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Back to Basics? Supreme Court Guts *Fultz* Defense in Opinion that Crosses Partisan Lines

By Drew Broaddus

The principles articulated in *Fultz v Union-Commerce,* 470 Mich 460 (2004) have long protected construction subcontractors, snow removal contractors, and other types of businesses from negligence claims brought against them by third-parties. Under *Fultz,* a party to a contract cannot be sued in negligence for failing to perform its duties under the contract. Under such circumstances, a plaintiff who is not a party to the contract cannot state a cause of action for negligence, unless the plaintiff identifies an independent duty that the defendant owed to him or her, apart from the contract. A common example is a business invitee who slips on snow or ice in the parking lot of a retail store, and tries to sue a snow removal contractor that was hired by the store for failing to plow. *Fultz* bars such claims. The result under *Fultz* was less certain, however, when the snow removal contractor accidentally missed an area, damaged the asphalt while plowing, or deposited the plowed snow in a way that arguably increased the hazard to the plaintiff.

In recent years, the scope of the *Fultz* defense had been expanded by holdings of the Michigan Court of Appeals and, to a lesser extent, peremptory orders of the Michigan Supreme Court in *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087 (2007) and *Banaszak v Northwest Airlines, Inc*, 477 Mich 895 (2006). As interpreted by these decisions, *Fultz* had evolved to bar "negligence causes of action on the basis of a lack of duty if a third-party plaintiff alleges a hazard" that was merely "the subject of" defendant's contractual obligations with another. See *Loweke v Ann Arbor Ceiling,* __ Mich __ (2011) (No. 141168), Slip Op at 6. Indeed, an unpublished 2010 Court of Appeals Opinion went so far as to say that *Fultz* barred negligence claims if the injury was "even remotely connected to a contractual relationship."

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The Court in *Loweke* specifically noted, at footnote 3, that it *was not* overruling *Fultz*. However, several post-*Fultz* decisions often relied upon by the defense bar, including *Mierzejewski* and *Banaszak*, no longer remain good law in light of *Loweke.*

According to *Loweke,* courts presented with a *Fultz* defense should begin their inquiry not with the contract. Rather, courts are now instructed to begin with an analysis of whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort.

By referring to a broad "common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons," *Loweke* opens the door for virtually any injured party to argue that they were owed an independent common-law duty of ordinary care.

It should be noted that plaintiffs have also frequently sought to avoid *Fultz* defenses by arguing that they are third-party beneficiaries of the contract. *Loweke* does not speak to this aspect of *Fultz* and plaintiffs who take this route will still have the difficult task of establishing their third-party beneficiary status under MCL 600.1405, as interpreted most recently in *Shay v Aldrich,* 487 Mich 648 (2010).

The *Fultz* decision itself identified two exceptions to this bar: where the plaintiff was an intended third-party beneficiary of the contract, and where the defendant breached a "separate and distinct duty" apart from the contract. In *Loweke*, *supra*, the Michigan Supreme Court sought to clarify the "separate and distinct" legal duty analysis that it had previously adopted in *Fultz.*

In *Loweke*, the Court rejected *Mierzejewski, Banaszak*, and other post-*Fultz* decisions that had significantly curtailed (or arguably extinguished) the "separate and distinct duty" exception to *Fultz. Loweke* arose out of an accident that occurred at a construction site where the plaintiff was working for an electrical subcontractor. The defendant was a carpentry and drywall subcontractor. The defendant's employee allegedly left more than twenty sheets of cement board stacked against the hallway wall. While the plaintiff was working on

installing wiring in the hallway, the cement boards fell on the plaintiff and injured his leg. The plaintiff filed a lawsuit alleging that the defendant negligently stacked the cement boards and created a "new hazard" which did not previously exist.

The Court of Appeals held that, under *Fultz,* the defendant's action did not go beyond the requirements of the contract. The Court of Appeals looked at the terms of the contract and made a determination of whether defendant's action of stacking the boards was required under the contract. After reviewing the contract, the Court of Appeals found that there was little question that the alleged hazard was not outside the construction zone and did not present any unique risk not contemplated by the contract. Therefore, the plaintiff's claim was based on defendant's negligence in performing the requirements of its contract, and as a result, the defendant owed no duty separate and distinct to the plaintiff.

The Supreme Court reversed and remanded in an opinion that was signed by 5 Justices, and did not generate a dissent.[1] The Court held that *Mierzejewski, Banaszak,* and the Court of Appeals' holding in *Loweke* were all based upon "the mistaken belief that *Fultz* extinguished preexisting common-law duties." *Loweke,* Slip Op at 14. *Fultz* "did not extinguish the simple idea that is embedded deep within the American common law of torts…: if one having assumed to act, does so negligently, then liability exists as to a third party for failure of the defendant to exercise care and skill in the performance itself." *Loweke,* Slip Op at 13. Rather than looking to the contract first in such cases, the Court in *Loweke* clarified that under *Fultz,* the "proper initial inquiry" is "whether, aside from the contract, defendant owed any independent legal duty to the plaintiff." *Id.* at 14. The Court further clarified that this "independent legal duty" need not be imposed by statute, but may simply be the general "common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings."

The essential holding of *Loweke* can be summarized as follows: "a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to non contracting third parties in the performance of the contract." *Loweke,* Slip Op at 2. In so holding, the Court explicitly rejected the reasoning of *Hatcher v Senior Home Health Care,* unpublished Court of Appeals opinion, released 8/19/10 (289208), *Carrington v Cadillac Asphalt* unpublished Court of Appeals opinion, released 2/9/10 (Docket No. 289075), and *Bennett v MIS Corp,* 607 F3d 1076 (6th Cir 2010), along with *Mierzejewski* and *Banaszak*. The Court appears to have been persuaded by the Sixth Circuit's criticism of post-*Fultz* jurisprudence in *Davis v Venture One Constr, Inc,* 568 F3d 570 (6th Cir 2009) – even though *Davis* was later rejected by the Sixth Circuit in *Bennett* for being inconsistent with Michigan law.

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[1] Justice Hathaway concurred in the result only, while Justice Zahra did not participate because he was on the Court of Appeals' panel in *Loweke.*

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