *Davis*, 568 F3d at 577. See, also, *Churchill v Howe*, 186 Mich 107, 114; 152 NW 989 (1915) (explaining that although a tort can grow out of a contract, in general, a tort is a “wrong independent of a 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, see 470 Mich. at 469–470, 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 6.]

In granting JCS Fireplace's motion for summary disposition, the trial court explained that the only reason it did so was because *Fultz* compelled such a result:

In ruling on JCS Fireplace's motion for summary disposition the unpublished Court of Appeals opinion that was tendered by counsel this morning, this *Carrington versus Cadillac Asphalt*, parallels, I think, the feeling of this Court. That is, I agree with what is stated in footnote number one; that is, that I do find the *Davis versus Venture One Construction* analysis sounder. In this unpublished Court of Appeals decision the Michigan Court of Appeals is indicating that they, likewise, find that rationale to be sounder reasoning; but they are bound by the decision of the Michigan Supreme Court in both the *Meierzejewski* case and the *Banaszak*, the Northwest Airlines case.

Certainly, if they are bound by the decisions of the Michigan Supreme Court, I'm bound as well. In addition, the Court's required, obviously, to follow the decisions of the Michigan Court of Appeals; and while I agree with the rationale in *Davis versus Venture One*, and I think that's the more appropriate outcome, the Court, I think, does find the *Fultz* doctrine is applicable here. The Michigan Supreme Court has dictated what the results should be, and that is that JCS can only be held liable for injuries that result to the Plaintiff from actions that are separate and distinct from its contractual obligations; and here I don't find any fact question with regard to the contract. It's clear that it involved the installation of a fireplace. I think both the *Banaszak* and *Mierzejewski* cases are even more compelling facts because they do involve injuries to the public at large in contrast to what's happened here where the homeowner's house is burned as a result of the installation of this fireplace.

So, the Court doesn't necessarily agree with *Fultz* or with the cases that have followed from it, but I find that I'm obligated to follow that precedent. I think they should take another look at this, but the Michigan Supreme Court hasn't seemed to be inclined to do that.

While we would normally remand for the trial court to reconsider the motion in light of *Loweke*, it is clear that, had the trial court not felt compelled to follow what it perceived to be a conclusion necessitated by *Fultz*, it would have applied the *Davis* reasoning and denied JCS Fireplace's motion. Accordingly, we reverse the trial court's order granting summary disposition.

Reversed and remanded for further proceedings.

/s/ Joel P. Hoekstra  
/s/ Kirsten Frank Kelly  
/s/ Jane M. Beckering