

# Michigan Supreme Court “Clarifies” Fultz Decision, Re-Defines Duty Person Performing Contractual Obligation Owes To Non-Contracting Third-Party

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On June 6, the Michigan Supreme Court issued a decision which the court stated was a “clarification” of its previous decision in *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004). In reality, the court did not simply “clarify” the Michigan law, but changed it regarding the potential liability of a party to a contract to a non-contracting third-party, effectively returning state law to what it was prior to 2004.

The *Fultz* decision held that a party to a contract could not be held liable to a non-contracting third-party for negligence unless the duty upon which the non-contracting third-party’s lawsuit was based upon alleged a duty which was “separate and distinct” from the duties set forth in the contract at issue.

According to the recent Michigan Supreme Court decision issued in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, No. 141168, (MSC, 2011), a contracting party’s assumption of contractual obligations does not extinguish or limit separately existing common law or statutory duties owed to a non-contracting third-party in the performance of the agreement. Instead, the analysis must focus on whether there can be a basis for a claim that a duty does exist from some other source, such as the common law or a specific tort statute.

In *Loweke*, an employee of a subcontract sued another subcontractor for a personal injury suffered as a result of the allegedly negligent stacking of drywall by the defendant subcontractor. Both subcontractors had separate contracts with the general contractor.

The defendant subcontractor moved for summary disposition, arguing that pursuant to the decision in *Fultz*, the defendant subcontractor owed no duty to the plaintiff that was “separate and distinct” from defendant’s contractual duties owed to the general contractor. The contract at issue stated that the

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defendant subcontractor was responsible for unloading, moving, lifting, protecting, securing, and dispensing of the drywall at issue. Both the trial court and the Michigan Court of Appeals agreed with the defendant’s position.

The Michigan Supreme Court, in reaching its decision in *Loweke*, first noted that it felt that courts in Michigan were erroneously interpreting the *Fultz* decision and creating a legal rule which was unique to Michigan law that resulted in the barring of negligence causes of action on the basis of a lack of duty if a third-party plaintiff alleged a hazard that was the subject of the defendant’s contractual obligation. As a result of this perceived problem, the Michigan Supreme Court decided to hear the *Loweke* case and “clarify” the rule of law in Michigan regarding this issue.

According to the Michigan Supreme Court, the “error” in the various decisions by courts that had interpreted the *Fultz* decision was that *Fultz* directed courts to focus on whether a particular defendant owed any duty at all to a particular plaintiff, and, thus, required an inquiry into whether, apart from the contract, a defendant was under any legal obligation to act for the benefit of the plaintiff. The Michigan Supreme Court indicated that a contracting party’s assumption of a contractual obligation did not extinguish or limit pre-existing common law or specific statutory duties owed to a non-contracting party in the performance of a contract.

The law in Michigan now is that a contracting party’s assumption of a contractual obligation does not extinguish or limit separate, pre-existing common law or statutory tort duties owed to a non-contracting third party in the performance of a contract. Courts must not permit the contents of the contract to obscure the inquiry of whether, apart from the contract, the defendant owed any independent legal duty to the plaintiff, such as one created by common law or statute.

The Michigan Supreme Court held that, as a general rule, a defendant owes the non-contracting party (the plaintiff) the common law duty to use ordinary care in order to avoid physical harm to persons and property in the execution of its undertaking. The fact that a defendant owes the same contractual obligation to a general contractor does not absolve the defendant from its common law duties to the public in general. Such a duty is “separate and distinct” from the defendant’s contractual obligations it owes to the general contractor. However, the court did not determine if this general rule or the exception regarding the absence of a duty on the part of the subcontractor to make the worksite safe for other subcontractors, see *Klovski v Martin Fireproofing Corp*, 363 Mich 1 (1961), applied because the issue had not been decided by the trial court.

The *Loweke* decision, while stated to be a “clarification” of *Fultz*, really is a departure from *Fultz* and a return to the law as it existed before *Fultz*. The effect of the *Loweke* decision will be to now permit more lawsuits by non-contracting third-parties who will rely upon general common law duties to support their “separate and distinct” claims. The defense that the duties alleged by the non-contracting plaintiff were not “separate and distinct,” from the defendant’s obligations under its contract, as

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previously permitted by *Fultz*, no longer exists.

Another issue, which has now been created by the *Loweke* decision, deals with the issue of the return to a misfeasance/nonfeasance test for determining if a "separate and distinct" duty exists. Under *Loweke*, there can be no liability to a non-contracting third-party if there is a finding of nonfeasance (the contractor failed to do anything). Liability can only be found if there is a finding of misfeasance (the contractor acted in a negligent manner).

The Michigan Supreme Court failed to provide any standard to determine when misfeasance, as opposed to nonfeasance, occurs. In some cases, the resolution may be straightforward (the contractor fails to perform anything required by the contract). In other cases, the resolution may be not so straightforward (the contractor performs part, but not all, of its required contractual obligations). This leaves the door open for future judicial interpretation and another possible future clarification by the Michigan Supreme Court.

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