

STATE OF MICHIGAN  
COURT OF APPEALS

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SUSAN MUSKETT,

Plaintiff-Appellant,

v

GRAND PRIX FLOATING LESSEE, L.L.C.,

Defendant/Cross-Plaintiff-Appellee,

and

BIRCH TREE BARK & STONE, L.L.C.,

Defendant/Cross-Defendant-  
Appellee.

UNPUBLISHED

June 26, 2012

No. 297953

Kent Circuit Court

LC No. 09-003680-NI

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Before: GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ.

GLEICHER, P.J., (*concurring*).

I concur with the lead opinion. I write separately to highlight that under *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), even absent the helpful clarification provided by *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011), the trial court erred by granting summary disposition to defendant Birch Tree Bark & Stone, L.L.C.

In *Fultz*, the Supreme Court posited that the creation of a “new hazard” may give rise to a breach of a duty separate and distinct from the contract. *Id.* at 469 (emphasis in original). *Fultz*’s “new hazard” reference derived from this Court’s decision in *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).<sup>1</sup> The plaintiff in *Osman* also

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<sup>1</sup> In *Smith*, the Supreme Court held that in *Osman*, this Court had “erroneously applied” incorrect standards for summary disposition derived from *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973). *Smith*, 460 Mich at 456 n 2. The Supreme Court clarified that *Osman* and several other cited decisions “that approve of *Rizzo*-based standards for reviewing motions for summary

slipped and fell on an icy surface subject to a snow removal contract. *Id.* at 704. This Court summarized that the plaintiff alleged that the defendant

breached its duty by negligently, carelessly, and recklessly removing snow from the premises and placing it on a portion of the premises when it knew, or should have been 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. [The p]laintiff alleged that [the] defendant was negligent in failing to keep the premises and all common areas fit for their foreseeable uses and in failing to remove ice from areas after notice of the dangerous condition, in allowing ice to build up, in maintaining a hazardous condition when it could have been reasonably discovered, and in failing to remove a dangerous condition. [*Id.*]

The defendant argued that its contract with the landowner “indicated that [the] defendant assumed no duty or responsibilities of the premises owner,” nor “any of the responsibility for damage or injury caused by slipping and falling on any pavement surface.” *Id.* at 705.

This Court found that the contract at issue “allow[ed] only one interpretation,” and specifically referenced the following language: “*Nothing contained in this agreement shall relieve Provider from liability for its breach of this agreement or damages caused to person or property as a result of Provider’s, its employees’, its agents’ or representatives’ negligence.*” *Id.* at 707 (emphasis in original). The Court in *Osman* explained that when “[r]ead as a whole,” the contractual language obligated the defendant “to provide snow removal services in a reasonable manner, holding [the] defendant liable for its negligent conduct in the snow removal process.” *Id.* The Court elaborated that the defendant’s tort duty to the plaintiff stemmed from two sources:

Not only did the contract articulate that [the] defendant would remain liable for its negligent conduct, but such duty also arose out of [the] defendant’s undertaking to perform the task of snow plowing. The duty allegedly owing is that which accompanies every contract, a common-law duty to perform with ordinary care the things agreed to be done. Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. [*Id.*]

The common-law duty of care existed “separate and apart from the contract itself” as part of “a general duty owed by [the] defendant to the public of which [the] plaintiff is a part.” *Id.* at 710.

In *Fultz*, 470 Mich 460, the Supreme Court declined to overrule this portion of *Osman*. The Supreme Court distinguished that in *Osman*, the defendant had created a new hazard by placing snow near pedestrian walkways, in an area where melting and freezing snow foreseeably created a danger “to individuals who traverse those areas.” *Id.* at 469, quoting *Osman*, 209 Mich App at 704. Here, plaintiff claims that Birch Tree’s negligent snow removal efforts

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disposition brought under MCR 2.116(C)(10) are overruled to the extent that they do so.” *Id.* at 455-456 n 2.

foreseeably created the conditions under which black ice formed. In my view, the central holding in *Osman* compels the conclusion that summary disposition in favor of Birch Tree was improper.

/s/ Elizabeth L. Gleicher