

Legal Alert

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New Michigan Supreme Court Ruling Extends Business and Insurer Exposure to Personal Injury Claims

Lowering the shield that protects contracting businesses from personal injury lawsuits.

By Steven K. Stawski, Attorney

All businesses that own, lease, improve, service, or maintain property, including property management companies, contractors, and service providers—and their insurers, agents, and risk managers—are alerted to a new Michigan Supreme Court decision that erodes a once powerful defense to personal injury lawsuits.

The risk scenario is common: an injured visitor or employee initiates a lawsuit against a company that contracted to provide services, usually to a business or landowner for the maintenance, construction, or operation of its facilities, equipment, or premises.

Previously, business owners and their insurers could use contracts for maintenance, construction, or related services as a shield against negligence suits from personal injury plaintiffs. This protection, known as a *Fultz* defense, has shielded defendants from lawsuits since 2004.

The Michigan Supreme Court's new ruling on June 6, 2011 favors personal injury plaintiffs and may extend lawsuits that were previously subject to early dismissal by Michigan courts.

The Fultz Defense: Using Contracts to Dismiss Personal Injury Actions

Sandra *Fultz* fell and injured her ankle while walking across a business parking lot. She sued the premises owner and the property maintenance contractor for negligence, arguing that the property maintenance

contractor owed a duty to keep the premises safe for pedestrians.

Using its contract as a shield, the property management company argued that its plowing and salting obligations were solely for the benefit of the owner—that it owed no duty to the plaintiff, even when it did not perform its contract to plow or salt in the 14 hours before the accident. The *Fultz* court agreed and dismissed the personal injury case in favor of the property maintenance contractor.

The *Fultz* decision is significant because it replaced a decades-old and confusing “misfeasance” and “nonfeasance” analysis with one simplified question: whether the alleged duty is “separate and distinct” from the defendant’s obligations in the contract. After considering the obligations in the property service agreement, the *Fultz* court found that no duty existed “separate and distinct” from the defendant’s contract, and dismissed the case in favor of the contractor.

Since 2004, a wide range of businesses and insureds have benefitted from the *Fultz* defense, especially those with contracts that provide obligations for safety. For example, written agreements that require compliance with safety obligations, including governmental rules and regulations, have been used as a basis for dismissal of personal injury lawsuits. The “*Fultz* defense” became increasingly strong over time, and was even perceived by some as a type of immunity from suit.

In reversing this trend, the Michigan Supreme Court uncharacteristically acknowledged that two of its recent orders added to the confusion that applied *Fultz* protections to new extremes.

Loweke's Effect: Common Law and Statutory Duties Survive the Shield

The new *Loweke* ruling lowers *Fultz's* protective shield in favor of personal injury plaintiffs by preserving actions that arise from statutory and common law duties.

The situation in *Loweke* could occur at any business or job site: stacked materials fell on a subcontractor's employee, injuring his leg. The injured worker sued another subcontractor on the project, claiming that its employee negligently leaned the sheets of cement board against a wall that fell and caused his injury.

Instead of starting with the obligations in the contract, the Michigan Supreme Court focused first on the acts and conduct of the drywall subcontractor that could give rise to a duty—such as when the drywall subcontractor's employee stacked the cement board in a way that created a foreseeable risk of harm that endangered others who were working in the same area.

The *Loweke* decision holds that “a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to non-contracting third parties in the performance of the contract.” In other words, personal injury lawsuits may survive early dismissal if the complaint alleges a valid statutory or common law duty that exists outside of the obligations in a contract.

The *Loweke* decision has wide-ranging impact because it sets precedent for lawsuits by personal injury plaintiffs, including pedestrians, visitors, and employees against businesses that are performing contracts on site, usually for the construction, operation, and maintenance of facilities.

Statutory and Common Law Duties

Statutory duties are created by state and federal laws. For example, businesses that lease residential properties are under a statutory duty to keep the

premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises is located.

Common law duties are unwritten, legally enforceable rules that require every person to act with ordinary care so not to injure other persons or property.

Under *Loweke*, litigation will likely continue through the fact finding portion of the case, called discovery, to further evaluate a range of factors that could give rise to a common law duty, including: (1) the foreseeability of the harm; (2) the degree of certainty of injury; (3) the closeness of the connection between the conduct and the injury; (4) the moral blame attached to the conduct; (5) the public policy of preventing future harm; and (6) the burdens and consequences of imposing a duty and the resulting liability for the breach.

Protecting Business and Insurer Interests

From a business and risk management perspective, the Michigan Supreme Court's new ruling promotes increased attention to safety and proactive risk management.

From a litigation perspective, this new opinion may increase the number of personal injury lawsuits that previously would not have survived *Fultz's* prior interpretation. The particular facts of each case that may give rise to a common law or statutory duty will become increasingly important, and lawsuits that would otherwise have been dismissed early will continue at least through the fact finding portion of the lawsuit, and possibly, to trial.

Businesses should also seek additional protections from personal injury lawsuits through indemnity and insurance agreements that are designed to distribute and manage the financial impact of lawsuits and may provide additional and alternative defenses.

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