STATE OF MICHIGAN

COURT OF APPEALS

SEBOK MOTORS CORPORATION and GARY W. SEBOK,

Plaintiffs/Counterdefendants-Appellees,

v

ZITO CONSTRUCTION,

Defendant/Counterdefendant-Appellant,

and

ROBERT MEYER, d/b/a MEYER CUSTOM HOMES, WALT JOHNSON CONSTRUCTION COMPANY, INC., WALT JOHNSON, and RUTH JOHNSON,

Defendants/Counterplaintiffs.[1]

UNPUBLISHED
October 18, 2002

No. 226852
Genesee Circuit Court
LC No. 98-062452-CK

Before: Murphy, P.J., and Markey and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals by right from an order of judgment in favor of plaintiff in this negligence and breach of contract action.[2] We affirm.

[1] Defendant Robert Meyer will be referred to as defendant Meyer. Defendant Walt Johnson Construction Company, Inc. will be referred to as defendant Johnson Construction. Defendant Walt Johnson will be referred to as defendant Johnson. Defendant Zito Construction will be referred to simply as defendant. Plaintiffs will be referred to collectively as plaintiff.

[2] Plaintiff contracted with defendant Meyer to act as a general contractor in the construction of Sebok Collision Center (Meyer Contract). Defendant Johnson Construction contracted with plaintiff to provide stone and asphalt for the construction of plaintiff's parking lot (Johnson (continued…)

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant argues that the trial court erred in denying its motion for a new trial. On appeal, this Court reviews a trial court's decision to grant a new trial for an abuse of discretion. *Kelly v Builders Square, Inc,* 465 Mich 29, 34; 632 NW2d 912 (2001). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Bean v Directions Unlimited, Inc,* 462 Mich 24, 34-35; 609 NW2d 567 (2000). This Court reviews a trial court's finding of fact in a bench trial under the clearly erroneous standard. MCR 2.613(C); *Walters v Snyder,* 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* This Court reviews a trial court's conclusions of law de novo. *Id.* Regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Attorney General ex rel Director of Dep't of Natural Resources v ACME Disposal Co,* 189 Mich App 722, 724; 473 NW2d 824 (1991).

Defendant first argues that the trial court's verdict was against the great weight of the evidence. In *Hadfied v Oakland Co Drain Comm'r,* 430 Mich 139, 187 n 26; 422 NW2d 205 (1988), overruled[3] on other grounds *Pohutski v City of Allen Park,* 465 Mich 675; 641 NW2d 219 (2002), the Michigan Supreme Court observed that "a 'great weight of the evidence' challenge would seem to be irrelevant in the bench trial setting." This Court impliedly acknowledged this when it addressed a "great weight of the evidence" argument in a bench trial under the clearly erroneous standard. *Phardel v State,* 120 Mich App 806, 812; 328 NW2d 108 (1982). Therefore, this Court will address defendant's great weight argument under the clearly erroneous standard.

Defendant argues that plaintiff failed to prove that defendant was negligent and, therefore, failed to prove that defendant breached the contract. Defendant cites no case law to support this argument. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald,* 237 Mich App 186, 197; 602 NW2d 834 (1999). This is also the case where a party fails to cite any supporting legal authority for its position. *Id.,* citing *Schellenberg v Rochester Elks,* 228 Mich App 20, 49; 577 NW2d 163 (1998). Despite this deficiency, this Court will address the issues raised by defendant on appeal.

(…continued)

Contract). Defendant contracted with defendant Meyer to provide grading and drainage on plaintiff 's lot (Zito Contract). After portions of the constructed lot and curbs were torn out and replaced due to various inadequacies, the finished lot was still uneven and poorly drained. Plaintiff pleaded two claims against defendant: 1) conversion and 2) negligent performance of contract. During trial, however, the trial court recognized that plaintiff 's proofs corresponded with a breach of contract claim and advised plaintiff to amend its pleadings to conform to the proofs. Plaintiff did not amend its pleadings; however, defendant does not dispute the sufficiency of plaintiff 's pleadings on appeal.

[3] In *Pohutski,* the Court overruled *Hadfield* in holding with respect to municipalities, that the governmental tort liability act, MCL 691.1407, did not preserve the common-law trespass-nuisance exception to governmental immunity.

Plaintiff claimed that defendant breached the Zito contract, which required defendant to provide grading and drainage on plaintiff's lot. The trial court found against defendant "on a third-party beneficiary theory under [MCL] 600.1405." In *Nash v Sears, Roebuck & Co*, 383 Mich 136, 142; 174 NW2d 818 (1970), the Court noted every contract contains an implied "duty to perform it skillfully, carefully, diligently, and in a workmanlike manner." Where a party to a contract fails to comply with the implied duty to perform in a workmanlike manner, the other party may be entitled to damages resulting from the deficient performance. *Id.* at 143. MCL 600.1405 provides that any person for whose benefit a promise is made, has the same right to enforce the promise as if the promise had been made directly to him. *Krass v Tri-County Security, Inc*, 233 Mich App 661, 665; 593 NW2d 578 (1999). Defendant does not contest that plaintiff was a third-party beneficiary to the Zito contract. Thus, the only remaining question is whether defendant breached the Zito contract.

The Zito contract provided that defendant would supply grading and drainage on plaintiff's lot. The evidence showed that the subgrade defendant provided left inadequate room for the amount of crushed stone and asphalt delivered by defendant Johnson Construction. Defendant Johnson testified that because the rough grade defendant installed was too high, Johnson removed some of the stone. Architect Rick Swihart testified, and his architectural drawings for the lot showed, that his plan called for the finished lot to be comprised of ten inches of material. The finished lot did not meet his specifications.

Defendant argues that Swihart's specifications were changed as evidenced by the Johnson contract. Defendant also argues that the Johnson contract was ambiguous as to how many inches of stone were required. Defendant was not a party to this contract, but claims that it relied on it in determining the required depth of the subgrade. In determining whether a contract provision is ambiguous, we are to give the language used its ordinary and plain meaning to see if its words may reasonably be understood in different ways. *Trierweiler v Frankenmuth Mut Ins Co*, 216 Mich App 653, 656-657; 550 NW2d 577 (1996). A reading of the plain language of the Johnson contract indicates that a six-inch stone base was required. The contract language providing for, "4 [inch] stone mix base compacted = 6 [inch] base" cannot reasonably be read as anything other than requiring six inches of compacted stone. The four-inch notation is most reasonably recognized as an error because four inches obviously cannot be compacted to six inches. Additionally, William Jones testified that six inches of compacted stone means that the stone must be six inches deep *after* being compacted. Regardless of whether the architectural specifications or the specifications in the Johnson contract were complied with, the evidence showed that the subgrade was too high.

The evidence also showed that the grading improperly sloped resulting in standing water on the lot. Swihart testified that standing water on the lot resulted from improper slope. Defendant Meyer similarly testified that the lot did not slope adequately to catch the drainage basins resulting in pooled water. William Jones testified that the standing water was due to uneven grading. Defendant argues that the testimony showed that the grade was correct. However, the trial court, however, was free to disbelieve defendant's witnesses, and this Court gives deference to the trial court's credibility assessment. MCR 2.613(C); *Attorney General ex rel Director of Dep't of Natural Resources v ACME Disposal Co*, 189 Mich App 722, 724; 473 NW2d 824 (1991).

Core samples taken from the lot also showed that the lot was uneven which could have been due to improper grading. Defendant cites Jones' testimony that the core samples cannot show that the subgrade was improper. Scott Patrick also testified that the core testing did not indicate anything about the subgrade or slope. Plaintiff argues that the trial court could have properly inferred that the varying depths of stone and asphalt were caused by an uneven subgrade. Further support for this inference is that the lot depth varies from 7/8 of an inch to 10½ inches. Circumstantial evidence is a permissible method of meeting a burden of proof under a preponderance of the evidence standard. *Firemen's Ins Co v Sterling Coal Co*, 348 Mich 564, 569; 83 NW2d 319 (1957). Therefore, the trial court could have properly inferred that the subgrade was uneven based on the evidence.

The Zito contract included a duty for defendant to perform the contract in a workmanlike fashion. The evidence shows that inadequacies in the subgrade and grading contributed to a lot with an uneven surface and with improper drainage. Therefore, the trial court's finding that defendant breached the Zito contract was not clearly erroneous.

Defendant next argues that the trial court erred in its finding that defendant did not conform to the specification in the Johnson agreement. Defendant argues that the facts showed that it complied with the Johnson contract, which defendant argues required only a four-inch stone base (or a total lot depth of 8 3/4 inches). However, the trial court specifically referred to the core samples and the photographs showing that the lot was uneven and did not drain properly. Seven of the core samples showed depths below 8 3/4 inches. This evidence supports the conclusion that the subgrade did not even meet the alleged 8 3/4 inches requirement of the Johnson contract. Defendant explained the core sample variations by arguing that the evidence showed that defendant Johnson's delivery of the crushed stone caused "ruts and depressions." However, ruts and depressions would cause concavities that do not explain why some portions of the lot were *shallower* than required even by the Johnson contract.

Finally, defendant argues that the fact that Johnson dumped stone that was too high proves that defendant did not install an improper subgrade. This argument, however, overlooks the fact that if the subgrade were too high, the stone would be too high. If defendant Johnson provided the amount of material called for in the Johnson contract, then the fact that that amount of material did not fit into the subgrade without being too high shows that the subgrade was not deep enough. Circumstantial evidence is a permissible method for meeting a burden of proof under a preponderance of the evidence standard. *Firemen's Ins Co, supra*, 348 Mich 569. Therefore, the trial court did not abuse its discretion in finding that the lot did not conform to "even Exhibit 3," the Johnson contract. Moreover, if this finding were erroneous, it would be harmless error[4] because, as discussed above, the Johnson contract did not call for four inches of crushed stone as defendant argues. Further, the evidence shows that defendant did not perform its contract in a workmanlike manner, regardless of which specifications it relied on, resulting in uneven grading and improper drainage.

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[4] MCR 2.613(A).

Defendant also argues that the trial court committed an error of law in finding against defendant because plaintiff did not prove that defendant was negligent. This is simply a rephrasing of the great weight of the evidence argument discussed above.

Defendant finally argues that the trial court erred in its finding that it was a party to the Meyer contract. However, the portion of the trial court's findings defendant cites is taken out of context. The entire passage reads as follows:

> The Court does not believe that I should do this jointly and severally. I think each one of the defendants before the Court made his or its contract to do certain parts of this work that was to result in a parking lot to meet Mr. Sebock's [sic] specifications and expectations. They are in separate arenas. Zito dealing with the subgrade work, Johnson dealing with supplying stone and asphalt to certain specifications, and Meyer frankly, to supervise and—and deliver a parking lot in part of his contract, Exhibit 2, that would include all subgrade and above-grade site work, and it says per supplied architectural drawings. And each and every one of them breached and failed to perform as required and expected by the contractual language.

This language does not indicate that the trial court found that defendant was a party to the Meyer contract. The trial court stated that each party had a separate contract. The last sentence of the passage, in context of the entire passage, indicates that each party breached its individual contract. Because the trial court did not find that defendant was a party to the Meyer contract, it did not err as a matter of law.

The trial court's findings of fact and law were not clearly erroneous. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Roman S. Gribbs