

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FARM BUREAU GENERAL INSURANCE  
COMPANY OF MICHIGAN,

UNPUBLISHED  
July 21, 2005

Plaintiff/Counter-Defendant-  
Appellant,

v

No. 252659  
Calhoun Circuit Court  
LC No. 02-002374-CK

WILLIAM KOCH and TERRI KOCH,

Defendants/Counter-Plaintiffs-  
Appellees.

and

WILLIAM KOCH and TERRI KOCH,

Third Party-Plaintiffs-Appellees,

v

JAMES MARSH and MICHAEL A. CAPUTO,

Third Party-Defendants-Appellants.

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Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

COOPER, P.J. (*dissenting*).

I must respectfully dissent from the majority opinion of my colleagues. I would find that the trial court properly determined that the Kochs' negligence claim sounded in misfeasance of a contractual duty. Accordingly, I would affirm the trial court's dismissal of Farm Bureau's motion for partial summary disposition of the Kochs' negligence claim.

We review a trial court's determination regarding a motion for summary disposition de novo.<sup>1</sup> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery.<sup>2</sup>

It is well settled "that a tort action will not lie when based solely on the nonperformance of a contractual duty."<sup>3</sup> However, an action may lie in tort when a party breaches his duty "to perform his promise in a careful and skillful manner without risk of harm to others . . . ." <sup>4</sup> "Misfeasance" is defined as "'active misconduct causing personal injury,'" <sup>5</sup> or a case in which "a situation of peril has been created, with respect to which a tort action would lie without having recourse to the contract itself."<sup>6</sup>

I disagree with the majority's determination that Farm Bureau did not create the peril that the Kochs alleged caused them harm. The peril to the Kochs came from the extensive mold and water damage caused to their home by the actions of Mr. Marsh and Mr. Caputo. These agents severely mismanaged the Kochs' claim so that repairs were not made in a timely manner. As a result of the agents' mismanagement, the Kochs' roof was not repaired for four months. The repairs, when finally made, were not completed in a competent manner. The inadequate and untimely repairs have caused water to continue to damage the Kochs' home and mold to continue to form.

Moreover, Farm Bureau sent Mr. Marsh to the Kochs' home to initially investigate the claim even though the Kochs indicated that they could not work with him. The Kochs presented evidence that Mr. Marsh either failed to discover mold damage or failed to inform the Kochs of its discovery. The agents sent unlicensed contractors to repair the damage and interfered with the Kochs' attempts to secure licensed professionals. Mr. Caputo even pushed Ms. Koch to the ground and entered her home without permission while a contractor retained by the Kochs was examining the damage.

Under these circumstances, I would find that the Kochs presented sufficient evidence to overcome Farm Bureau's motion for summary disposition and that the court properly allowed their negligence claim to move forward to trial.

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<sup>1</sup> *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

<sup>2</sup> *Id.* at 129-130.

<sup>3</sup> *Fultz v Union-Commerce Assocs*, 470 Mich 460, 466; 683 NW2d 587 (2004).

<sup>4</sup> *Hart v Ludwig*, 347 Mich 559, 565; 79 NW2d 895 (1956).

<sup>5</sup> *Fultz*, *supra* at 466, quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988).

<sup>6</sup> *Hart*, *supra* at 565.

I would affirm the trial court's dismissal of Farm Bureau's motion for partial summary disposition and affirm the finding of the jury.

/s/ Jessica R. Cooper