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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

Snow Removal Contractor Not Liable for Slip and Fall on Ice

By Drew W. Broaddus **June 7, 2017**

In *Fawaz*, unpub op at 1, the Plaintiff slipped and fell in the parking lot of a retail store operated by Younis Enterprises, LLC. Younis Enterprises, LLC contracted with Aces 4 Season Lawn & Snow Care, Inc "for snow removal services for the Petsmart parking lot where plaintiff fell." *Id.* at 2. Plaintiff sued both Younis Enterprises, LLC and its snow removal contractor (although the Plaintiff voluntarily dismissed Younis Enterprises, LLC). *Id.* at 1 n 1. The snow removal contractor moved for summary disposition, based on the lack of a duty owed. *Id.* at 1. The trial court granted the contractor's motion, and the Court of Appeals unanimously affirmed.

The panel began by looking at *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004) and the Supreme Court's subsequent clarification/modification of *Fultz* in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157 (2011). The panel found "that the trial court correctly applied the applicable and governing legal principles set forth in *Fultz* … and clarified in *Loweke*" as follows:

> …[T]he trial court properly cited *Fultz* for the legal proposition that the court must determine that defendant owed plaintiff a duty separate and distinct from the defendant's contractual obligations. The trial court also recognized that without an independent

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In premises liability suits involving snow or ice, snow removal contractors are often named as co-defendants alongside the property owner. However, it is common for the complaint allegations against the contractor to either be vague or merely repetitive of those made against the property owner.

Because duty in the premises liability context "is conditioned upon the presence of both possession and control over the land," *Kubczak v Chemical Bank & Trust*, 456 Mich 653, 660 (1998), the plaintiff must articulate some other basis for imposing a duty upon the contractor.

Fawaz v Aces 4 Season Lawn & Snow Care, Inc, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2017 (Docket No. 330959), illustrates that in many cases, snow removal contractors – since they do not owe the duties of a premises owner or possessor – will not owe any actionable duty to persons entering the property after the work is done.

Fawaz, unpub op at 7-8, also illustrates that such plaintiffs generally cannot rely upon the contract between the property owner and the snow removal company to establish a duty.

Fawaz may have been a very different case if there had been evidence that the contractor created a "new hazard." However, the contractor cannot be sued in tort simply for not fulfilling its contractual obligations to a third-party's satisfaction.

> duty to plaintiff, a tort action on the basis of the contract cannot be successfully pursued. The trial court also correctly analyzed whether plaintiff had established that a duty to her existed that was separate and distinct from defendant's contractual obligations, ultimately determining that plaintiff had made no such showing. Therefore, … the trial court properly considered and decided the threshold question of whether any independent legal duty to plaintiff existed. *Fawaz*, unpub op at 4-5 (citations omitted).

Although the Plaintiff argued that the contractor "owed a duty to her independent of the contract with Younis Enterprises … to use due care in its maintenance of the Petsmart parking lot," the panel found no evidence in the record supporting "plaintiff's assertion that defendant failed to act with reasonable care in undertaking to maintain the Petsmart parking lot." *Id.* at 5. Simply put, there was "nothing in the record to suggest that defendant acted in a negligent manner in plowing and salting the Petsmart parking lot." *Id*. at 6.

Plaintiff also argued that she was a third-party beneficiary of the contract between Younis Enterprises, LLC and the snow removal company. The panel rejected this argument as well, noting that a "person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person." *Id.* at 7, citing MCL 600.1405. "By using the modifier directly, the Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Fawaz*, unpub op at 7 (citations omitted). "[T]he language of the contract between Younis Enterprises and defendant [the snow removal contractor] reflects no indication that the contracting parties were aware that the scope of their contractual undertakings encompasses a third party." *Id.* "Moreover, we have reviewed the contract language, and there is nothing in the clear contract terms, viewed from an objective standard, leading to the conclusion that defendant undertook to do something for plaintiff, or anyone else, as a third-party beneficiary." *Id.*

Finally, the panel clarified that – as underscored by the Supreme Court's recent decision in *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7 (2016) – it *was not* the contractor's burden under MCR 2.116(C)(10) to prove a negative; in other words, the contractor did not have to prove that it *did not* owe a duty. Rather, a defendant meets its burden under (C)(10) "by submitting affirmative evidence that negates an essential element of the non-moving party's claim." *Fawaz*, unpub op at 7. Here, "the crux of defendant's argument was that defendant did not owe plaintiff a duty of care" and the snow removal contractor "supported its motion with a copy of the contract between defendant and Younis Enterprises, a copy of the first amended complaint, defendant's maintenance log for the Petsmart parking lot, as well as … copies of the deposition transcripts of both plaintiff and [her sister, who witnessed the fall]." *Id.* at 8. Therefore, the contractor "produced ample documentation to support its argument that it did not owe plaintiff a duty of care, and that it had not breached any common-law duty of care to perform its undertakings pursuant to the contract in a reasonable, nonnegligent manner." *Id.*

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