

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS LAMEAU, Personal Representative of
the Estate of JOHN M. CRNKOVICH,

UNPUBLISHED
August 21, 2012

Plaintiff-Appellee,

v

No. 289947
Oakland Circuit Court
LC No. 2007-083761-NO

CITY OF ROYAL OAK, DETROIT EDISON
COMPANY, ELDEN DANIELSON, and BRIAN
WARJU,

Defendants,

and

GAGLIO PR CEMENT CORPORATION,

Defendant-Appellant.

Before: OWENS, P.J., and K.F. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant Gaglio PR Cement Corporation (hereafter “defendant”) appeals by leave granted from the trial court’s order denying its motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. RELEVANT FACTS AND PROCEEDINGS

Plaintiff’s decedent died from injuries he sustained when he collided with a guy wire stretching from a utility pole across a recently constructed city sidewalk in the city of Royal Oak. The collision occurred at approximately 11:00 p.m. at night, while the decedent was riding a motorized scooter, without lights. A toxicology analysis revealed the presence of marijuana in the decedent’s system, and a blood alcohol level of 0.13 percent.

Plaintiff, as the personal representative of the decedent’s estate, brought this wrongful death action against defendant, the contractor who installed the sidewalk pursuant to a contract with the city, as well as against the city of Royal Oak (the “city”), city workers Elden Danielson and Brian Warju, and Detroit Edison Company, the owner of the utility pole, alleging claims for negligence and nuisance. Defendant filed a motion for summary disposition on the ground that it

did not owe a legal duty to plaintiff's decedent that was separate and distinct from its contractual obligations with the city. Defendant also sought summary disposition under MCL 600.2959 and MCL 600.2955a, on the ground that the decedent's comparative fault and intoxication was 50 percent or more the cause of his injuries. The city and the individual city defendants filed separate motions for summary disposition on the basis of governmental immunity. The trial court dismissed plaintiff's nuisance claims, but denied summary disposition of the negligence claims with respect to all defendants.

Defendant, the city, and the individual city defendants filed separate applications for leave to appeal. This Court granted the applications and consolidated the appeals. Defendant's appeal was subsequently disconsolidated and administratively closed after defendant filed for bankruptcy. This Court thereafter affirmed the trial court's orders denying summary disposition to the public defendants, *Lameau v City of Royal Oak*, 289 Mich App 153; 796 NW2d 106 (2010), but our Supreme Court subsequently reversed this Court's decision "for the reasons stated in the Court of Appeals dissenting opinion" and remanded the case to the trial court "for entry of an order granting summary disposition to the public defendants." *Lameau v City of Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011). In April 2012, defendant's appeal was administratively reopened after the bankruptcy court entered an order granting relief from the automatic bankruptcy stay.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). In evaluating the motion, this Court considers the affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Id.* at 567-568. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Latham*, 480 Mich at 111.

III. DUTY

Defendant challenges the trial court's denial of its motion for summary disposition with respect to plaintiff's negligence claim.¹ To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Defendant argues that it is entitled to summary disposition of plaintiff's negligence claim because there is no genuine issue of material fact that it did not owe a duty of care to plaintiff's decedent separate and distinct from its contractual obligations with the city to construct the sidewalk.

¹ The trial court dismissed plaintiff's nuisance claims and that decision is not at issue on appeal.

Our Supreme Court addressed the issue of a contracting party's duty to third persons in *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465-466; 683 NW2d 587 (2004), stating:

If one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 529; 538 NW2d 424 (1995); *Osman, supra*; Keeton, Prosser & Keeton, Torts, § 56, pp 380-381 (5th ed., 1984).

We described this common-law duty in *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967):

“Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. . . .

* * *

Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part. Moreover, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract. [*Id.* at 260-261.]”

In defining the contours of this common-law duty, our courts have drawn a distinction between misfeasance (action) and nonfeasance (inaction) for tort claims based on a defendant's contractual obligations. We have held that a tort action will not lie when based solely on the nonperformance of a contractual duty. See *Hart v Ludwig*, 347 Mich 559; 79 NW2d 895 (1956); *Chase v Clinton Co*, 241 Mich 478; 217 NW 565 (1928); *Churchill v Howe*, 186 Mich 107; 152 NW 989 (1915).

The Court commented that the distinction between misfeasance and nonfeasance “obscures the proper initial inquiry: Whether a particular defendant owes any duty at all to a particular plaintiff.” *Id.* at 467. The Court stated:

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.]

“[T]he threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant’s contractual obligations.” *Id.*

In *Loweke*, the Supreme Court revisited this issue to clarify its decision in *Fultz*. The Court commented that courts had “misconstrued the *Fultz* test requiring a ‘separate and distinct duty’ by erroneously focusing on whether a defendant’s conduct was separate and distinct from the obligations required by the contract or whether the hazard was a subject of or contemplated by the contract.” *Loweke*, 489 Mich at 168. The Court stated:

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 12-25; see, also, *Fultz*, 470 Mich at 468-469. [*Loweke*, 489 Mich at 171 (ellipses in the original).]

The Court concluded that the plaintiff’s cause of action “was not brought solely on the basis of defendant’s failure to perform its contractual obligations to the general contractor.” Rather, the plaintiff claimed “that defendant breached the common-law duty to exercise reasonable care and avoid harm when one acts.” *Id.* at 171-172.

Loweke is consistent with the Michigan Supreme Court’s statement in *Clark*, 379 Mich at 261, that Michigan law generally recognizes that “accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and [] a negligent performance constitutes a tort as well as a breach.” Additionally, where a party voluntarily undertakes to perform an act, having no obligation to do so, a duty may arise to perform that act in a nonnegligent manner. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 529; 538 NW2d 424 (1995).

In this case, plaintiff’s negligence claim against defendant is not based on a duty arising solely from defendant’s contract with the city. Indeed, plaintiff does not allege that the actual concrete and asphalt that was installed was itself defective. Rather, plaintiff alleges that defendant had a duty to construct the sidewalk so as not to cause an unreasonable risk of harm to pedestrians and users of the sidewalk and public in general. In *Loweke*, 489 Mich at 169-170, our Supreme Court explained:

Determining whether a duty arises separately and distinctly from the contractual agreement . . . 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. [*Davis v Venture One Constr, Inc*, 568 F3d 570, 576 (CA 6, 2009).] Instead, *Fultz*’s directive is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant’s contractual obligations to another. *Fultz*, 470 Mich at 461-462. As this Court has historically recognized, a separate and distinct duty to support a cause of action can arise by statute . . . or by a number of 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

In this case, regardless of its contract with the city, defendant had a common-law duty to noncontracting parties to use due care in its undertaking to construct a sidewalk, which encompassed a duty to avoid creating a new hazardous condition to third parties. Although plaintiff's complaint recognized that defendant's construction of the sidewalk was undertaken pursuant to a contract with the city, the negligence claim was not based on a duty arising solely from that contract. Plaintiff's claim was based on allegations that defendant created a hazardous condition by constructing the sidewalk in the path of a crossing guy wire without taking adequate measures to remove the hazard, or to warn or protect the public from the hazard.

Although there was evidence that the previously unpaved area was already being used by pedestrians, the construction of a sidewalk expanded the foreseeable uses of the pathway and created the impression that it was safe for uses commonly associated with a sidewalk, such as travel by bicycle or certain motorized conveyances. Plaintiff submitted evidence that defendant and other city representatives recognized that the construction of the sidewalk in the path of the guy wire created a significant hazard to persons using the sidewalk, much more so than any hazard that previously existed from the limited pedestrian use of the unpaved pathway. Because of this, defendant wanted to leave the area unpaved to alert people that the sidewalk was not ready for use, but it proceeded with the construction at the insistence of city personnel. The trial court did not err in concluding that plaintiff's negligence claim was based on a duty separate and distinct from defendant's obligations under its contract with the city.

Defendant contends that it was faced with the dilemma of building a sidewalk where it could not be safely used, or breaching its contract with the city. Defendant contends that its obligation not to breach the contract should negate the existence of any duty to plaintiff's decedent. As the Court explained in *Loweke*, 489 Mich at 169, "[d]etermining whether a duty arises separately and distinctly from the contractual agreement . . . 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." Rather, a court must "determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to another." *Id.* Accordingly, the Court in *Loweke* held that, "[u]nder *Fultz*, a contracting party's assumption of contractual obligations does not *extinguish* or limit separate, preexisting common-law or statutory tort duties owed to noncontracting third parties in the performance of a contract." *Id.* at 172 (emphasis added). Therefore, we reject defendant's suggestion that compliance with its contractual obligations to construct a sidewalk may extinguish any common-law legal duty to a noncontracting party, such as plaintiff's decedent. Moreover, in a contract in which the parties exchange payment for services, exempting the service-providing party to the contract from liability violates the general principle that a tortfeasor cannot shift responsibility to another party who breached a duty of care. See 57A Am Jur 2d, Negligence, § 80, p 151, which states:

In an action for injury alleged to result from a neglect of duty by the defendant, it is no defense that a similar duty rested upon another person. One upon whom the law devolves a duty cannot shift it to another, so as to exonerate himself or herself from the consequence of its nonperformance. Thus, one upon whom the law has imposed a duty of care cannot avoid responsibility for its faithful discharge by contracting with another for its performance. Accordingly,

the right of one to receive care from another in the performance of a service is not ordinarily lost by the delegation to others of the performance of the service.

Accordingly, defendant cannot rely on its contract with the city to exempt it from its general duty of care to third parties.

In a supplemental brief filed after this case was administratively reopened, defendant raises issues concerning whether it “exercised ordinary care while working on the sidewalk project” in the context of arguing that it did not owe a legal duty of care to plaintiff’s decedent or to the general public. For instance, defendant refers to evidence that it tried to persuade the city to delay completion of the project until the guy wire was moved. Defendant also refers to evidence that it barricaded the area and tried to maintain the barricades in place, but they were removed by unknown persons. Defendant asserts that it had no duty to protect the decedent from the criminal conduct of trespassers who removed the barricades. These arguments do not compel a different result. First, plaintiff’s negligence claim against defendant is not based on injuries caused by a third party’s criminal conduct. Second, issues involving defendant’s efforts to avoid or limit the creation of the hazard, or to warn or guard the public from the hazard, relate to whether defendant breached its duty of care, not the existence of a duty in the first instance. Defendant’s motion for summary disposition was based solely on its position that it did not owe a legal duty of care to plaintiff’s decedent. Defendant did not seek summary disposition on the ground that there was no genuine issue of material fact with respect to whether it breached a duty of care that was owed, nor was this an issue that was addressed and decided by the trial court. “Generally, an issue not raised before and considered by the trial court is not preserved for appellate review.” *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Further, as the moving party, defendant was obligated to identify the issues for which it believed there was no genuine issue of material fact. MCR 2.116(G)(4). Because defendant did not seek summary disposition on the basis that there was no genuine issue of material fact concerning its compliance with the applicable standard of care, plaintiff had no duty to respond with evidence showing a genuine issue for trial with respect to that issue. *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 369-370; 775 NW2d 618 (2009). Accordingly, defendant’s arguments relating to whether it exercised due care in its work are not properly before this Court. Defendant is free to raise that issue in an appropriate motion on remand.

IV. MCL 600.2959 and MCL 600.2955a

Defendant next argues that the trial court erred in denying summary disposition under either MCL 600.2955a or MCL 600.2959. We disagree.

MCL 600.2955a provides:

(1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was

less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

(2) As used in this section:

(a) "Controlled substance" means that term as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws.

(b) "Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance. An individual is presumed under this section to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed by section 625a of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625a of the Michigan Compiled Laws, a presumption would arise that the individual's ability to operate a vehicle was impaired.

MCL 600.2959 provides:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, and noneconomic damages shall not be awarded.

A court properly may grant summary disposition under MCL 600.2959 if no reasonable juror could find that the defendant was more at fault. *Huggins v Scripser*, 469 Mich 898; 669 NW2d 813 (2003). Although the evidence showed that the decedent was riding a motorized scooter at night without a light, and also had marijuana and alcohol in his system, the evidence also permitted a reasonable juror to find that he was less than 50 percent responsible for his injuries. Plaintiff offered evidence that the guy wire was rising at a 45-degree angle from the ground across the sidewalk. Every person involved in the construction of the sidewalk agreed that the guy wire needed to be removed because it was a hazard to all persons using the sidewalk. A taut wire stretching across a sidewalk is not something that a sidewalk user would reasonably expect to encounter, whether during the day or at night. Even a pedestrian without a light was at risk of colliding with the wire. Although the decedent's speed on the scooter put him at a greater risk of harm in a collision, the risk of a collision was foreseeable for all sidewalk users. Further, while the decedent's toxicology report indicated that he had alcohol and marijuana in his system, a jury could find from the evidence that the hazardous condition was reasonably likely to cause

an injury to a person who was sober. Thus, a jury could find that even if the decedent's alcohol and marijuana consumption impaired his ability to function, that impairment was not 50 percent or more the cause of the accident that resulted in his death. The trial court properly determined that the decedent's comparative fault and the effect of his alcohol and marijuana consumption were issues of fact for the jury to resolve.

Affirmed.

/s/Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Mark T. Boonstra