STATE OF MICHIGAN

COURT OF APPEALS

CREIGHTON E. FORESTER and DENISE M. FORESTER, Plaintiffs-Appellants, v ALLSTATE INSURANCE COMPANY, SERVPRO OF BLOOMFIELD & LIVONIA, a/k/a COLBY COMPANY, INC., and BELFOR USA, f/k/a INRECON, L.L.C., Defendants-Appellees.	UNPUBLISHED July 26, 2005 No. 260914 Oakland Circuit Court LC No. 2004-057221-NO

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants ServPro of Bloomfield & Livonia ("ServPro") and Belfor USA ("Belfor") (collectively referred to as "the contractors"), pursuant to MCR 2.116(C)(7) and (10). Plaintiffs also challenge the trial court's order granting summary disposition in favor of defendant Allstate Insurance Company ("Allstate") pursuant to MCR 2.116(C)(8). We affirm in part, reverse in part, and remand.

I. Facts

In July 2000, Steven Lunn's home in Bloomfield Hills suffered extensive water damage due to an overflowing toilet tank. Lunn's insurance provider, Allstate, contracted with ServPro to begin rehabilitation of the home. Belfor was also hired to perform repairs and rehabilitation of the home, after Lunn chose it from a list of Allstate's approved contractors. Approximately a year and a half after the initial incident, Lunn was relocated overseas for business reasons and sold his home to plaintiffs. In January 2003, plaintiffs filed a complaint against Lunn for fraudulent concealment and misrepresentation, among other claims. Plaintiffs and Lunn entered into a settlement agreement, in which Lunn paid plaintiffs $35,000 in exchange for the release of all plaintiffs' claims against him. In addition, Lunn executed an assignment of claims in favor of plaintiffs assigning to them any and all claims and causes of action he had against defendants. Plaintiffs then brought suit against defendants.

II. Statute of Limitations

Plaintiffs first argue that the trial court erred by granting summary disposition in favor of ServPro and Belfor based on the statute of limitations. We review de novo a trial court's decision on a motion for summary disposition. *Nastal v Henderson & Assocs Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). In reviewing a motion under MCR 2.116(C)(7), we accept the contents of the complaint as true unless the moving party contradicts the plaintiff's allegations and offers supporting documentation. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). We must also consider any affidavits, depositions, admissions, and other documentary evidence when reviewing a motion under MCR 2.116(C)(7), if the supporting materials are admissible into evidence. *Id*.

Plaintiffs argue that the six-year "statute of repose" in MCL 600.5839(1) applies to this case. Both this Court and the Michigan Supreme Court have recognized that this provision is both a statute of limitation and a statute of repose. *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980); *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 8; 687 NW2d 309 (2004). "For actions which accrue within six years from occupancy, use, or acceptance of the completed improvement, the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations. When more than six years from such time have elapsed before an injury is sustained, the statute prevents a cause of action from ever accruing" and thus acts as a statute of repose. *O'Brien, supra* at 15 (footnote omitted).

MCL 600.5839 is limited in scope to injuries "arising out of the defective and unsafe condition of an improvement to real property." Thus, we must determine whether the work that the contractors performed can be considered "an improvement to real property." As this Court has recognized, MCL 600.5839 does not define "improvement to real property." *Pendzsu v Beazer East, Inc*, 219 Mich App 405, 410; 557 NW2d 127 (1996). However, this Court has interpreted the phrase, stating:

> An improvement is a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable *as distinguished from ordinary repairs*." *Pendzsu, supra* at 410. The test for an improvement is not whether the modification can be removed without damage to the land, but whether it adds to the value of the realty for the purposes for which it was intended to be used. *Id*. at 410-411. In addition, the nature of the improvement and the permanence of the improvement should also be considered. *Id*. at 411. Furthermore, if a component of an improvement is an integral part of the improvement to which it belongs, then the component constitutes an improvement to real property. *Id*. [*Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 478; 586 NW2d 760 (1998)(emphasis added).]

In *Travelers Ins Co*, this Court held that the installation of a new circuit panel box and transformer constituted an improvement to real property for purposes of the statute. *Travelers Ins Co, supra* at 478-479. Similarly, this Court held that the relining of coke ovens and blast furnaces constituted an improvement to real property. *Pendzsu, supra* at 409-412. On the other hand, this Court held that the removal of an underground storage tank did not constitute an improvement for purposes of MCL 600.5839. *Pitsch v ESE Michigan, Inc*, 233 Mich App 578, 601; 593 NW2d 565 (1999).

In this case, the contractors' services did not constitute improvements within the meaning of MCL 600.5839, but rather, were merely ordinary repairs. ServPro provided "emergency drying and contents storage" services and water damage remediation. In addition, Belfor contracted to "provide all labor and material required to repair the specified real property, resulting from water damage at the property." The repair work and restoration that the contractors performed did not enhance the capital value of the property but merely returned the property to the state it was in before the water damage occurred. Because the contractors' services did not constitute an "improvement to real property" within the meaning of MCL 600.5839(1), that statute is inapplicable.

Because MCL 600.5839 does not apply to this case, the three-year statute of limitations for negligence actions under MCL 600.5805(10) governs plaintiffs' negligence claim. Plaintiffs argue that because they did not discover the defect until February 2004 when destructive testing was conducted in the home, the statute of limitations did not begin to accrue until that time. Generally, a plaintiff's cause of action accrues when all the elements of the action have occurred and can be alleged in a proper complaint. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 640; 692 NW2d 398 (2004); *Travelers Ins Co, supra* at 479. However, if an element of a cause of action, such as damage, has occurred but cannot be pleaded in a proper complaint because it is undiscoverable with reasonable diligence, Michigan courts have applied the discovery rule. *Doe, supra* at 640; *Travelers Ins Co, supra* at 479-480. "Under the discovery rule, the statute of limitation 'begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action.'" *Doe, supra* at 640, quoting *Moll v Abbott Laboratories*, 444 Mich 1, 5; 506 NW2d 816 (1993). In situations involving the sale of a home, "the statutory period begins to run when the plaintiffs or their predecessor(s) discovered or should have discovered the defect." *McCann v Brody-Built Construction Co, Inc*, 197 Mich App 512, 515-516; 496 NW2d 349 (1992).

No evidence suggests that Steven Lunn either discovered or should have discovered the defects before he sold the home to plaintiffs. Lunn stated in his affidavit that he did not experience any problems related to the repairs. Accordingly, he had no reason to believe that the contractors did not completely remedy the problems caused by the overflowing toilet tank. Lunn did not put the home up for sale until August 2001, and plaintiffs did not offer to purchase the home until November 8, 2001. Thus, plaintiffs could not have discovered any defects in the home until they viewed the home as prospective purchasers, which could not have occurred until sometime after Lunn listed the home for sale in August 2001. Even assuming that plaintiffs should have discovered the defects in November 2001, when they offered to purchase the home, their complaint was timely because it was filed on March 30, 2004, within the three-year limitation period for negligence actions provided in MCL 600.5805(10). Likewise, plaintiffs' breach of contract claim was timely filed within the six-year limitation period for breach of contract actions MCL 600.5807(8).[1] We therefore reverse the trial court's grant of summary

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[1] The trial court ruled that a one-year statute of limitations applied, but did not specify whether it was applying the statutory period to both plaintiffs' negligence claim and their breach of contract claim. Because Belfor argues that the statute of limitations bars both claims, however, we have addressed both claims. Notwithstanding our conclusion that plaintiff's timely filed their breach

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disposition of plaintiffs' negligence and breach of contract claims in favor of ServPro and Belfor on this ground.

III. Assignment of Contract Claims

Plaintiffs also argue that the trial court erred by granting summary disposition in favor of ServPro and Belfor on plaintiffs' breach of contract claim. Although the trial court did not specify under which subrule of MCR 2.116(C) it granted the contractors' motions for summary disposition, it appears that the court considered documentary evidence and thus granted the motions under subrule (C)(10). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under MCR 2.116(C)(10), a court considers all the evidence, affidavits, pleadings, and admissions submitted by the parties in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31.

Generally, contractual rights can be assigned unless the assignment is clearly restricted. *Burkhardt v Bailey*, 260 Mich App 636, 652; 680 NW2d 453 (2004). An assignee stands in the same position as the assignor and acquires the same rights, subject to the same defenses, that the assignor possessed. *Id*. at 652-653. In exchange for the dismissal of plaintiffs' claims against Lunn in plaintiffs' previous lawsuit, LC No. 03-046807-CK, Lunn assigned any claims he had against Allstate, ServPro, and Belfor to plaintiffs. Because plaintiffs acquired only those rights, subject to the same defense that Lunn possessed, they acquired no greater rights and could assert no claims that Lunn could not have asserted on his behalf. *Burkhardt, supra* at 652-653; *Professional Rehabilitation Associates, supra* at 177.

ServPro correctly argues that no contract existed between it and Lunn. Lunn testified that ServPro personnel were already performing services at the house when he arrived home from overseas on July 4, 2000. Lunn also testified that Allstate was the entity that hired ServPro to dry out the home. In addition, the president of ServPro averred that Allstate contacted ServPro to perform emergency drying and contents storage of Lunn's home. Documents attached to ServPro's motion for summary disposition indicate that Allstate paid ServPro for its services at the home on behalf of Lunn. Thus, the evidence does not reveal a contractual relationship between Lunn and ServPro. Because no contract existed between Lunn and ServPro, Lunn could not assign any contractual rights to plaintiffs. *Burkhardt, supra* at 652; *Professional Rehabilitation Associates, supra* at 177.

Even assuming that a contract existed between Lunn and ServPro, however, plaintiffs could not assert a breach of contract claim against ServPro by virtue of the assignment because Lunn did not suffer any damages as a result of ServPro's alleged breach. Similarly, although Lunn and Belfor entered into a contract for services, plaintiffs could not assert a breach of contract claim against Belfor as a result of the assignment because Lunn suffered no damages as

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of contract claim, we nevertheless conclude in Section III, *infra*, that plaintiffs had no valid breach of contract claim.

a result of Belfor's alleged breach. Plaintiffs argue that Lunn suffered economic damages in the amount of $35,000 when he settled with plaintiffs on their previous lawsuit, LC No. 03-046807-CK. That lawsuit, however, alleged that Lunn and his realtor misrepresented and fraudulently concealed the extent of the damage caused by the overflowing toilet tank and misrepresented the square footage of the home. Accordingly, Lunn suffered damages in the amount of $35,000 for alleged misrepresentations, and the $35,000 settlement was a result of Lunn's alleged wrongdoing rather than the alleged negligence of the contractors.

Plaintiffs also argue that Lunn suffered property damage, but sold the home before the extent of the damage was ascertained. This argument merely evidences that Lunn suffered no damages because of any breach on behalf of the contractors. Black's Law Dictionary (8th ed) defines "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." Regardless of whether Lunn suffered property damage of which he was unaware, he suffered no loss or injury because of the damage and thus suffered no *damages*. Because Lunn suffered no damages as a result of the contractors' alleged negligence and plaintiffs acquired only those claims that Lunn could have asserted on his behalf, plaintiffs cannot assert a valid breach of contract claim. *Burkhardt, supra* at 652; *Professional Rehabilitation Associates, supra* at 177.

The contractors also rely on *Kingston v Markward & Karafilis, Inc*, 134 Mich App 164; 350 NW2d 842 (1984), and argue that any assignment was invalid because it materially increased their risk of liability. In *Kingston,* this Court held that because the assignment at issue in that case significantly increased the risk to one of the parties to the contract, the assignment was void. *Id*. at 173. In the instant case, even assuming that the assignment transferred to plaintiffs a right to sue the contractors for breach of contract, the assignment would have been void because it materially increased the risk to the contractors. Lunn had no cause of action against the contractors because he suffered no damages as a result of any alleged breach on behalf of the contractors. Thus, allowing Lunn's rights under the contracts to transfer to plaintiffs would have materially increased the risk to the contractors by opening the door to liability for damages that Lunn, the contracting party, never suffered. Accordingly, under *Kingston*, the assignment would have been void. We therefore affirm the trial court's grant of summary disposition in favor of ServPro and Belfor on this ground.

IV. Plaintiff's Negligence Claim Against Allstate

Finally, plaintiffs argue that the trial court erroneously granted summary disposition in favor of Allstate. Although the trial court did not specify under which subrule of MCR 2.116(C) it granted Allstate's motion for summary disposition, it appears that the court granted the motion under subrule (C)(8), ruling that, as a matter of law, insurance benefits cannot be assigned. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint and is properly granted when the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). When deciding a motion brought under this subrule, a court considers only the pleadings, accepts all well-pleaded factual allegations as true, and construes the allegations in a light most favorable to the nonmoving party. *Maiden, supra* at 119.

In general, property owners and general contractors are not liable for the negligence of independent contractors. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48, 53; 684 NW2d 320 (2004). However, the "common work area doctrine" creates an exception to the general rule of nonliability for general contractors.[2] Plaintiffs contend that Allstate was acting as a general contractor. A general contractor may be held liable for the negligence of an independent contractor under the "common work area doctrine" if: "(1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Id*. at 54. As can be seen from the elements of the "common work area doctrine," this doctrine is inapplicable in the present case. Accordingly, Allstate cannot be held liable under the "common work area doctrine." We therefore affirm the trial court's grant of summary disposition in favor of Allstate.

V. Conclusion

Affirmed in part, reversed in part, and remanded for further proceedings regarding plaintiffs' negligence claim with respect to defendants ServPro and Belfor only. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad

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[2] Plaintiffs argue that defendant Allstate "retained control" over the contractors' work and therefore defendant Allstate falls under the "retained control doctrine" exception to the general rule of nonliability. The Michigan Supreme Court recently clarified that the "retained control doctrine" is not a separate exception to the general rule of nonliability. *Ormsby v Capital Welding, Inc, supra* at 49. Instead, when a property owner has "retained control" over a construction project (i.e. assumed the role of a general contractor), and the "common work area doctrine" applies, the property owner will be held to the same degree of care as the general contractor. *Id*. Because Allstate was not the property owner, the "retained control doctrine" is not at issue in this case.