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MAPPING LEGAL SOLUTIONS FOR THE CONSTRUCTION INDUSTRY

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## A CONTRACTOR OWES NO DUTY TO A PLAINTIFF SEPARATE AND DISTINCT FROM THE DUTY OWED UNDER ITS CONTRACT

By Jack Weston

In *Banaszak v Otis Elevator Company*, et al, the Michigan Supreme Court considered whether a contractor on a construction project owed an independent duty to a plaintiff injured on that project, above and beyond the duties the contractor owed under its contract.

*Banaszak* involved a claim for back injuries Plaintiff claimed arose from a fall while working during the construction of the new Northwest Airlines terminal at Detroit Metropolitan Airport. Defendant Hunt Construction Group was a contractor on the project, and hired Plaintiff's employer, State Group, to perform the electrical work. Defendant Otis Elevator was also a contractor, whose duty was to construct the elevators, escalators, and moving walkways.

On the day of the injury, Plaintiff was working in the vicinity of several moving walkways, which were in the process of being installed by Otis Elevator. The machinery that ran the walkways was located in machine pits, known as wellways, which were located in holes in the floor, near the related walkways. The wellways had permanent aluminum covers, but, at the time of the accident, Otis had covered the involved wellway with a temporary cover consisting of a sheet of plywood. During the course of her job, plaintiff walked on this plywood, which collapsed, causing her to fall into the wellway and be injured.

Plaintiff filed a cause of action alleging negligence against Hunt Construction, Otis Elevator, Northwest Airlines, and Wayne County, as the owner of the premises. Subsequently, Wayne County was dismissed based on governmental immunity. The remaining defendants filed motions for summary disposition, premised upon various theories of defense. Plaintiff's claim as to Otis was that it was the entity responsible for the wellway, and that it failed to adequately secure the area to prevent the type of accident that occurred.

The trial court granted Otis' motion, holding that Otis, as a subcontractor, did not owe any duty to the employees of another subcontractor working at the same site. On appeal, Plaintiff asserted that the trial court erred, because Otis was liable for her injury based on a

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While acknowledging that the temporary cover over the wellway was "inadequate," the Michigan Supreme Court refused to allow the Court of Appeals to expand the concept of duty under a construction contract as outlined under *Fultz v Union-Commerce Associates*. Because the duty to guard the wellway arose from the construction contract, it was not a "new hazard," and did not therefore create any duties independent of those under the contract. Because Plaintiff was not a party to that construction contract, she was owed no duty by the subcontractor, Otis Elevator Company, and Otis had no liability for her injury. This is an important concept, because it effectively bars the employees of one subcontractor from suing another subcontractor for injury relating to that subcontractor's work, as long as no "new hazard," as defined under *Fultz*, has been created by that work.

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common-law theory of negligence. The Michigan Court of Appeals, citing *Fultz v Union-Commerce Associates*, 470 Mich 460 (2004), held that the trial court erred in granting summary disposition in favor of Otis Elevator, and reversed the trial court.

The Court of Appeals noted that Otis had a contractual obligation to provide protection at floor openings like the subject wellway. While the Court felt that Otis Elevator may have arguably breached its duty to provide *adequate* coverings, and to maintain reasonable safeguards, it acknowledged, citing *Fultz, supra* at 470, that this duty was contractual, and in the absence of a duty to act separate and distinct from the contract, Otis had no liability for injuries to third persons to the contract. The Court went on to observe, however that, under *Fultz*, a separate and distinct duty, independent of any duties under the contract, will arise when a defendant creates a “new hazard.” *Id.* at 469.

The Court of Appeals noted that, like Plaintiff in *Fultz*, it was undisputed that Ms. Banaszak was not a party to the contract between Northwest Airlines and Otis Elevator, and there would therefore be no duty owed her by Otis under that contract. Plaintiff asserted, however, that Otis created a “new hazard” when it installed the temporary plywood cover without warning workers in the vicinity that the permanent aluminum cover was removed and was not just hidden under the piece of plywood. The Court of Appeals believed that removal of the structural aluminum covers, and substituting inferior plywood covers, created the risk in this case, and was a hazard for other users of the premises. Furthermore, observing that discovery seemed to demonstrate Otis Elevator’s knowledge of the potential hazards posed by the wellways, the Court of Appeals held that Otis Elevator’s performance, and choices of performance, were negligence issues and not duty issues, which were questions of fact for the jury. The Court concluded that: “Because Otis Elevator owed a separate and distinct duty from that required under its contract with Northwest Airlines, the trial court erred in granting summary disposition in favor of Otis Elevator and dismissing plaintiff’s claim.” The Court reversed the trial court, and Otis appealed to the Michigan Supreme Court.

The Supreme Court, also applying *Fultz v Union-Commerce Associates*, summarily reversed the Court of Appeals, without entertaining oral argument. While agreeing with the Court of Appeals that *Fultz* controlled, the Supreme Court disagreed with the Court of Appeals analysis that the use of the plywood cover created a “new hazard,” which would subject Otis to a separate and distinct duty from that required under its contract. In a one-paragraph opinion, the Supreme Court noted: “Otis entered into a contract to install moving walkways in a new airport terminal. As part of that contract, Otis was required to provide a cover over the “wellway,” an opening at the end of the moving walkway that contains the mechanical elements. The purpose of the cover was to protect persons using that area. The plaintiff was injured when she stepped on an inadequate piece of plywood covering the “wellway.” This hazard was the subject of the Otis contract. As a result, Otis owed no duty to plaintiff that was “separate and distinct” from its duties under the contract. “

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