

## U.S. Sixth Circuit Upholds Michigan's Fultz Doctrine In Mold Case

In a mold contamination injury case, the U.S. Sixth Circuit Court of Appeals, in an opinion to be published, affirmed in large part a Michigan District Court's ruling that upholds the unique Michigan doctrine that an injured non-party to a contract cannot sue a contractor or professional for negligence or violation of the professional standard of practice based on negligent performance of a contract. The injured plaintiff must show some duty completely independent from the contractual duties undertaken by the contractor or professional. This rule has been called the Fultz Doctrine or rule based on the Michigan Supreme Court case, *Fultz v Union-Commerce Associates*, 683 NW.2d 587 (Mich. 2004).

In this case, *Bennet, et al v MIS Corporation, et al*, US 6th Circuit Court of Appeals, Case No.: 08-2567 (attached), the plaintiffs, air traffic controllers at the Detroit-Wayne County Metropolitan Airport, and their spouses sued for a variety of illnesses and diseases they claimed to have suffered from exposure to mold at the air traffic control tower. Plaintiffs sued a number of professionals, CIH's and indoor air quality specialists, and remediation contractors claiming that they negligently performed services under their contracts with the FAA. The Sixth Circuit, upholding the District Court's grant of summary judgment, followed the Fultz ruling and subsequent cases following it and rejected tort principles adopted in most other states that a negligent action by a contractor can be a voluntary assumption of a duty to foreseeable plaintiffs. The Court noted and held

that this is not the law in Michigan and Michigan does not follow a misfeasance versus nonfeasance distinction as in other states. The Court adopted the Fultz rule to apply not only to contractors, but to professionals being sued for violations of their standard of practice, consistent with some intermediate Michigan Court of Appeals cases which had done so.

The Court also upheld the Federal Court's jurisdiction under the government contractor defense and federal officer removal statute, 28 U.S.C. 1442(a)(1), finding that defendants only had to allege a colorable federal defense.

The Sixth Circuit did reverse and remand as to one contractor defendant who was also sued for spraying an allegedly toxic biocide inside the traffic control tower because the contractor's contract did not specifically address that work.

This case illustrates that the unique Fultz doctrine is still alive and well in Michigan and extends well beyond the simple snow and ice removal contract and premises liability claim addressed in the Fultz case.

*Provizer & Phillips, P.C., can assist you with the handling of a variety of litigation matters. If you have any questions, please contact Randall E. Phillips at Provizer & Phillips, P.C., 30200 Telegraph Road, Suite 200, Bingham Farms, Michigan 48025, (248) 642-0444; rphillips@p-ppc.com or www.provizer-phillips.com.*