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Reaction

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Michigan Supreme Court Issues Opinion Clarifying Third Party Contractor's Potential Liability in Negligence Claim

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The Michigan Supreme Court has clarified the affect of *Fultz v Union-Commerce Assoc.*[1] in an opinion released on June 6, 2011, *Loweke v Ann Arbor Ceiling & Partition Co., L.L.C.*[2] At first glance, one may be concerned that *Loweke* serves to alter the landscape of contractor liability. However, upon closer inspection litigants may realize that the *Loweke* framework is strikingly similar to that created by *Fultz*.

Separate and Distinct under *Fultz*

Decided in 2004, *Fultz* is widely credited with changing the landscape in tort liability for defendants whose only connection to a matter was a services contract. The decision in *Fultz* addressed whether a third-party to a contract could nevertheless enforce a contracting party's failure to uphold its duties under the contract. Borne from the *Fultz* decision then was the common catch phrase "separate and distinct." As the *Fultz* reasoning went, "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."[3]

In the years that followed, the *Fultz* decision was the weapon used to dismiss a number of defendants from a variety of circumstances, but generally in claims of premises liability.[4] At first glance, the Supreme Court's decision in *Loweke* threatens to undermine the road paved by *Fultz*.

Understanding *Loweke*

The *Loweke* decision is based upon an injury allegedly sustained by a plaintiff while working at a construction job site. The plaintiff was standing next to several large sheets of cement board set in a hallway by defendant, Ann Arbor Ceiling's employees. The sheets of cement board fell on plaintiff's right knee, causing him injury. Subsequently, the plaintiff filed suit against defendant Ann Arbor Ceiling claiming general negligence.

In response to the claim, defendant filed a motion for summary disposition arguing that *Fultz* stood for the proposition that it did now owe plaintiff a duty under a theory of negligent performance of its contractual duties. The trial court granted defendant's motion for summary disposition and the Court of Appeals affirmed.[5] Plaintiff appealed the ruling of the Court of Appeals to the Michigan Supreme Court.

The Court granted leave to "clarify *Fultz*'s 'separate and distinct' mode of analysis…."[6] The Court traced the pre-*Fultz* history as well as the reasoning of *Fultz* and its progeny. The Court specifically notes that "[s]ince *Fultz* and its progeny were issued… courts have erroneously interpreted this Court's

1 470 Mich 460 (2004).

2 *Loweke v Ann Arbor Ceiling & Partition Co.*, L.L.C., ___ Mich ___, ___ N.W.2d ___ (2011).

3 *Fultz*, supra at 467.

4 See, e.g., *Campbell v Kroger, Inc.*, unpublished per curiam opinion of the Court of Appeals decided March 15, 2011 (docket number 295376, 296309); *Socia v Pacers Baskeball Corp.*, unpublished per curiam opinion of the Court of Appeals decided February 9, 2010 (docket number 284845); *Churchill v J.P. King Auction Co., Inc.*, unpublished per curiam opinion of the Court of Appeals decided April 10, 2008 (docket number 274461); *Anderson v Torre & Bruglio, Inc.*, unpublished per curiam opinion of the Court of Appeals decided September 29, 2005 (docket number 262200).

5 *Loweke v Ann Arbor Ceiling & Partition Co., Inc.*, unpublished per curiam opinion of the Court of Appeals decided April 22, 2010 (docket number 289451).

6 *Loweke*, ___ Mich ___ at slip op 2.

decisions as rejecting accepted tort-law principles and creating a legal rule 'unique to Michigan tort law,' which bars negligence causes of action on the basis of a lack of duty if a third-party plaintiff alleges a hazard that was subject of defendant's contractual obligations with another."[7]

To remedy the error employed by the lower courts, the Court then further defined its intentions in *Fultz*. In doing so, the Court identified that the true import to be taken from *Fultz* is that the courts must focus on "whether a legal duty independent of a contract" exists.[8] Determining whether a duty exists "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."[9] The Court stated:

> 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. As this Court has historically recognized, a separate and distinct duty to support a cause of action in tort 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.[10]

To emphasize that point, the Court reiterated, "'whether a particular defendant owes *any duty at all* to a particular plaintiff in tort' is generally determined without regard to the obligations contained within the contract."[11] On the contrary, in determining whether a duty is owed to a noncontracting plaintiff, courts should only look to see whether a duty is owed via common law, statute or arising out of a special relationship.[12]

Practical considerations after *Loweke*

It is noteworthy that the Michigan Supreme Court in *Loweke* did not rule that the plaintiff was owed a duty by the defendant but instead returned the question for the trial court's consideration.[13] As such, the practical effects of *Loweke* will be played out in the trial courts and Court of Appeals over the next several months.

However, much is to be gathered from the Court's opinion. Specifically, the Court repeatedly references a prior Court of Appeals matter, *Osman v Summer Green Lawn Care, Inc.*[14] The *Fultz* decision uses *Osman* as an example of a situation where there is a duty "separate and distinct" from the applicable contract. In *Osman*, plaintiff slipped and fell on ice that was negligently placed by the defendant, snow removal contractor. There, the court specifically found that the contractor created a new hazard by placing snow in a precarious place where it should have known individuals would be walking.[15] Under those circumstances, the *Osman* court reasoned that a third-party could bring suit against a contractor despite that fact that she was not a party to the subject contract.

The *Loweke* decision can thus be seen as a reminder from the Court that "entering into a contract with another pursuant to which one party promises to do something does not alter the fact that there exists a preexisting obligation or duty to avoid harm when one acts."[16] With that premise, the underlying lesson to be learned from *Loweke* is that a contractor remains subject to the general duty to act with ordinary care and its failure to do so will subject it to tort liability.

However, *Loweke* apparently has no impact where a contractor simply fails to perform the duties required under the subject contract. For example, if a plaintiff slips and falls on snow and ice and the contractor fails to perform snow and ice removal services under the subject contract, the contractor would not be liable to the plaintiff. That is true because, as *Loweke* recognized, "there is no duty that obligates one person to aid or protect another."[17] Consequently, the law as to third-parties remains that a contractor is likely better off to completely fail to perform under a contract than to perform without due care.

7 *Id*, at slip op 6, citing, *Bennett v MIS Corp*, 607 F3d 1079, 1091-1092, 1094-1095 (CA 6, 2010); see also, *Hatcher v Senior Home Health Car Inc*, unpublished per curiam opinion of the Court of Appeals decided August 19, 2010 (docket number 289208).

8 *Id*, at slip op 11. (Emphasis in original).

9 *Id*, at slip op 12. (Citations omitted).

10 *Id.* (Citations omitted).

11 *Id.* (Citations omitted, emphasis in original).

12 *Id*, at slip op 13-14.

13 *Id*, at slip op 14.

14 209 Mich App 703 (1995).

15 *Id*, at slip op 9-10, citing *Fultz*, supra at.

16 *Id,* at slip op 12-13. (Citations omitted).

17 *Id* at slip op 7, citing *Williams v Cunningham Drug Stores*, Inc., 429 Mich 495 (1988).

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