

STATE OF MICHIGAN
COURT OF APPEALS

FREDERICK PRICE and STELLA PRICE,
Plaintiffs-Appellants,

UNPUBLISHED
June 14, 2012

v

CITY OF ROYAL OAK and GM & SONS, INC.,
Defendants,

No. 296483
Oakland Circuit Court
LC No. 2009-100119-NO

and

PAMAR ENTERPRISES, INC.,
Defendant-Appellee.

ON REMAND

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

This is the second time that this case is before us. The prior majority opinion related the relevant facts of this case, and, for the sake of brevity, we shall not repeat them here. See *Price v City of Royal Oak*, unpublished opinion per curiam of the Court of Appeals, issued June 9, 2011 (Docket No. 296483). In our prior opinions, we addressed whether the trial court properly granted summary disposition in favor of defendant Pamar Enterprises, Inc. (Pamar) under MCR 2.116(C)(10). Specifically, we addressed whether plaintiffs Frederick and Stella Price were third-party beneficiaries of the contract for the replacement and repair of the sidewalk at issue between Pamar and defendant City of Royal Oak and addressed whether plaintiffs stated a claim that was premised on a duty that was separate and distinct from Pamar's duties under that contract. *Id.* The majority and dissent agreed that plaintiffs were not third-party beneficiaries under the contract. The majority nevertheless concluded that the trial court erred when it determined that plaintiffs did not allege that Pamar owed them a duty that was separate and distinct from that arising under the contract for the repair of the sidewalk at issue. On that basis, the majority reversed the trial court's order dismissing plaintiffs' claim against Pamar and remanded for further proceedings. *Id.* Judge Whitbeck, however, determined that plaintiffs failed to state a claim premised on a duty that was separate and distinct from Pamar's duties

under its contract to perform the sewer improvement project; and, accordingly, he would have affirmed the trial court's decision to grant summary disposition in Pamar's favor. *Id.*

Pamar appealed to our Supreme Court arguing that the majority failed to "review" or "properly follow" our Supreme Court's recent decision in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; ___ NW2d ___ (2011), which clarified the separate and distinct duty analysis first stated in *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004). And, in lieu of granting leave to appeal, the Supreme Court vacated our previous opinions and ordered us to reconsider Pamar's duty in light of its decision in *Loweke*. See *Price v City of Royal Oak*, 490 Mich 988 (2012). On remand, we conclude that the majority's application of *Fultz* to the facts of this case was consistent with our Supreme Court's clarification of *Fultz* in *Loweke*. For that reason, we again reverse and remand for further proceedings.

In *Fultz*, the plaintiff slipped and fell in a parking lot. *Id.* at 462. She later sued the contractor that had been hired to remove snow from the parking lot for failing to properly clear the lot. *Id.* On appeal, our Supreme Court considered whether a plaintiff could establish the duty element of her claim where the duty arose solely from a contract to which she was not a party. *Id.* at 463.

In examining the issue, the Court first noted the Michigan courts had long held that an action in tort will not lie "when based solely on the nonperformance of a contractual duty." *Fultz*, 470 Mich at 466. It explained that Michigan courts traditionally examined the claim and determined whether it was premised on misfeasance (an improper act taken in furtherance of the contract) or premised on nonfeasance (the failure to perform under the contract). Where the suit was premised on nonfeasance—that is, the failure to perform a duty under the contract—a tort action would not lie. *Id.* at 465-466. However, the Court concluded that such distinctions were "largely semantic and somewhat artificial." *Id.* at 466. The Court determined that it would be preferable for courts to examine 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." *Id.* at 467. Applying the separate and distinct definition to the facts of its case, the Court in *Fultz* determined that the plaintiff failed to establish the requisite duty because the only duty she identified was the duty to plow and salt the parking lot at issue, which duty the contractor had solely by reason of its contract. Because the contractor had no duty to clear the lot outside that imposed by the contract, it could not be liable in tort for failing to properly clear the lot. *Id.* at 468.

After the decision in *Fultz*, some courts recognized that *Fultz* did not fundamentally alter the applicable law; rather, it merely adopted a different framework for analyzing the nature and origin of the duty alleged to have been breached. See, e.g., *Tucker v Pipitone*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2011 (Docket No. 294754). In *Tucker*, the Court held that a contractor was not insulated from liability under *Fultz* simply because he was acting in furtherance of a contract; rather, because the common law imposes a separate duty to act reasonably, he could be held liable for placing his building materials in a place where it was likely to cause others to trip and fall. *Id.*; see also *Moning v Alfonso*, 400 Mich 425, 437; 254 NW2d 759 (1977) (stating that the common law imposes a general obligation on all persons to perform actions reasonably in light of the apparent risk to others); *Clark v Dalman*,

379 Mich 251, 261; 150 NW2d 755 (1967) (stating that the common law “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.”). Other courts, however, tried to interpret and apply *Fultz* in light of our Supreme Court’s orders for peremptory reversal in *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087 (2007) and *Banaszak v Northwest Airlines, Inc*, 477 Mich 895 (2006). Those courts recognized that *Mierzejewski* and *Banaszak* appeared to materially alter *Fultz* by expanding the rule limiting tort actions involving contractual relationships; they concluded that, after the decisions in *Mierzejewski* and *Banaszak*, an action in tort will not lie for duties—whether involving misfeasance or nonfeasance—performed under or contemplated by the parties to a contract. Applying a form of “but for” analysis, the courts held that a plaintiff failed to state a claim where the claim involved any action taken by the defendant in performance of its contractual duties. Stated another way, if the defendant would not have acted “but for” the contract, then the duty necessarily arose under the contract. See, e.g., *Carrington v Cadillac Asphalt, LLC*, unpublished opinion per curiam of the Court of Appeals, issued February 9, 2010 (Docket No. 289075) (stating that the defendant’s digging and backfilling activities were required under the contract and, accordingly, were not actionable under *Fultz*). Those courts understood *Fultz*—as applied by the Supreme Court in *Mierzejewski* and *Banaszak*—to essentially eliminate the common law duty to act reasonably, so long as the act was taken in furtherance of a contract.¹

This Court applied the latter understanding of *Fultz* to the facts involved in *Loweke*. See *Loweke*, 489 Mich at 161 (noting that this Court understood *Fultz* to require courts to look “at the terms of the contact and determine whether the defendant’s action was required under the contract.”) (citation omitted). But our Supreme Court disagreed that this was the correct application of *Fultz* and, because of the confusion created in part by its orders in *Mierzejewski* and *Banaszak*, see *id.* at 168, it felt compelled to clarify how courts should apply the separate and distinct duty analysis. *Id.* at 159. The Court first rejected the notion that *Fultz* transformed the law in this area:

Fultz did not modify the aforementioned historical understandings of this Court’s “separate and distinct mode of analysis.” Instead, *Fultz* favorably cited [*Rinaldo’s Constr v Mich Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997)] and [*Ferrett v Gen Motors Corp*, 438 Mich 235, 245; 475 NW2d 243 (1991)], which, like *Fultz*, focused on whether a *legal duty* independent of a contract existed, rather than whether defendant’s conduct was separate and distinct from

¹ This, of course, could lead to absurd results. For example, a person injured in an accident with a delivery truck would have no action because the driver was operating his truck under an agreement to deliver goods; a passerby would have no action against a construction worker who negligently discharged a nail gun because the contractor was operating the nail gun in furtherance of a contract; and a person who fell from a sidewalk into a nearby excavation would have no cause of action against the excavator, notwithstanding its failure to properly barricade the excavation, because the excavator performed its work in furtherance of a contract.

the tasks required by the contract or whether the hazard was contemplated by the contract. [*Loweke*, 489 Mich at 169.]

Thus, the mere fact that the defendant acted in furtherance of a contract or even that the parties' specifically contemplated a particular hazard under the terms of the contract does not necessarily immunize the defendant from liability for the harms that its actions or omissions may have caused. *Id.* ("Determining whether a duty arises separately and distinctly from the contractual agreement, therefore, generally does not necessarily involve reading the contract, noting the obligations required by it, and determining whether the plaintiff's injury was contemplated by the contract."). "*Fultz*", the Court explained, "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." *Id.* at 170-171 (quotation marks and citations omitted). Because this Court and the lower court misapplied *Fultz* to the facts in *Loweke*, our Supreme Court reversed and remanded the matter to the trial court. *Id.* at 172-173.

We conclude that the majority's prior opinion in this case was consistent with *Fultz*, as clarified in *Loweke*. Although plaintiffs' original complaint was not the model of clarity, they did allege that Pamar breached its duty of care by creating an unsecured and missing area of sidewalk—that is, they alleged that Pamar's failure to secure its worksite or otherwise warn of the hazard created by their activities led to the harm at issue. It is plain that Pamar did not have a duty to repair or replace the sidewalk at issue; any such duty arose from its contract with Royal Oak. Nevertheless, once it agreed to replace the sidewalk at issue, it had a common law duty—a duty that was separate and distinct from its contract—to perform that replacement with "due care" so as "not to unreasonably endanger the person or property of others." *Clark*, 379 Mich at 261. Therefore, plaintiffs adequately alleged a duty that was separate and distinct from Pamar's contractual duties.

Reversed and remanded for further proceedings consistent with this opinion. As the prevailing parties, plaintiffs may tax their costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Michael J. Kelly