

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

WOLVERINE MUTUAL INSURANCE CO.,  
Subrogee of Mark Wysong, and  
MARK WYSONG,

Plaintiffs,

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File No. 94-12029-CB  
HON. PHILIP E. RODGERS, JR.

BRENDA SPEARS, d/lo/a B & D  
CONSTRUCTION,

Defendant.

Michael J. Swogger (P42905)  
Attorney for Plaintiff

Richard J. Zerafa (P22717)  
Attorney for Defendant

DECISION AND ORDER

Defendant filed a Motion to Strike Count II of Plaintiffs' Complaint. Plaintiffs timely responded to this Court's Pre-Hearing Order dated July 11, 1994. Defendant untimely replied to Plaintiffs' response. Pursuant to MCR 2.119(E)(3), this Court dispenses with oral argument. This Court has reviewed the motion, the briefs and the Court file.

The following facts are undisputed. Defendant and Max Wysong entered into a contract whereby Defendant agreed to repair Mr. Wysong's barn. Plaintiffs, in the complaint, allege that a fire resulted from Defendant's employee's use of a circular saw. Count I is a breach of contract claim; Count II is a tort claim based on the theory of negligence. Defendant, in her motion, seeks this Court's order to strike Count II of the complaint.

The parties, in their respective briefs, argued the applicability of several Michigan appellate cases. The parties have not presented any cases which are factually parallel to this matter. This Court finds the following excerpt, as presented in Plaintiffs' responsive brief, to be helpful and instructive:

Actionable negligence presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty of care by the other. Clark

v Dalman, 379 Mich 251, 260; 150 NW2d 755 (1967). The legal relationship underlying such a duty may arise by contract. That is, the contract created the state of things that furnishes the occasion of the tort. *Id.*, 261. However, there must be some active negligence or misfeasance that is distinct from the breach of duty owed under the contract. *Hart v Ludwig*, 347 Mich 559, 563; 79 NW2d 895 (1956). See also 74 Am Jur 2d, Torts, ~ 23, pp 639-641. If a relationship exists that would give rise to a legal duty without enforcing the contractual promise itself, a tort action will lie; otherwise, it will not. *Hart, supra*, 565 (relying on *Prosser, Torts* [1st ed], § 33, p 205). See also *Freeman-Darling, Inc v Andries-Storen-Reynaert Multi Group Inc*, 147 Mich App 282; 382 NW2d 769 (1985).

*Antoon v Community EMS, Inc*, 190 Mich App 592, 594-595; 476 NW2d 479 (1991). This Court denies Defendant's motion. A *prima facie* claim in tort has been stated. No costs are awarded.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge  
Dated: 11/04/94