

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ANNETTE ANDERSON,

Plaintiff-Appellant,

v

TORRE & BRUGLIO, INC,

Defendant-Appellee,

and

DETROIT PUBLIC SCHOOLS,  
DETROIT BOARD OF EDUCATION,  
and PAUL ROBERSON ACADEMY,

Defendants.

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UNPUBLISHED

September 29, 2005

No. 262200

Wayne Circuit Court

LC No. 03-340590-NO

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendant Torre & Bruglio, Inc. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a clerical worker employed by defendant Detroit Public Schools at defendant Paul Roberson Academy, sustained injuries when she slipped and fell on ice in a parking lot on December 11, 2000. Torre had contracted with Detroit Public Schools to plow the parking lot in which plaintiff fell, but had subcontracted the job to City Municipal Services.

Plaintiff filed suit alleging negligence and intentional misconduct. Subsequently, she voluntarily dismissed her complaint against Detroit Public Schools, Paul Roberson Academy, and Detroit Board of Education. Torre moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), claiming that it owed no duty to plaintiff. The trial court agreed, finding that “pursuant to the principles in *Fultz v Union-Commerce Assoc*, [470 Mich 460; 683 NW2d 587 (2004)], . . . defendant Torre & Bruglio did not owe a duty to the Plaintiff that was separate and distinct from its contractual obligations to its co-Defendant, the Detroit Public Schools.”

“If a court determines as a matter of law that a defendant owed no duty to a plaintiff, summary disposition is appropriate under MCR 2.116(C)(8).” *Terry v City of Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997). We review de novo a trial court’s decision on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether defendant owed a duty to plaintiff is a question of law that we also review de novo. *Fultz*, *supra* at 463.

On appeal plaintiff acknowledges that *Fultz* requires her to show that Torre owed her a duty separate and distinct from its contractual duty with Detroit Public Schools in order to prevail. However, she maintains that the trial court read *Fultz* too broadly, and that Torre’s action in subcontracting the job to City Municipal Services served to allow recovery under *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 704; 532 NW2d 186 (1995), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999).

We disagree and affirm. As plaintiff admits, our Supreme Court has held that a third party to a contract cannot recover for negligence based on an alleged breach of the contract in the absence of a “violation of a legal duty separate and distinct from the contractual obligation.” *Fultz*, *supra* at 467, quoting *Rinaldo’s Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). Previously, this Court had held that the availability of a third party’s recovery was based on whether the harm to the third party resulted from the tortfeasor’s misfeasance (action) or nonfeasance (inaction). See *Fultz*, *supra* at 465-467. However, the *Fultz* Court held:

[T]he “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.

Accordingly, the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a “separate and distinct” mode of analysis. Specifically, the threshold question is 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.]

The *Fultz* Court left intact the previous opinion from this Court in *Osman*, holding that such a separate duty does arise when the one rendering performance under the contract creates a new hazard or increases the danger to the plaintiff:

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 (emphasis in original).]

Plaintiff maintains that the peculiar circumstances in the instant case are more akin to the situation in *Osman* because Torre owed a separate duty to delegate its contractual responsibilities in a reasonable manner to a reasonably competent company. However, plaintiff's argument is not supported by the discussion in *Fultz* concerning the duty a contracting party owes to others. Had Torre either failed to plow the parking lot altogether or simply done so negligently, *Fultz* would prevent plaintiff from recovering for her injuries. As the *Fultz* majority points out, plaintiff's ostensible avenue of recovery would lie against the property owner, who could then seek indemnification from the contractor for breach of a contractual duty. *Id.* at 467-468 n 2. Had Torre directly increased the danger to plaintiff by creating a new hazard during the course of performing its obligation, she could seek recovery. However, we find it incongruous to allow recovery against Torre for an act of negligence committed by City Municipal Services when Torre could not recover from City Municipal Services under *Fultz*. Plaintiff's underlying claim is based on an assertion that, at the time of her fall, the parking lot upon which she fell was plowed but not salted. While plaintiff argues that the act of plowing the lot without salting it increased the hazard to her, she is mistaken. This situation is not akin to *Osman, supra*.

Moreover, even then, plaintiff's claim would lie against City Municipal Services rather than against Torre. Plaintiff has not presented any rationale that would allow recovery against Torre for the actions of its subcontractor. See *Reeves v Kmart Corp*, 229 Mich App 466, 475-476; 582 NW2d 841 (1998) (employers not liable for acts of independent contractors absent retained control or inherently dangerous activity). Summary disposition was correctly granted in favor of Torre.

We affirm.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio