

STATE OF MICHIGAN
COURT OF APPEALS

BERNIE THORNTON,

Plaintiff-Appellant/Cross-Appellee,

v

GINOP CONSTRUCTION INC.,

Defendant-Appellee/Cross-Appellant,

and

JIM'S HANDYMAN AND REPAIR SERVICES,
INC., JIM ZWAR INC., and ST. JOHN
EVANGELICAL LUTHERAN CHURCH,

Defendants-Appellees,

and

ROBIADEK & SONS EXCAVATING INC.,

Defendant.

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Plaintiff Bernie Thornton appeals as of right the order granting defendant Ginop Construction, Inc.'s (hereinafter "defendant") motion for directed verdict and dismissing plaintiff's case with prejudice. Defendant cross-appeals, arguing that the trial court erred in denying its motion for summary disposition. For the reasons set forth in this opinion, we find that the trial court erred in granting defendant's motion for directed verdict and we therefore reverse.

I. FACTS AND PROCEDURAL HISTORY

This case arises as a result of a personal injury accident at a construction site. Defendant is a Michigan Corporation that conducts business in excavation, earth moving and roadway and driveway construction. Defendant entered into a contract with defendant St. John Evangelical Lutheran Church (hereinafter “church”) to excavate and install a roadway or service driveway. On December 10, 2002, plaintiff, an employee of Indian River Custom Log homes, was working at the construction site at the church. Plaintiff and a co-worker were working on “a lift vehicle known as a Pettibone, which [i]s a four-wheel drive piece of heavy equipment designed for use on construction sites.” At the time of the accident, plaintiff’s co-worker was driving the Pettibone, and plaintiff was on a work platform connected to the Pettibone, approximately three feet above the ground. According to plaintiff, defendant had “excavated the land extensively, changed the topography, and built a driveway, a berm next to the driveway and inadequate foundation soil supports for these structures.” Plaintiff alleges that as his co-worker drove the Pettibone partially outside the driveway on the berm, the berm collapsed due to defendant’s defective workmanship, and the Pettibone slid backwards down a slight incline and flipped over. As a result of the accident, plaintiff sustained injuries that rendered him a paraplegic. Plaintiff filed suit against defendant,¹ alleging that defendant performed “negligent excavation, earth moving, filling, compaction, roadway and driveway construction work” on the church premises.

In November 2006, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Citing *Banaszak v Northwest Airlines, Inc*, 477 Mich 895; 722 NW2d 433 (2006), and *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), defendant argued that its sole duty arose from its contractual relationship with the church and it owed no duty to plaintiff that was separate and distinct from its contractual duty. Plaintiff argued that defendant owed a duty to plaintiff that was separate and distinct from its duties under the contract because defendant created a new hazard by excavating on the church property and creating a berm, and plaintiff was injured when the berm collapsed and the Pettibone slipped down the collapsed berm and overturned. The trial court held a hearing on the motion, and granted plaintiff 14 days to amend his complaint to allege obligations that were separate and distinct from defendant’s obligations under the contract. On February 6, 2007, plaintiff filed its fifth amended complaint. In an order dated March 14, 2007, the trial court denied defendant’s motion for summary disposition.

In September 2007, defendant filed a renewed motion for summary disposition. Defendant argued that under its contract with the church it was required to excavate and install the lower drive, and plaintiff alleged that he was injured when the soil adjacent to the lower drive collapsed. Because the hazard was the subject of the contract, defendant asserted that it owed no duty to plaintiff that was separate and distinct from its duties under the contract. The trial court denied the motion. In denying defendant’s motion, the trial court ruled that defendant created a new hazard in constructing the service driveway and that defendant therefore owed plaintiff a duty separate and distinct from its obligations under the contract:

¹ Plaintiff also filed suit against other defendants, but they are not involved in this appeal.

In the present case, pursuant to the contract, Ginop created a roadway where one had not previously existed. . . . It was known that the drive would be used by motor vehicles including various subcontractors working on the job essentially inviting them to traverse the drive with vehicles and equipment. If one relied on the construction of this drive as being adequate to sustain vehicular traffic and in fact it was not, this would result in the creation of a new hazardous condition which did not exist prior to the performance under the contract. This creates a separate and distinct duty to third parties as described in the *Fultz* decision.

Thereafter, defendant moved for rehearing, and the trial court also denied that motion, stating:

Therefore, assuming Ginop constructed the roadway in a negligent fashion thereby rendering it subject to collapse; Ginop would be responsible to any third parties that were injured as a result of this negligence whether or not there was a contract. If Ginop gratuitously undertook the construction of a roadway to make travel easier in the community, there is a duty owed to construct it in such a fashion that it would not be hazardous to parties who might use this road. This duty exists irregardless of the existence of a contract.

Thereafter, the case proceeded to trial. After plaintiff rested, defendant renewed its motion for summary disposition based on the absence of any duty owed to plaintiff that was separate and distinct from the duty owed by defendant under the contract with the church. Defendant also moved for a directed verdict, arguing that plaintiff failed to establish a prima facie case of negligence against defendant because there was no evidence that defendant's work violated any standard of reasonable conduct.

The trial court granted defendant's motion for directed verdict and issued its opinion on the record. In granting the motion, the trial court noted that defendant finished its work on the service driveway in July 2002, and plaintiff's accident at the construction site did not occur until months later, in December 2002. According to the trial court, there was evidence that other workers were storing materials on the slope after defendant finished its work there. Furthermore, the trial court noted that the photographic evidence revealed that there was a disturbance in the area between the service driveway and the edge of the slope that occurred after defendant had finished its work on the driveway and that the slope itself had been worked on after defendant's work was completed. Regarding a soil collapse, the trial court ruled that while "[n]obody said they saw a collapse[.]" the photographic evidence revealed a small collapse: "[t]he collapse is very small. It's a little bit of sliding and it gets into the mud and it slides down on two wheels." Ultimately, the trial court granted defendant's motion for directed verdict based on plaintiff's failure to establish a genuine issue of material fact regarding whether defendant caused the accident:

As to what exactly caused the accident, it's not known. If I give the plaintiff the benefit of the doubt. There was some soil shifting and it wasn't Mr. Lalonde [the driver of the Pettibone] simply backing down too far. There was soil shifting again. It's in this really disturbed area that was disturbed by somebody other than a Ginop, so if that caused it—I'm not saying the proofs indicate that

caused it, and if I give that benefit of the doubt to the plaintiffs, it still doesn't establish the case because that uneven soil condition was created by all this activity that was going on there for the four months plus that Ginops [sic] had been off the job, so I—I don't think there is reasonable minds that could differ on that, so I would grant a directed verdict.

On February 18, 2009, the trial court entered an order granting defendant's motion for directed verdict "for the reasons stated on the record."

Plaintiff appeals as of right the trial court's granting of defendant's motion for directed verdict, and defendant cross-appeals as of right the denial of its motion for summary disposition.

II. DIRECTED VERDICT—CAUSATION

Plaintiff argues that the trial court erred in granting defendant's motion for directed verdict because the evidence, viewed in a light most favorable to plaintiff, established a genuine issue of material fact regarding defendant's negligence. Defendant counters that the trial court properly granted its motion for directed verdict because plaintiff's evidence regarding causation, or how the accident occurred, was insufficient as a matter of law. Specifically, defendant contends that plaintiff failed to introduce sufficient evidence of a soil collapse.

This Court reviews de novo the trial court's decision on a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in favor of that party to determine if a question of fact existed. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). A directed verdict is only appropriate if there is no factual question on which reasonable jurors could differ. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). "A motion for directed verdict . . . should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Sniecinski*, 469 Mich at 131. "Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). Directed verdicts are disfavored in negligence cases. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

In a premises liability action, a plaintiff must prove the following elements of negligence: "(1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). To preclude summary disposition based on the lack of a material factual dispute, a disputed factual issue must be material to the dispositive legal claims. *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003).

In this case, the trial court concluded that plaintiff failed to establish an issue of material fact regarding whether defendant caused plaintiff's injuries. According to the trial court, even

though there was evidence of some soil shifting and a slight soil collapse, the evidence established that defendant had been finished with the service drive for months before the accident occurred and that other workers had worked and stored equipment in the area after defendant finished its work on the service driveway.

Generally, the existence of cause in fact is a question for the jury to decide, but if there is no issue of material fact, the question may be decided by the court. *Genna v Jackson*, 286 Mich App 413, 418; 781 NW2d 124 (2009). “A plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.” *Id.* “A mere possibility of such causation is not sufficient; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant.” *Id.*

At trial, there was evidence that defendant knew that the soil at the church was poor and unstable. There was evidence that defendant excavated an area 12 to 14 feet wide for the service driveway and then compacted it with a compactor and trucks. However, defendant did not excavate or compact an area about six inches to two feet between the service driveway and the edge of the slope. Plaintiff introduced expert testimony that it violated reasonable standards of design and construction to leave the six inch to two feet area of uncompacted problematic soil along the edge of the slope and that leaving the area uncompacted would make it less stable. Plaintiff’s expert explained that only if the soil in that area “was very good dense compacted hard packed quality material” would one leave such an area next to a slope uncompacted and that the soil did not appear to be dense and compacted. According to plaintiff’s expert, if the driveway had been compacted to the edge of the slope, the edge would not have broken down even if a Pettibone had driven on it.

Defendant contends that the trial court properly granted its motion for directed verdict because even viewing the evidence in a light most favorable to plaintiff, plaintiff failed to introduce sufficient evidence of causation. Specifically, defendant asserts that plaintiff failed to introduce any evidence that the six inch to two feet wide area between the service driveway and the edge of the slope collapsed. Our review of the evidence reveals that, contrary to defendant’s contention, there was evidence that the six inch to two feet area between the service driveway and the slope collapsed. The police report for the accident was admitted into evidence, and it contains a description of the accident. According to the police report, the operator of the Pettibone was backing up when “the right front and rear tires gave way to a [sic] embankment causing the forklift to slide down the embankment and roll on its side” James Lalonde, the driver of the Pettibone at the time of the accident, testified regarding his statements in the police report. According to Lalonde’s testimony, he was “creeping” forward² on the service driveway about a foot from the slope, when the “embankment g[a]ve away.” Lalonde testified that all four

² Lalonde testified that the police report was incorrect in stating that he was backing up the Pettibone at the time of the accident.

tires were on the service driveway and that “[d]irt right from the—underneath the tire kind of let loose.” Although the police report and Lalonde’s testimony differ on whether Lalonde was driving the Pettibone forwards or backwards, when viewed in a light most favorable to plaintiff, both permit the inference that the soil gave way or collapsed either on the service driveway itself or in the area between the service driveway and the edge of the slope, causing the Pettibone to slide down the slope. Furthermore, when asked if he had looked at the photos and whether he could see any soil collapse, Lalonde responded: “I seen [sic] it underneath the rear tire collapse.” Lalonde testified that he stated in his deposition that the soil collapsed “[s]omething like” one foot. Similarly, plaintiff testified that the accident “happened because the ground gave way.”

As noted previously, directed verdicts are disfavored in negligence cases. *Hunt*, 217 Mich App at 99. Viewing Lalonde’s testimony, plaintiff’s testimony and the police report in a light most favorable to plaintiff, there was a genuine issue of material fact regarding whether the soil between the service driveway and the slope collapsed, thus causing the Pettibone to slide down the slope. Furthermore, the trial court erred in concluding that plaintiff failed to establish causation because other contractors had worked in the area of the accident and stored equipment after defendant had completed its work on the service drive. Plaintiff’s expert testified that defendant violated reasonable standards of design and construction by leaving the six inch to two feet area between the service driveway and the edge of the slope uncompacted and that if the driveway had been compacted to the edge of the slope, the edge would not have broken down even if a Pettibone had driven on it. Viewing this evidence in a light most favorable to plaintiff, even if other contractors stored equipment and worked in the area after defendant finished its work on the service driveway, there is still evidence that defendant’s failure to compact the area between the service driveway and the edge of the slope caused a soil collapse that caused the Pettibone to slide down the slope and injure plaintiff. Given plaintiff’s evidence that there was a soil collapse and that defendant should have compacted the area, causation was not a matter of pure speculation and conjecture. See *Genna*, 286 Mich App at 418. At the very least, plaintiff’s causation evidence raises a genuine issue of material fact upon which reasonable minds could differ. *Holland v Liedel*, 197 Mich App 60, 64; 494 NW2d 772 (1992). Thus, we hold that the trial court erred in granting defendant’s motion for directed verdict.

Defendant argues that Lalonde’s testimony that the soil collapsed is contradicted by the photographic evidence and that “[t]estimony which is contrary to physical facts as shown by unimpeached photographs is legally insufficient to create a genuine issue of material fact and is properly disregarded.” In support of its argument, defendant cites federal cases, cases from other jurisdictions and an unpublished case decided by this Court. *Adams v K-Mart Corp*, unpublished opinion per curiam of the Court of Appeals, issued March 1, 2007 (Docket No. 271819). In *Adams*, this Court rejected the plaintiff’s claim that a danger from sidewalk pavement was not open and obvious, concluding that “plaintiff’s own photographic exhibits prove otherwise.” Because *Adams* is unpublished it has no precedential effect under the rule of stare decisis. MCR 7.215(C)(1). In any event, the trial court actually concluded that the photographic evidence revealed a small collapse: “[t]he collapse is very small. It’s a little bit of sliding and it gets into the mud and it slides down on two wheels.” Moreover, we have reviewed the photographic evidence, and we disagree with defendant’s contention that the photos clearly show that there was no soil collapse. In our view, the photos are inconclusive regarding whether there was a soil collapse in the area between the edge of the service driveway and the slope. Only a few of the photos actually depict the area between the service driveway and the edge of the slope, and, at

most, these photos reveal that the area appears muddy and is uneven and heavily rutted. Contrary to defendant's argument, some of the ruts might be interpreted as a soil collapse.

In sum, we find that given that directed verdicts are generally disfavored in negligence actions and given plaintiff's testimony, Lalonde's testimony, plaintiff's expert testimony and the police report, there was sufficient evidence that defendant's failure to compact the area between the service driveway and the edge of the slope caused a soil collapse that caused the Pettibone to slide down the slope and injure plaintiff. We therefore reverse the trial court's order granting of a directed verdict in favor of defendant.

III. SUMMARY DISPOSITION—DUTY

On cross-appeal, defendant argues that the trial court erred in denying its motion for summary disposition because based on our Supreme Court's decisions in *Banaszak* and *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087; 729 NW2d 225 (2007), defendant did not owe plaintiff a duty that was separate and distinct from defendant's obligations under its contract with the church.

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10)³ is as follows:

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362;

³ Because defendant attached documentary evidence to its motion for summary disposition, and it appears that the trial court relied on at least some of this documentary evidence in deciding the motion, we treat the motion, and the trial court's ruling on the motion, as governed by the standards set forth in MCR 2.116(C)(10).

547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

The starting point for our analysis in this case is our Supreme Court's decision in *Fultz*. In *Fultz*, the defendant snow removal company contracted with a property owner to provide snow and salt services for the property owner's parking lot. *Fultz*, 470 Mich at 462. The plaintiff was injured when she slipped and fell on the snow- and ice-covered parking lot; when plaintiff fell, defendant had not plowed the parking lot in approximately fourteen hours and had not salted it. *Id.* Our Supreme Court held that the defendant owed no duty to the plaintiff that was independent of the defendant's contract with the property owner and that plaintiff therefore "fail[ed] to satisfy the threshold requirement of establishing a duty that [defendant] owed to her under the 'separate and distinct' approach set forth in this opinion." *Id.* at 468.

Under *Fultz*, "[t]he threshold question in a negligence action is whether the defendant owed a duty to the plaintiff." *Id.* at 463. "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Id.*, quoting *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). In a case involving a tort claim brought by a third party to a contract, "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." *Fultz*, 470 Mich at 467. A duty is separate and distinct if it creates a new hazard to plaintiff that the defendant knew or should have known or anticipated would pose a dangerous and hazardous condition. *Id.* at 469.

In this case, we must examine the contract between defendant and the church. This contract required defendant to

excavate & install lower drive using existing materials, install 1000' of 4" drain lines including drain stone for perimeter drain around building, install 260' of 24" pipe for drainage ditch, excavate for basement to bottom of footings, backfill with sand under lower level floor & along side walls, install 22A gravel for parking area, grade, topsoil, seed & mulch disturbed areas, install new septic tank, pump tank, pipe from pump tank to field, install new field (pump not included).

A significant component of defendant's contract with the church was the excavation and installation of a service driveway. Plaintiff's complaint alleges that defendant's "negligent excavation, earth moving, filling, compaction, roadway and driveway construction work" caused the Pettibone on which plaintiff was working to slide down the berm and injure plaintiff. Plaintiff's allegations regarding defendant's negligence concern defendant's excavation and installation of the service driveway, which was the subject of defendant's contract with the church.

The question is whether under *Fultz*, defendant owed plaintiff a separate and distinct duty from its contractual obligations by creating a new hazard to plaintiff that defendant knew or should have known or anticipated would pose a dangerous and hazardous condition. *Id.* at 467, 469. Both this Court and our Supreme Court have generally limited the *Fultz* concept of the creation of a new hazard resulting in a separate and distinct duty to the plaintiff. See, e.g., *Banaszak*, 477 Mich 895; *Mierzejewski*, 477 Mich 1087; *Mutual v Kojaiian Management Corp*,

unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket Nos. 293740 & 295842); *Frommert v Teera Construction Co*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 292097); *Gerzanics v Boston Market Corp*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2010 (Docket No. 294192); *Zweifel v Fairway Sales Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2010 (Docket No. 293775); *Loweke v Ann Arbor Ceiling & Partition Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2010 (Docket No. 289451), lv gtd ___ Mich ___ ; 788 NW2d 461 (2010).

Nevertheless, we reject any suggestion that defendant's contract with the church immunized defendant from tort liability by eliminating *any* duty of care to third parties damaged by defendant's negligence in the performance of the contract. "If the actor's negligent performance of his undertakings results in increasing the risk of harm to a third person, the fact that he is acting under a contract . . . with another will not prevent his liability to the third person." 2 Restatement Torts, 2d, § 324A, comment c, p 143.⁴ Moreover, in *Boylan v Fifty-Eight Ltd Liability Co*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 291141, rel'd September 7, 2010) (2010 Mich App LEXIS 1657), this Court recently addressed this issue and observed that "*Fultz* specifically contemplates that despite the existence of a contract, under certain circumstances tort duties to third parties may lie." *Id.*, slip op p 3. In *Boylan*, the plaintiff, who rented a residence from the defendant Fifty-Eight Limited Liability Company (Fifty-Eight), filed a complaint against the defendant after the residence flooded and sewage backed up into the bathroom and kitchen sinks. *Id.* at 2. The defendant's property manager concluded that Pamar Enterprises, Inc., which had contracted with Lyon Township for the installation of a water main, improperly graded the earth on the property when installing the water main. *Id.* at 2, 6. Fifty-Eight thus filed a third-party complaint against Pamar that included a negligence claim. *Id.* at 2. Fifty-Eight's third-party complaint alleged that Pamar violated its duty to properly grade the earth. *Id.* Pamar moved for summary disposition, arguing that under *Fultz*, it owed no duty to Fifty-Eight that was separate and distinct from its obligations under the contract with Fifty-Eight. *Id.* at 2-3. The trial court concluded that Pamar owed Fifty-Eight no duty in tort and granted Pamar summary disposition of Fifty-Eight's negligence claim. *Id.* at 3. Fifty-Eight appealed to this court, and this Court reversed the trial court's order granting Pamar summary disposition of Fifty-Eight's negligence claim.

In reversing, this Court carefully examined our Supreme Court's decision in *Fultz* and rejected the conclusion that under *Fultz*, a contractor never owes a duty to third parties. *Id.* at 4. Relying on language from *Fultz*, this Court concluded that "tort liability may attach [to third parties] in the presence of a duty that arises separately and distinctly from the contractual

⁴ In *Fultz*, our Supreme Court acknowledged that "Michigan courts have accepted the Restatement of Torts, 2d, § 324A, as an accurate statement of Michigan law . . ." *Fultz*, 470 Mich at 464. However, the Supreme Court did not address Comment c to § 324A and also stated that judicial opinions endorsing "§ 324A . . . must not be invoked uncritically or without regard to limiting principles within our case law." *Id.*

agreement.” *Id.* Furthermore, this Court observed that under *Fultz*, the creation of a “‘new hazard’” may give rise to a breach of a duty that is separate and distinct from the contract. *Id.*, quoting *Fultz*, 470 Mich at 469 (emphasis in *Fultz*).

In *Boylan*, this Court held that “separate and distinct from Pamar’s contract to install a new water main for Lyon Township, Pamar bore a duty to exercise reasonable care when it entered onto and altered private property” and that Pamar’s contract with the township “neither created this separate duty of care, nor eliminated it.” *Boylan*, slip op p 6. This Court characterized Pamar’s duty as several common-law duties to avoid permanently damaging the property and explained that

The common law indisputably recognizes a landowner’s right to the full enjoyment of her land. For example, the private nuisance doctrine penalizes

an interference with the occupation or use of land or an interference with servitudes relating to land. There are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, disturbance in the comfort or conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment. The essence of private nuisance is the protection of a property owner’s or occupier’s reasonable comfort in occupation of the land in question. [*Id.*, quoting *Adkins v Thomas Solvent Co*, 440 Mich 293, 303; 487 NW2d 715 (1992).]

This Court also concluded in *Boylan* that “Pamar’s water main construction work created a ‘new hazard’ consisting of interference with the subject property’s drainage system.” *Id.* at 7. Explaining how Pamar’s conduct created a new hazard, this Court stated:

Record evidence establishes that in the course of constructing the water main, Pamar entered onto Fifty-Eight’s property, graded the land, and eliminated a swale that had been present before the water main work commenced. *Fultz* explains that a party to a contract breaches a duty ‘separate and distinct’ from the contract when it creates a ‘new hazard’ that it should have anticipated would pose a dangerous condition to third persons. 470 Mich at 468-469. Viewed in the light most favorable to Fifty-Eight, the facts reasonably support that Pamar’s rearrangement of the soil on Fifty-Eight’s premises, and Pamar’s elimination of a preexisting swale, created a new condition on the premises that it should have foreseen could predispose the property to flooding. [*Id.*]

In light of *Boylan*, we find that defendant in this case bore a common-law duty to exercise reasonable care when it entered and altered the church property. There was evidence that defendant excavated an area that was 12 to 14 feet wide and two to 4-1/2 feet deep for the service driveway and then brought in pit run gravel to fill it in. There was also evidence that defendant compacted the service driveway with a compactor and trucks, but did not compact or excavate an area about six inches to two feet wide between the service driveway and the edge of the slope. Plaintiff introduced expert testimony that it violated reasonable standards of design

and construction to leave the six inch to two feet area of uncompacted soil along the edge of the slope and that leaving the area uncompacted would make it less stable.

Under *Boylan*, defendant had a common-law duty not to interfere with the physical condition of the land itself and not to create a threat of injury that is a present menace. *Id.* at 6. By leaving an area six inches to two feet wide between the edge of the service driveway and the edge of the slope that was not excavated and not compacted, defendant did interfere with the physical condition of the land itself and, in doing so, created a condition that threatened injury to workers who were working in the area. Moreover, the six inch to two feet wide area did not exist before defendant worked on the church's property. Thus, this narrow strip of unexcavated and uncompacted earth between the service driveway and the edge of the slope constitutes a new hazard that did not exist before defendant worked on the property and that was created by defendant. This area, which had not been compacted, created a "new hazard" that defendant should have anticipated would pose a dangerous condition to third persons. *Fultz*, 470 Mich at 469; *Boylan*, slip op p 7.

Furthermore, Edward Ginop, one of defendant's owners, was aware that there were soil problems on the property. He was also aware that a service driveway can collapse if it is built wrong. Furthermore, he was aware that the church "needed a good road that would be able to handle a well truck[.]" Thus, defendant knew or should have known that the service driveway would need to be able to handle heavy trucks or equipment. Viewing the evidence in a light most favorable to plaintiff, plaintiff's excavation and installation of the service driveway created a new condition on the church's property that defendant should have foreseen could have caused injury. *Boylan*, slip op p 7; see also *Davis v Venture One Constr, Inc*, 568 F3d 570 (CA 6, 2009) (holding that defendant construction company owed a separate and distinct duty to a third party to the contract where the defendant created a new hazard by removing a door and leaning it against a wall outside the construction zone).

Defendant argues that the Supreme Court's decisions in *Banaszak* and *Mierzejewski* changed the law that had been stated in *Fultz* by broadening the protection given to construction contractors and eliminating the "new hazard" test of a separate and distinct duty. This argument is not persuasive. Neither *Banaszak* nor *Mierzejewski* explicitly overruled *Fultz*, and nothing in the language of either order can reasonably be interpreted as implicitly overruling *Fultz*. *Banaszak* does not cite *Fultz* or even mention the "new hazard" test. As this Court observed in *Boylan*, *Mierzejewski* "specifically invoked *Fultz* in support of its holding" *Boylan*, slip op p 5. We reject defendant's argument in this regard.

In sum, we find that the trial court did not err in denying defendant's motion for summary disposition. Viewing the evidence in a light most favorable to plaintiff, defendant's construction of the service driveway created a new hazard that resulted in a duty to plaintiff that was separate and distinct from defendant's duties under defendant's contract with the church.

Reversed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello