

STATE OF MICHIGAN
COURT OF APPEALS

CREIGHTON E. FORESTER and DENISE M.
FORESTER,

UNPUBLISHED
November 14, 2006

Plaintiffs-Appellants,

v

No. 268545
Oakland Circuit Court
LC No. 04-057221-NO

SERVPRO OF BLOOMFIELD & LIVONIA, a/k/a
COLBY COMPANY, INC., and BELFOR USA,
f/k/a INRECON, LLC,

Defendants-Appellees,

and

ALLSTATE INSURANCE COMPANY, INC.,

Defendant.

Before: Whitbeck, CJ., and Hoekstra and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's orders granting summary disposition in favor of defendants ServPro of Bloomfield & Livonia, a/k/a Colby Company, Inc., and Belfor USA, f/k/a Inrecon, LLC. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In June and July 2000, a home owned by Steven Lunn sustained significant water damage when a second-story bathroom developed a leak. Allstate, Lunn's insurer, contracted with ServPro to perform cleaning and restoration services in the home. In its contract, ServPro agreed to use its best efforts to perform in a workmanlike manner and to use reasonable diligence in the execution of its duties. Subsequently, Lunn hired Belfor, a contractor approved by Allstate, to perform repairs and rehabilitation on the home. Belfor agreed to perform in a workmanlike manner in accordance with construction guidelines published by the National Association of Home Builders.

In 2001, plaintiffs purchased the home from Lunn. Plaintiffs determined that the flooding problem had resulted in major damage that required extensive renovation of the home. In 2003, plaintiffs filed suit against Lunn alleging, inter alia, fraudulent concealment and

misrepresentation. The parties entered into a settlement agreement pursuant to which Lunn paid plaintiffs \$35,000 in exchange for release of all claims against him. Lunn executed an assignment of claims in which he assigned all claims he had against defendants to plaintiffs.

In October 2004, plaintiffs filed suit against Allstate, ServPro, and Belfor, alleging breach of contract, negligence, and breach of contract pursuant to a valid assignment of claims. The trial court granted summary disposition in favor of all defendants, and found that plaintiffs' claim of negligence was barred by the statute of limitations.

In *Forester v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 26, 2005 (Docket No. 260914), another panel of this Court affirmed in part, reversed in part, and remanded for further proceedings. This Court reversed the trial court's grant of summary disposition of plaintiffs' negligence and breach of contract claims in favor of ServPro and Belfor on statute of limitations grounds, *id.*, slip op at 2-4, affirmed the grant of summary disposition of plaintiffs' assignment of contract claims in favor of ServPro and Belfor, *id.* at 4-5, and affirmed the grant of summary disposition of plaintiffs' negligence claim in favor of Allstate. *Id.* at 5-6. This Court remanded for further proceedings regarding plaintiffs' claim of negligence against ServPro and Belfor, only. *Id.* at 6.

ServPro and Belfor filed separate motions for summary disposition of plaintiffs' claim of negligence pursuant to MCR 2.116(C)(10) and MCR 2.116(C)(8) and (10), respectively. Both ServPro and Belfor argued that it had no duty to plaintiffs. The trial court granted the motions, finding that neither ServPro nor Belfor owed plaintiffs a duty separate and distinct from its contractual obligations.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. There can be no tort liability unless the defendant owed duty to the plaintiff. *Fultz v Union-Commerce Assocs*, 470 Mich 460, 463; 683 NW2d 587 (2004). A tort action resulting from misfeasance of a contractual obligation must be based on the existence of a duty separate and distinct from the contractual obligation itself. *Id.* at 467.

Plaintiffs argue that the trial court erred by granting summary disposition in favor of ServPro and Belfor. Plaintiffs assert that ServPro and Belfor breached a duty separate and distinct from their contractual obligations by engaging in misfeasance that created a new hazard; therefore, they are liable in tort for the damage created by that hazard. We disagree.

Plaintiffs were not parties to a contract with either ServPro or Belfor. Therefore, under *Fultz, supra*, ServPro and Belfor could be liable in tort only if they owed a duty to plaintiffs that was separate and distinct from a contractual duty. Neither ServPro nor Belfor agreed to perform

its duties in accordance with any specific industry guidelines. Both ServPro and Belfor agreed generally to perform contractual duties in a workmanlike manner.¹

This case is distinguishable from *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds in *Smith v Global Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999), on which plaintiffs rely. In that case, the defendant, who had contracted to provide snow removal services to the premises owner, created a new hazard by piling snow in a location from which it knew or should have known that the snow would melt and freeze into ice on abutting sidewalks, steps, and walkways. *Id.* at 704. In this case, no evidence showed that ServPro or Belfor agreed to inspect plaintiffs' home for mold or to take steps to remediate a mold problem. Thus, no evidence showed that ServPro or Belfor acted in a negligent manner that created a new hazard that resulted in harm to plaintiffs.

The trial court did not err in finding that ServPro and Belfor owed no duty to plaintiffs because neither defendant breached a duty separate and distinct from a contractual duty. *Fultz, supra* at 467. The trial court correctly granted summary disposition in favor of ServPro and Belfor.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

¹ Plaintiffs contend that Belfor was certified by the Institute of Inspection, Cleaning and Restoration, a non-profit organization of trade associations responsible for setting standards for the professional inspection, cleaning, and restoration services industries. Belfor's contract indicates that it agreed to perform duties in a workmanlike manner "in accordance with the 'Residential Construction Performance Guidelines' published by the National Association of Home Builders." Plaintiffs point to no evidence that this promise constituted an agreement to perform duties in accordance with specific standards established by the Institute of Inspection, Cleaning and Restoration.