

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH A. BANASZAK,

Plaintiff-Appellant,

v

NORTHWEST AIRLINES, INC.,

Defendant/Cross-Plaintiff,

and

OTIS ELEVATOR COMPANY,

Defendant/Cross-Defendant-
Appellee,

and

COUNTY OF WAYNE and HUNT
CONSTRUCTION GROUP, INC.,

Defendants.

UNPUBLISHED
February 28, 2006

No. 263305
Wayne Circuit Court
LC No. 02-200211-NO

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing all claims against defendant, Northwest Airlines, Inc. (Northwest Airlines). However, the issue on appeal is related to an earlier order granting summary disposition in favor of defendant, Otis Elevator Company (Otis Elevator). Because Otis Elevator owed a separate and distinct duty from that required under its contract with Northwest Airlines, the trial court erred in granting summary disposition in favor of Otis Elevator and dismissing plaintiff's claim. We reverse and remand for further proceedings consistent with this opinion.

This is a personal injury action where plaintiff alleged that she sustained back injuries when she fell while working at a construction site in September 2001. At the time of plaintiff's injury, Northwest Airlines was in the process of building a new terminal at Detroit Metropolitan Airport. Hunt Construction Group (Hunt Construction) was a contractor on the project and hired

plaintiff's employer, State Group, to perform the electrical work on the project. Otis Elevator was also a contractor with the primary duty to construct the elevators, escalators, and moving walkways throughout the new terminal.

On the day of the injury, plaintiff was working in the vicinity where Otis Elevator employees had been installing moving walkways in the floor of the terminal. To install the motors for the walkways, employees placed machinery inside holes in the floor known as wellways. In the course of her job, plaintiff walked on a piece of plywood that was covering the wellway and it collapsed, causing her foot and possibly a portion of her leg to break through the plywood. An empty wellway is approximately 48 inches deep, but the wellway into which plaintiff fell contained machinery. Plaintiff claims that she suffered a back injury that has left her unable to work.

Plaintiff filed a cause of action alleging negligence against Hunt Construction, as the general contractor, Otis Elevator, as the subcontractor responsible for the walkway area, Northwest Airlines, as the possessor of the premises, and Wayne County, as the owner of the premises.¹ Wayne County was dismissed from the action based on governmental immunity. Subsequently, the three remaining defendants filed separate motions for summary disposition. First, the trial court entered an order granting summary disposition in favor of Hunt Construction after concluding that Hunt Construction was not the general contractor over Otis Elevator, and therefore, it did not owe plaintiff a duty. Next, the trial court entered an order granting summary disposition in favor of Otis Elevator, concluding that Otis Elevator, as a subcontractor, did not owe a duty to the employees of another subcontractor working at the same site. The trial court then entered an order denying Northwest Airlines' motion for summary disposition after finding that material questions of fact existed regarding possession of the area, retention of control, and whether the condition was open and obvious or had special aspects. The trial court granted plaintiff leave to amend her complaint to include a theory of general contractor liability based on the common work area and retained control exceptions. Subsequently, however, the trial court entered an order granting Northwest Airlines' renewed motion for summary disposition based on new case law subordinating the retained control theory to the common work area theory and its finding that plaintiff failed to prove a common work area theory.² This appeal followed.³

On appeal, plaintiff contends that the trial court erred in granting summary disposition in favor of Otis Elevator because it was liable for her injury based on a common-law theory of negligence. We review de novo a trial court's decision to grant or deny a motion for summary

¹ Northwest Airlines filed a cross-complaint against Otis Elevator asserting a claim for contractual indemnification, but later dismissed the claim.

² See *Ormsby v Capital Welding*, 471 Mich 45; 684 NW2d 320 (2004).

³ Plaintiff filed this appeal raising three issues, Issues I and II concerning Northwest Airlines, and Issue III concerning Otis Elevator. Following the filing of a notice of bankruptcy regarding Northwest Airlines, this Court limited review to plaintiff's Issue III concerning Otis Elevator. A pending bankruptcy proceeding deprives this Court of its authority to continue its review of the case against Northwest Airlines. See 11 USC 362.

disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must be supported by affidavits, depositions, admissions or other documentary evidence. MCR 2.116(G)(3)(b); *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In evaluating such a motion, a court must consider the substantively admissible evidence presented at the time of the motion in the light most favorable to the party opposing the motion. MCR 2.116(G)(6); *Corley, supra* at 278; *Pena v Ingham County Rd Comm'n*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Summary disposition is appropriate if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Id.* Moreover, we review de novo questions of law, including whether there is a duty of care giving rise to a tort action for negligence. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004).

A negligence cause of action requires proof of a duty, breach of that duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The initial inquiry in a negligence action is whether the defendant owed a duty to the plaintiff; therefore, “[i]t is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.” *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). The existence of a duty of care is a question of law that is properly determined by the court. *Id.*

In *Fultz, supra*, our Supreme Court found that a tort action based on a contract and brought by a plaintiff who was not a party to that contract must be analyzed by use of the “separate and distinct” test. *Fultz, supra* at 467.⁴ While *Fultz* involved an injury claim arising out of a slip and fall on ice, the analysis nonetheless applies to the construction site injury claim

⁴ Previously, this Court had ruled that the recovery of a third-party was based on whether the injury to the third-party was caused by the tortfeasor’s misfeasance (action) or nonfeasance (inaction). See *Fultz, supra* at 465-467. However, the *Fultz* Court reasoned:

We believe the “slippery distinction” between misfeasance and nonfeasance of a duty undertaken obscures the proper initial inquiry: Whether a particular defendant owes any duty at all to a particular plaintiff.

We believe that the “separate and distinct” definition of misfeasance offers better guidance in determining whether a negligence action based on a contract and brought by a third party to that contract may lie because it focuses on the threshold question of duty in a negligence claim. As there can be no breach of a nonexistent duty, the former misfeasance/nonfeasance inquiry in a negligence case is defective because it improperly focuses on whether a duty was breached instead of whether a duty exists at all. [*Id.* at 467.]

of a subcontractor's employee. *Ghaffari v Turner Constr Co*, 473 Mich 16, 31; 699 NW2d 687 (2005); *Ghaffari v Turner Constr Co, (On Remand)* 268 Mich App 460, ___, ___ NW2d ___ (2005). The threshold inquiry becomes "whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Ghaffari, supra* at 16. Accordingly, "[i]f no independent duty exists, no tort action based on a contract will lie." *Id.* A separate and distinct duty will exist where a defendant creates a "new hazard" independent of its duties under the contract. *Id.* at 469. Such is the case because, although a subcontractor does not have a duty to make a work place safe for the employees of another subcontractor, *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 12-13; 574 NW2d 691 (1997), a subcontractor does have a common-law duty to use due care or to act in a manner that does not cause unreasonable danger to the person or property of another. *Ghaffari (On Remand), supra* at ___; *Johnson v A & M Custom Built Homes of West Bloomfield, LPC*, 261 Mich App 719, 722; 683 NW2d 229 (2004).

The *Fultz* Court did not nullify our prior opinion in *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), by concluding that an independent duty exists where a defendant creates a new hazard or increases the danger to the plaintiff, but it distinguished the facts in the two cases.

As noted earlier, the Court of Appeals relied on *Osman* to hold that CML owed a duty to plaintiff to fulfill its contractual obligation with defendant Comm-Co. The Court of Appeals reliance on this case was misplaced.

Like the plaintiff here, the plaintiff in *Osman* was injured when she fell on a patch of ice. Also, like the defendant here, the defendant in *Osman* had contracted to provide snow removal services to the premises owner. In that case, however, the defendant had breached a duty separate and distinct from its contractual duty when it created a *new* hazard by placing snow

on 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 individuals who traverse those areas. (*Osman, supra* at 704.)

[*Fultz, supra* at 468-469.]

Similar to the plaintiff in *Fultz*, it is undisputed that plaintiff was not a party to the contract between Northwest Airlines and Otis Elevator that would give rise to a duty owed her by Otis Elevator. However, plaintiff contends that Otis Elevator created a "new hazard" when it "removed the aluminum cover and replaced it with an inadequate piece of plywood, without warning any worker in the vicinity that the aluminum cover was removed and was not just hidden under the piece of plywood."

Otis Elevator contracted with Northwest Airlines to construct the elevators, escalators and moving walkways throughout the new terminal. Part of Otis Elevator's contractual duties was to be "responsible for complying with all applicable codes, ordinances, rules, and regulations, including federal and local OSHA regulations, involving safety on the Project."

Under the contract, Otis Elevator was also to “provide perimeter protection at floor openings, elevator shafts, stairwells, and floor perimeters in accordance with OSHA requirements” and to “erect and properly maintain at all times . . . all reasonable safeguards for the safety and protection of workmen and the public and shall post danger signs warning against hazards.” Regarding “[c]overs for holes in floors, roofs, and other walking/working surfaces,” the Michigan Occupational Safety and Health Act (“MIOSHA”), MCL 408.1001 *et seq.*, standards require:

- (1) Covers located in roadways and vehicular aisles shall be capable of supporting, without failure, at least twice the maximum axle load of the largest vehicle expected to cross over the cover.
- (2) All other covers shall be capable of supporting, without failure, at least twice the weight of employees, equipment, and materials that may be imposed on the cover at any one time.
- (3) All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.
- (4) All covers shall be color-coded or they shall be marked with the word “HOLE” or “COVER” to provide warning of the hazard. [29 CFR 1926.502(i), as adopted by Mich Admin Code R 408.44502.]

Therefore, Otis Elevator had a contractual obligation to provide protection at floor openings like the subject wellway. Although Otis Elevator arguably breached its duty to provide adequate coverings and to maintain reasonable safeguards, this duty was contractual, and in the absence of a duty to act that is separate and distinct from the contract, liability for injuries to third persons will not attach. *Fultz, supra* at 470. A separate and distinct duty will exist, however, where a defendant creates a “new hazard” independent of its duties under the contract. *Id.* at 469. Our analysis then focuses on the record evidence to determine if Otis Elevator created a new hazard that resulted in a concomitant duty to plaintiff, the breach of which would form the predicate upon which liability for plaintiff’s injuries may attach.

The record evidence, although contradictory at various times, suggests a number of fact scenarios concerning Otis Elevator’s actions. Clearly Otis Elevator was required to cap the wellways. Otis Elevator accomplished the task with the designed structural aluminum caps. Because the area of inclusion of the wellways was open to other users, workers, subcontractors’ employees, public, private, and local officials, during the construction phase of the new terminal, the aluminum covers were subjected to hard use sustaining marring and other damage. In order to protect the covers, Otis Elevator allegedly either placed plywood over the aluminum covers, or removed the covers and replaced them with structural plywood. Otis Elevator asserts that sometimes the structural plywood would “disappear” requiring replacement.

It is the removal of the structural aluminum covers, however, that created the risk. Regardless of the questions of placement and ownership of the deficient plywood, it was the removal that created a hazard for other users of the premises. The thin-scale plywood would have been an appropriate protective cover for an underlying aluminum cover. But with the requisite aluminum cover removed, the deficient plywood was unfit for wellway protection

because it introduced the breakthrough risk that ultimately occurred. The record evidence appears to show that Otis Elevator solely created such a risk because it does not assert that anyone else removed the aluminum covers. Plaintiff's assertions regarding contract breaches and the manner of such breaches appear to give context to the hazard allegedly created by Otis Elevator and seem to demonstrate Otis Elevator's knowledge of the hazards.

Whether others removed structural plywood covers, or whether others placed the deficient plywood are factual matters to be determined at trial. Whether the action presents one of failure of policing by others, the general contractor, or the owner as a theory of defense is also subject to proof at trial. Otis Elevator's performance, and choices of performance, are negligence issues and not duty issues. And these, like the theories concerning proximate causation are questions of fact for the jury. See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) ("A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.").

Because Otis Elevator owed a separate and distinct duty from that required under its contract with Northwest Airlines, the trial court erred in granting summary disposition in favor of Otis Elevator and dismissing plaintiff's claim. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly