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NEGLIGENT PERFORMANCE OF A CONTRACT: STILL AN UNNECESSARILY COMPLICATED ISSUE

BY TIMOTHY A. DIEMER, VANDEVEER GARZIA, P.C.

A common but confusing problem for the negligence lawyer arises when a party uses the terms of a contract to argue that a tort duty of care is also owed. This issue is analytically complex, and it certainly did not help that courts used at least three different standards for analyzing it.

The Michigan Supreme Court recently weighed on the issue of when a contractual duty can give rise to an action in tort. Previously, courts used a murky distinction between active misconduct (misfeasance) and a failure to act (nonfeasance) to determine when a contracting party can be held liable in tort. Under this framework, if a party undertook to perform a contract, and proceeded to perform on that contract, he could be liable in tort for harm actively caused in the course of that work; however, if a party agreed to perform a contract, but did not proceed to perform it, then no tort action was allowed against him for non-performance.¹

In *Fultz v CML*,² the Michigan Supreme Court thought it was doing litigants a favor by discarding the misfeasance/nonfeasance distinction in favor of a more workable approach. Under the new approach, a tort plaintiff is required to show a duty that is "separate and distinct" from the contract. But instead of creating a new or different rule of law, the Court was merely revising the misfeasance/nonfeasance analysis by incorporating an initial threshold question that must be addressed before the issue of misconduct or inaction arises. The separate and distinct analysis and the misfeasance/nonfeasance are both based on the same premise: the existence of an actionable duty.

The full meaning of this new pronouncement is less than clear. The *Fultz* opinion is full of unresolved questions and until its boundaries are more adequately addressed by appellate courts, this opinion could be used advantageously by both plaintiffs and defendants.

The Separate And Distinct Analysis

In *Fultz*, the Court addressed whether a slip and fall plaintiff could sue the snow removal contractor who had a contract with the supermarket where the plaintiff slipped and fell on an icy parking lot. The plaintiff's claim against the contractor was premised on an allegation that the contractor should have plowed the supermarket parking lot on the day

she fell and that the failure to do so constituted negligence.

The Supreme Court ruled that the plaintiff's action could lie only against the premise's owner because the snow removal contractor did not owe plaintiff a duty. "The injured plaintiff has no cause of action against [CML] because it breached no duty owed to plaintiff."³ Under the previous framework, the plaintiff's case should have been dismissed because the claim was based on nonfeasance, i.e., the failure to perform a contract, which gives rise to a cause of action solely in contract.

The Supreme Court could have simply reversed the Court of Appeals on this basis, but felt it was also necessary to offer some clarification to guide similar claims in the future. Instead of merely correcting the Court of Appeals' error, the Court instead ruled that each of these cases has an initial or threshold question: whether the defendant owed the plaintiff a "legal duty separate and distinct from the contractual obligation."⁴ If the answer is "no," then the analysis is effectively over.

The plaintiff's claim in *Fultz* failed because the alleged duty (to plow another's parking lot) could arise only from a contract. In other words, since a duty to plow the supermarket parking lot was not imposed on the contractor by the common law, a statute or an ordinance, the defendant could not be held liable in tort for the failure to breach a non-existent duty.

The Court's language, and the fact there was a concurring opinion, would seem to imply that the Court was moving the law in a different direction. But it is

difficult to identify much in this opinion that is new.

The separate and distinct inquiry is not really a new mode of analysis. Instead, the separate and distinct analysis had been a fixture in Michigan law for years.

For example, the Court of Appeals employed the separate and distinct analysis in ruling that one construction contractor could not sue another contractor in tort for the latter's delay because the obligation to perform work without unnecessary delay can arise only by contract.⁵ Since there was no duty to timely perform work separate and distinct from the contractual undertaking, no negligence action could be maintained.

In *Freeman-Darling*, the State of Michigan decided to construct a new prison in Ypsilanti. Instead of issuing one general contract and allowing the general to pick subcontractors to coordinate the project, the State chose to issue several prime contracts covering various phases of the construction. The lawsuit was between two of the contractors.

One contractor sued another arguing that the defendant negligently performed its contract with the State thereby causing delays and increased costs for the plaintiff.⁶ The Court made note of the misfeasance/nonfeasance distinction, but based its decision on the more general principle that there must be a breach of duty distinct

from breach of contract in order for a negligence claim to arise.

The Court ultimately ruled in the defendant's favor, finding that the plaintiff failed to show that the defendant owed the plaintiff a duty separate from its contractual undertakings with the State, mainly because the defendant had no duty to perform its obligations regarding the prison construction in the absence of the contract. The Court emphasized the fact that the defendant did not have a general duty, owed to the public-at-large, to perform the work in question in a timely manner and that this duty arose solely out of the contract. The court stated:

"... the Court instead ruled that each of these cases has an initial or threshold question: whether the defendant owed the plaintiff a "legal duty separate and distinct from the contractual obligation.."

ASR did not violate a duty imposed upon all, for the common law does not insist that contractors perform their work without unnecessary delay. The contractual relationship was not merely the occasion of a duty arising by operation of law; rather, the entire existence of the duty depended upon the contract promise. Therefore, the breach of those contractual obligations could not provide the basis for an action sounding in tort.⁷

Also, the Michigan case, which essentially introduced the

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misfeasance/nonfeasance distinction emphasized the separate and distinct query. “[I]f a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not.”⁸

Misfeasance Is Still The Basis For Negligent Performance Of A Contract

Perhaps the importance of *Fultz* is the instruction that we return to the separate and distinct analysis that had been too often ignored. But the misfeasance/nonfeasance test has the same theoretical underpinnings as the separate and distinct question. This is evident from the Court’s conclusion found at the end of *Fultz*.

To summarize, if defendant fails or refuses to perform a promise, the action is in contract. If defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made.⁹

Rather than focusing on the labels placed on these terms, consider the underlying rationale of holding contracting parties liable in tort for active misfeasance. Misfeasance was actionable in

tort solely because active misconduct was in violation of the common law duty of reasonable care under the circumstances. Quite simply, injuring somebody by actively creating a hazardous condition runs afoul of the common law. There is no need to look at the terms of a contract to deem this conduct negligent.

The Court in *Fultz* seemed to recognize this and said that a misfeasance claim is essentially another name for a separate and distinct claim. “We believe that the ‘separate and distinct’ **definition** of misfeasance offers better guidance in determining whether a negligence action based on a contract and brought by a third party to that contract may lie because it focuses on the threshold question of duty in a negligence claim.”¹⁰

Nonfeasance, on the other hand, will rarely ever violate the common law because there is generally no duty to protect others from harm or voluntarily act for another’s benefit, unless there is a special relationship. But even this general rule against no duty to save or protect against harm comes with a caveat under *Fultz*. In stating that tort liability will not generally arise out of inaction, the Court indicates that sometimes a tort duty can arise “by implication” out of the contract.¹¹ This peculiar statement appears to leave the door open to claims based on nonfeasance where the contracts place a contracting party in a position where protective action may be required.

Ultimately, what the Court seems to be getting at, but did not

actually say, is that a tort action will lie only when the performance of the contract creates a new hazard or dangerous condition. The fact that the defendant in *Fultz* did not create the hazardous icy condition was the reason that particular tort claim failed, but the Court did not set this out as a bright line rule for all future litigants. “In this case, the Court of Appeals analysis is flawed because defendant CML’s failure to carry out its snow-removal duties owed to defendant created no new hazard to plaintiff.”¹² Again, it is not clear if the failure to create a peril will preclude tort liability each time.

In fact, as an example where a plaintiff showed a separate and distinct duty, the Court noted another snow removal case (*Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995)) where the contractor negligently plowed the snow into an area of the parking lot where it should have known that the snow was likely to melt, and then refreeze. Thus, the contractor actively created a new peril. The *Fultz* Court noted the distinction between that case and the present one. “In that case [*Osman*], however, the defendant had breached a duty separate and distinct from its contractual duty when it created a *new* hazard by plowing snow. . . .”¹³

Conclusion

In attempting to clarify this complicated issue, the *Fultz* opinion is saturated with ambiguity and still leaves many questions unanswered. The

true impact of the decision will not likely be fully known until litigants begin to test the limits of the decision and the appellate courts are forced to address the outer edges of the decision. Until then, the decision seems ripe for advantageous use by both plaintiffs and defendants. ☺

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Endnotes

- 1 *Hart v Ludwig*, 347 Mich 559, 562 (1956).
- 2 ___ Mich ___; ___ NW2d ___ (2004) (docket no. 121613), released July 14, 2004.
- 3 *Fultz, supra*, slip op, pp 1-2.
- 4 *Id.* at 9.
- 5 *Freeman-Darling, Inc v ASR, Inc*, 147 Mich App 282 (1985).
- 6 *Id.* at 283.
- 7 *Id.* at 288.
- 8 *Hart, supra*, 347 Mich 565 (citation omitted.)
- 9 *Fultz, supra*, slip op, p 13.
- 10 *Id.* at 9.
- 11 *Id.* at 13.
- 12 *Id.* at 12.
- 13 *Id.*

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