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**A Maintenance Contractor May
Not Be Sued in Tort for Non-
Performance of a Contractual Duty
by a Non-Party to the Contract**

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Your comments and articles are invited.

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Summary:

A Maintenance Contractor May Not Be Sued in Tort for Non-Performance of a Contractual Duty by a Non-Party to the Contract

In a recent Michigan Court of Appeals Opinion¹, summary disposition was affirmed in favor of defendant forklift manufacturer and defendant forklift maintenance company. The plaintiff in the case backed his forklift down a warehouse aisle, colliding with another forklift, and injuring

his foot. He claimed that his foot had strayed outside the operator's compartment.

Plaintiff sued the forklift manufacturer, alleging negligent design, negligent manufacture, negligent maintenance, failure to warn, and breach of implied warranty. Plaintiff also sued the company with which the owner of the forklift—plaintiff's employer—contracted to maintain the forklift, alleging that the maintenance company negligently maintained the machinery that caused his injury.

Applying the now disavowed misfeasance/nonfeasance analysis for determining whether a nonparty to a contract may sue a party to a contract for nonperformance of that contract, the trial court granted defendants' motion for summary disposition. The trial court also opined that there was no material question of fact and that defendant manufacturer was

¹ *Strauch v Raymond Corp*, 2005 Mich App LEXIS 3297.

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entitled to summary disposition as a matter of law. Plaintiff appealed both rulings to the Michigan Court of Appeals. In a unanimous opinion, the Michigan Court of Appeals recently affirmed both rulings.

The Court of Appeals opinion is noteworthy in its reliance on the “no duty” rule from *Fultz v Union Commerce Co.*,² a Michigan Supreme Court decision. In that case, the Supreme Court held that a negligence action “brought against a contractor on the basis of a maintenance contract” was untenable unless the contractor owed a plaintiff a duty “separate and distinct” from those it owed under the maintenance contract.³ In other words, “[i]f no independent duty exists, no tort action

based on a contract will lie.”⁴ The plaintiff in *Fultz* attempted to utilize the defendant’s non-performance of its maintenance contract as a basis for her negligence action.

Relying on *Fultz*, the Court of Appeals unanimously rejected plaintiff’s argument that defendant maintenance company’s “substandard checklist” created a new hazard to him, and thus gave rise to a duty “separate and distinct” from its contract. Because the maintenance company owed no duty of performance to plaintiff—a non-party to the contract—under the contract, and further owed no duty to plaintiff that was separate and distinct from

² *Fultz v Union-Commerce Assocs*, 470 Mich 460 (2004).

³ *Id.* at 461-462.

⁴ *Id.* at 467.

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that contract, the Court of Appeals panel held that plaintiff's negligent maintenance claim necessarily failed.

The Court of Appeals also concluded that plaintiff's claims with respect to the manufacturer were similarly baseless. Therefore, the Court of Appeals concluded that the trial court properly granted summary disposition in favor of both defendants.

ABOUT THE FIRM

Cardelli, Lanfear & Buikema, P.C. is an A/V rated firm that specializes in litigation matters with emphasis on personal injury and commercial defense litigation. It is dedicated to providing clients with the highest quality, cost effective legal services. The firm's areas of concentration include product liability, general negligence, insurance defense, and toxic torts. Cardelli, Lanfear & Buikema, P.C. also handles wrongful discharge and employment discrimination matters and environmental hazard claims. In addition to this focus on litigation matters, the firm is involved in a substantial amount of appellate work.

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