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Contractors Owe A Duty To Perform Contracts With Due Care

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In *Davis v Venture One Construction, Inc.*, ___ F3d ___ (6th Cir 2009) (Docket No. 08-1439), the U.S. Court of Appeals for the Sixth Circuit interpreted the “separate and distinct” legal duty analysis that the Michigan Supreme Court adopted in *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004).

The Sixth Circuit recognized that, “[a] contract does not give rise to a duty of a contracting party to a third party to perform the services described by the contract,” but held that, “[a] duty ‘separate and distinct’ from the duty to perform the contract, arises between a contracting party and a third party when the contracting party creates a ‘new hazard.’” The Court held that a contractor owes a duty to act with due care to third parties who are at risk of reasonably foreseeable harm stemming from the performance of the contract. A contractor has a duty to perform its contract “with due care toward third parties who might suffer injury resulting from negligence.”

In *Davis*, there was evidence that while the construction project was taking place, a subcontractor’s employee removed an interior door and, contrary to contract specifications, placed it outside the construction zone and in an area that third parties, including Plaintiff, regularly used in the course of their work. The door fell on Plaintiff, allegedly causing injury. Disputed evidence was presented that Defendant general contractor’s construction manager knew of the door’s placement and did not remedy the situation. There also was evidence that Defendant directed and controlled the subcontractor’s work to the extent that Court concluded that the subcontractor was Defendant’s servant.

The Sixth Circuit held that the hazard created by the door placement was a “new hazard” because it was outside of the construction zone and within the area that Plaintiff and her co-employees worked. The Court ruled that, viewing the facts in the light most favorable to Plaintiff, Defendant created the hazard when persons working for it leaned and left the door unsecured in an area outside of the construction zone and in an area that Defendant knew Plaintiff and her co-employees used. Thus, the Court reversed the order granting summary disposition in favor of the Defendant general contractor and remanded to the trial court for further proceedings.

SECRET WARDLE NOTES:

Plaintiffs seeking to hold contractors liable for injuries to third parties arising out of the performance of contract duties will likely rely on *Davis v Venture One Construction, Inc.* in support of their claims. Arguably, the Sixth Circuit interpreted *Fultz v Union-Commerce Associates* more broadly than Michigan courts have interpreted it, to avoid liability, contractors must perform their contract obligations with due care to avoid injury to third parties who might suffer personal injury if construction activities intrude into areas outside the “construction zone”.

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