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THE MICHIGAN SUPREME COURT CLARIFIES THE LAW APPLICABLE TO TORT CLAIMS BASED ON THE PERFORMANCE OF CONTRACTUAL OBLIGATIONS

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In *Loweke v Ann Arbor Ceiling & Partition Co., LLC*, ___ Mich __; ___ NW2d ___ (June 6, 2011), the Michigan Supreme Court clarified when a plaintiff can bring an action in tort based on a defendant's negligence in performing obligations imposed by a contract with another party.

The plaintiff in *Loweke* was an electrician and a subcontractor on a construction project at the Detroit Metro Airport. He was injured when cement boards that another subcontractor left leaning against a wall at the site fell onto his right leg. The plaintiff and his wife brought an action against the ostensibly responsible subcontractor, arguing that his injuries were the direct result of its employee's negligence. The subcontractor sought summary disposition, contending that, under the Michigan Supreme Court's opinion in *Fultz v Union-Commerce Assoc*, 470 Mich 460, 469-470; 683 NW2d 587 (2004), it did not owe the plaintiff a duty of care. All of its work on the jobsite, the subcontractor argued, was pursuant to an agreement with the general contractor. Absent the agreement, it would not have performed any work on the airport construction project at all. Therefore, in its view, it did not owe the plaintiff a duty of care "separate and distinct" from its agreement with the general contractor as required by *Fultz* and the plaintiff could not state a negligence claim.

The trial court agreed, as did the Michigan Court of Appeals. But in *Loweke*, the Michigan Supreme Court (absent Justice Zahra, who participated on the Court of Appeals panel) held that the Court of Appeals and the trial court misinterpreted *Fultz*. Indeed, *Loweke* establishes that courts throughout Michigan have been misinterpreting *Fultz* since it was issued in 2004.

Fultz itself was meant to clarify the law applicable to claims based on a defendant's negligent performance or nonperformance of contractual obligations. Until *Fultz*, courts had sometimes used a misfeasance/nonfeasance dichotomy, holding that a non-party to a contract could not bring an action in tort when a defendant failed to perform its contractual obligations (nonfeasance) but *could* bring a tort claim when a defendant performed contractual obligations owed to another party negligently (malfeasance). This distinction, the *Fultz* court noted, was often merely semantic. Consequently, the Court articulated a slightly new test, albeit one grounded in language of previous decisions and meant to clarify their meaning: a plaintiff could bring a tort claim based on the defendant's performance of contractual obligations only when the defendant owed the plaintiff a duty that was "separate and distinct" from the contract.

This rule had an apparently unintended result. Courts began to conclude, as in *Loweke*, that, if a defendant's conduct was governed at all by contract, the contract somehow removed the defendant's conduct from the potential liability imposed by the common law. In other words, a contract operated as a "get out of jail free" card: a defendant could avoid liability to a non-party to a contract simply by establishing that its conduct was governed by a contract.

Loweke makes it clear that the Michigan Supreme Court never intended *Fultz* to have such a sweeping impact. The inquiry required by *Fultz* is not whether a supposed duty is imposed by a contract but whether it is imposed by a source *other* than a contract. Courts are to determine whether the defendant owed the plaintiff a duty under Michigan's statutes, "preexisting tort principles," or "the generally recognized common-law duty to use due care in undertakings ..." *Loweke, supra* at *12. If a duty can be found in one of these sources, then a cause of action will lie, even if the duty is also covered by the defendant's contract. If these sources impose no duty and the defendant's alleged duty can be found only in a contract, then the plaintiff cannot state a claim in tort.

Ultimately, *Loweke* affirms a simple rule: if one acts, even pursuant to a contract, one may be liable to a third party for failure to exercise due care. *Id.* at *13. *Fultz* was not meant to extinguish this longstanding rule. It stands only for the proposition that a nonparty to a contract cannot state a tort claim based duties that are imposed *solely* by contract. The central question, even under *Fultz*, remains whether the plaintiff can establish a duty imposed by statute, common law, or the general duty to use due care.

Although the impact of *Loweke* remains to be seen, it is likely to expand the number of tort cases that survive motions for summary judgment, at least compared to the period in which *Fultz* was read expansively. *Loweke* makes clear, however, that the Michigan Supreme Court never intended *Fultz* to be read so broadly in the first place.

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