

STATE OF MICHIGAN
COURT OF APPEALS

MURRAY AVIATION, INC., TRAVELERS
INDEMNITY COMPANY OF AMERICA, and
TRAVELERS LLOYDS INSURANCE
COMPANY,

UNPUBLISHED
March 28, 2006

Plaintiffs-Appellants,

v

GRINNELL CORPORATION,

No. 257298
Wayne Circuit Court
LC No. 02-231493-NI

Defendant-Appellee.

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

This negligence action arises from three incidents where the fire protection sprinkler system at Willow Run Airport malfunctioned, releasing water onto Murray Aviation's property and causing damage. On appeal, plaintiffs argue defendant owed a duty to exercise reasonable care to plaintiffs in the performance of defendant's contractual obligations. This alleged breach of duty, specifically the failure to properly inspect and maintain the sprinkler system, purportedly caused damage to Murray Aviation's property. However, defendant's contractual relationship was with Wayne County,¹ the owner of the airport. Despite the lack of a relationship between plaintiffs and defendant,² plaintiffs sought to hold defendant liable for property damage based on the tort of negligence.

This Court reviews de novo the grant of a motion for summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). MCR

¹ Plaintiffs did not pursue a claim against Wayne County in this lawsuit, despite the fact that it contracted with defendant for the services performed.

² Plaintiffs did not allege that it was a third-party beneficiary of the contract between Wayne County and defendant. Therefore, we do not address the issue.

2.116(C)(10) provides for summary disposition where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 9; 692 NW2d 858 (2005). When deciding a motion for summary disposition, a court must consider the entire record in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Review is limited to the evidence presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). In presenting a motion for summary disposition under MCR 2.116(C)(10), the moving party has the initial burden of supporting its position by affidavits, depositions, admissions or other evidence. *Smith v Globe Life Insurance Company*, 460 Mich 446, 455; 597 NW2d 28 (1999). After the moving party supports its position, the burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party must go beyond the pleadings and set forth specific facts to demonstrate that a genuine issue of material fact exists. *Id.* If the opposing party fails to create a material factual dispute with documentary evidence, the motion is properly granted. *Id.*

To the extent resolution of the issue involves interpretation of the contract, the interpretation of a written contract with clear language is a question of law. *Busch v Holmes*, 256 Mich App 4, 7-8; 662 NW2d 64 (2003). This Court reviews contractual interpretations de novo. *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003). This Court must enforce the plain and unambiguous meaning of the terms of a contract as written. *Busch, supra*.

The threshold question in analyzing a tort action based on a contract and brought by a plaintiff who is not a party to the contract is “whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant’s contractual obligations.” *Fultz v Union-Commerce Associates*, 470 Mich 460, 467; 683 NW2d 587 (2004). In *Fultz*, the plaintiff fell while walking across an icy parking lot. The defendant had not plowed or salted the parking lot in approximately 14 hours, despite a contractually created obligation with the owner of the parking lot to do so. *Fultz, supra* at 462. The plaintiff contended that the defendant, by contracting to plow and salt the parking lot, owed a common-law duty to the plaintiff to exercise reasonable care in performing its contractual duties, and that the defendant’s failure to plow breached the common-law duty. *Fultz, supra* at 463-464. The Court held, however, that “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.” *Fultz, supra* at 470. The Court found that the plaintiff failed to allege that the defendant owed any duty, independent of the contract, to the plaintiff. *Fultz, supra* at 468.

The *Fultz* Court distinguished the facts before it from the facts presented in *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). In *Osman*, the defendant similarly contracted with the premises owner to provide snow removal services. *Osman, supra* at 704. The plaintiff slipped and fell on a patch of ice that was created by the defendant, when the defendant placed snow on a portion of the premises it knew, or should have known, would melt and freeze into ice. *Osman, supra* at 704. Our Supreme Court denied recovery to the *Fultz* plaintiff, finding that, unlike the *Osman* plaintiff, whose fall was caused by a new hazard created by the defendant, the *Fultz* plaintiff failed to allege that the

defendant owed her a duty separate and distinct from the contract because it did not create any new hazard. *Fultz, supra* at 469.

In the present case, plaintiff alleged that:

Once [Defendant] undertook to inspect, test, maintain and alter an important part of the sprinkler system that protected Murray [Aviation's] property, it had an obligation to do so with due care and consideration for the property. Murray was an entity who was clearly going to be affected by [Defendant's] work on the sprinkler system. [Defendant] thus had a duty, separate and distinct from its contract with Wayne County, to perform its work with due care for Murray's property interests.

However, the plain language of the contract is unambiguous and imposed upon defendant a contractual duty to inspect and test the sprinkler system at Willow Run Airport. The terms of the contract required Wayne County to request in writing any work in addition to testing or inspecting specific parts of the system, and specifically excluded from the contract any obligation on the part of defendant to complete maintenance or repair work. Defendant had no duty to Wayne County to maintain the sprinkler system.

In addition to the limited scope of services that were provided to Wayne County, unless the county authorized other recommended changes at an additional price, the contract at issue contained an express provision limiting defendant's liability. Because of the limited purpose for which defendant was retained with regard to services, plaintiffs failed to allege a breach of duty under the terms of the contract. Moreover, plaintiffs failed to allege a breach of duty separate and distinct from the contractual obligations such that plaintiffs could maintain a tort action. Plaintiffs seemingly alleged that, by virtue of its contract with Wayne County, defendant also owed a duty to plaintiffs and effectively sought to hold defendant liable for actions it expressly disclaimed in the contract. However, plaintiffs do not identify any legal authority that permits the filing of a tort action to allege a breach of duty that a party expressly excluded when it executed the terms of a contract with a third party. Accordingly, the trial court properly granted the defense motion for summary disposition when plaintiffs failed to establish that defendant owed them a duty separate and distinct from the contract.³

³ We note that plaintiffs alleged that a question of fact was created based on the deposition testimony of plaintiffs' employees, plaintiffs' expert witness, and defendant's employees. However, contract interpretation presents a question of law. *Busch, supra*. The question of whether a duty exists generally presents a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Additionally, the duty to interpret and apply the law is allocated to the courts, not the parties' witnesses. See *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997). Accordingly, plaintiffs' contention is without merit. Lastly, plaintiffs' reliance on state regulations that apply to owners is without merit because the contract at issue did not allow Wayne County to delegate to defendant without express approval and without incurring additional costs.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood