

## SC Opinion: Contracting party's assumption of contractual obligations does not abrogate its preexisting common-law and/or statutory duties to third parties

7. June 2011 By Madelaine Lane

On June 6, 2011, the Michigan Supreme Court decided *Loweke v. Ann Arbor Ceiling & Partition Co, LLC*, No. 141168. In *Loweke*, the Court clarified its prior ruling in *Fultz v. Union-Commerce Assoc.*, 470 Mich 460 (2004) and held that when engaging in *Fultz*'s "separate and distinct" analysis, courts should remember that despite whatever contractual obligations the defendant has entered into, the tort action is proper if the defendant owes any independent legal duty to the non-contracting third party.

Here, the plaintiff was the employee of an electrical subcontractor who was injured when multiple 4x8 cement boards, which had been negligently leaned against the wall by the defendant, fell on his leg. Defendant, a drywall and carpentry subcontractor, filed a motion for summary disposition relying on the Court's prior decision in *Fultz* and argued that it was not liable to plaintiff in tort because the duties defendant breached were not separate and distinct from defendant's obligations under the contract. The trial court agreed with the defendant and the Court of Appeals affirmed holding that, under *Fultz*, a defendant is not liable to a plaintiff in tort if the defendant is alleged to have breached a duty required under the contract. The Court of Appeals further noted that this interpretation of *Fultz* was supported by two Supreme Court preemptory rulings.

The Supreme Court granted leave to appeal to clarify what it described as an erroneous interpretation of its holding in *Fultz*. Since *Fultz*, Michigan courts have interpreted the ruling to grant immunity to defendants against certain negligence claims by non-contracting third parties. The Court held in *Loweke*, however, that merely because a recognized statutory or common-law duty is also required under the contract does not automatically bar a third party from pursuing a tort action. Rather, the third-party plaintiff has a valid tort claim so long as the defendant has any duty at all to the plaintiff. In this case, for instance, the plaintiff claimed that defendant breached the common-law duty to exercise reasonable care. However, the Court declined to rule whether this particular plaintiff was owed that particular duty of care. Accordingly, the Court of Appeals judgment was reversed and the case was remanded to the trial court for proceedings consistent with the Court's opinion.

Justice Cavanagh authored the majority opinion joined by the entire bench, except for Justice Zahara who did not participate because he was on the Court of Appeals panel. Justice Hathaway noted that she concurred in the result only.