

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF ROMULUS,

Plaintiff-Appellant,

v

LANZO CONSTRUCTION COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED

April 24, 2008

No. 274666

Wayne Circuit Court

LC No. 04-416803-CK

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Plaintiff, City of Romulus, appeals as of right from a judgment of no cause of action in favor of defendant, Lanzo Construction Company, Inc., in this action based on a contractual agreement for a construction project. We affirm.

This case arises from defendant's construction of a three-lane concrete section of Goddard Road. The parties entered into the contract on September 5, 1996, it was completed on June 30, 1998, and it was accepted on January 12, 1999. Although roads were generally designed and constructed to last for a 20 to 25 year period, the road at issue began to deteriorate in 2002. After taking measures to prevent further deterioration, plaintiff concluded that it was no longer cost effective to make repairs to the road, and the entire road would have to be rebuilt at a substantial cost. Consequently, on June 3, 2004, plaintiff filed suit against defendant alleging negligence and breach of contract. However, defendant moved for dismissal of the negligence claim, asserting that it was merely a restatement of the breach of contract claim. The trial court agreed and granted defendant's motion for summary disposition of the count alleging negligence. The trial court allowed the breach of contract count to proceed to trial, concluding that there were factual issues regarding this claim. Following a jury trial, a verdict of no cause of action was rendered. Plaintiff appeals as of right.

Plaintiff first alleges that the trial court erred by granting summary disposition of plaintiff's negligence cause of action. We disagree. Summary disposition decisions are reviewed de novo on appeal, viewing the evidence in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id.* Affidavits, depositions, and documentary evidence offered in

support of and in opposition to a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). A court is not bound by the party's choice of labels for the cause of action because to do so would exalt form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). The gravamen of a party's claim is determined by reviewing the entire claim, and a party cannot avoid dismissal of a cause of action by artful pleading. See *Maiden, supra* at 135.

Review of the complaint reveals that plaintiff alleged two causes of action. Specifically, the claim of negligence asserted that defendant had a duty to perform the contract in a skillful and workmanlike manner and had an additional duty of ensuring that all subcontractors performed to that standard. Plaintiff alleged that this duty was breached as evidenced by the extensive, pervasive, and premature deterioration of the road. With regard to the breach of contract claim, it was alleged that the contract "imposed upon [defendant and his agents] an implied duty of performance in a skilled and workmanlike manner, but the extensive road defects reveal[ed] that this duty was breached."

When claims of negligence and breach of contract are alleged to arise from the same conduct or transaction, the issue of the propriety of each claim will not rest on mere allegations, but an analysis of the pleaded facts must occur. *Rinaldo's Constr Co v Michigan Bell Tel Co*, 454 Mich 65, 82; 559 NW2d 647 (1997). "A plaintiff cannot maintain an action in tort for nonperformance of a contract." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 401; 729 NW2d 277 (2006). To pursue a tort action arising out of a contract, a threshold question must be satisfied. That is, whether the defendant owed a duty to the plaintiff that was separate and distinct from the obligations contained in the contract. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). The failure to properly perform a contractual duty does not give rise to an action in negligence unless the plaintiff alleges a violation of a duty separate and distinct from the duty imposed under the contract. *Id.* "If no independent duty exists, no tort action based on a contract will lie." *Id.*

In the present case, review of the pleaded allegations reveals that the claim of negligence is merely a restatement of the breach of contract action. The negligence claim is premised on the failure to perform the contract in a skillful and workmanlike manner; the same duty allegedly breached based on the terms of the contract. Accordingly, the trial court properly granted summary disposition of the negligence claim. *Fultz, supra; Rinaldo, supra.*

Plaintiff did not respond to the argument raised by defendant. Rather, plaintiff asserted that the action at issue was a products liability action, a hybrid of tort and contract, and therefore, the pleading of the complaint was proper. Case law does provide that a products liability action may be founded in negligence. See *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 250; 492 NW2d 512 (1992) ("Products liability actions grounded in negligence require a causal connection between the manufacturer's negligence or product defect and the plaintiff's injury."). However, review of the complaint reveals that plaintiff never pleaded an action in products liability nor did it seek to amend its complaint to allege a cause of action based on products liability. See MCR 2.116(I)(5). Moreover, irrespective of plaintiff's characterization of its cause of action, case law provides that an action in *tort* cannot be maintained unless a duty separate and distinct from a contractual duty is asserted. *Fultz, supra.* In the present case, a claim of products liability premised on a tort theory would nonetheless arise from the alleged nonperformance or

breach of the obligations contained within the contract. Accordingly, the trial court properly granted defendant's motion for summary disposition of the negligence action. *Joliet, supra*.

Plaintiff next alleges that the trial court erred in dismissing its claim for breach of implied warranty. Specifically, plaintiff contends that it was error to dismiss the breach of implied warranty claim where: (1) defendant agreed to the instruction in the final pre-trial order; (2) the trial court improperly characterized the claim as a tort action; (3) the trial court improperly characterized the claim as the previously dismissed negligence claim; and (4) there was substantial testimony from which the jury could conclude that the road was not fit for its intended purpose. We disagree.

This issue arose when the trial court reviewed the proposed jury instructions submitted by the parties, and the proposed instruction omitted an element of the claim for breach of implied warranty. Consequently, the trial court excluded the cause of action and the instruction from the jury's consideration. An appellate court reviews claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The jury instructions are examined as a whole to determine if error requiring reversal occurred. *Id.* "The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Id.* Instructions must not be extracted piecemeal to demonstrate error. Reversal for instructional error is only permitted where the failure to do so is inconsistent with substantial justice. *Id.*; see also MCR 2.613(A).

When this issue arose during the discussion of jury instructions, the trial court dismissed the breach of implied warranty claim. To the extent this ruling constituted a directed verdict, a trial court's decision regarding a motion for directed verdict is reviewed de novo. *Elezovic v Ford Motor Co*, 472 Mich 408, 418-419; 697 NW2d 851 (2005). When reviewing the trial court's decision, the evidence and all legitimate inferences are examined in the light most favorable to the nonmoving party. *Id.* "A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ." *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001).

After the parties submitted the proposed jury instructions, the trial court discovered that the instruction with regard to the breach of implied warranty claim was not the standard instruction. Rather, the parties had left off subpart D of the instruction. The instruction, M Civ JI 25.22 Implied Warranty – Burden of Proof, provides:

The plaintiff has the burden of proof on each of the following: a. that the [name of product] was not reasonably fit for the [use/uses] or [purpose/purposes] anticipated or reasonably foreseeable by the defendant, in one or more of the ways claimed by the plaintiff; b. that the [name of product] was not reasonably fit for the [use/uses] or [purpose/purposes] anticipated or reasonably foreseeable by the defendant at the time it left the defendant's control; c. that [plaintiff/plaintiff's decedent] [was injured/sustained damage]; d. that the [description of claimed defect] was a proximate cause of the [injuries/damages] to [plaintiff/ plaintiff's decedent].

Despite the elements of the claim for implied warranty, plaintiff omitted the fourth element of proximate cause, indicating that it did so to comport with the prior ruling regarding the negligence claim. Under the circumstances, the trial court did not err in refusing to submit

the instruction to the jury. Case law provides that the instruction may not eliminate or omit material elements, issues, or defenses. *Case, supra*. In the present case, plaintiff sought to eliminate the proximate cause element. Accordingly, the trial court did not err in refusing to give the proposed breach of implied warranty instruction.

On appeal, plaintiff does not address the trial court's ruling regarding the improper modification of the standard jury instruction and the omission of a material element. Rather, plaintiff asserts that defendant agreed to the instruction in the final pre-trial order. In that order, plaintiff sought to correlate the breach of implied warranty claim to the purported proofs that would demonstrate that the road was not reasonably fit for its intended purpose. Plaintiff cites to the fact that defense counsel signed this document. However, even if the parties stipulated to submit this instruction to the jury, the trial court was not bound by any agreement by counsel. "A stipulation is an agreement, admission or concession made by the parties in a legal action with regard to a matter related to the case." *People v Metamora Water Service, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). Entering into a stipulation may assist the parties in avoiding delay, trouble, and expense. *Id.* Stipulations of fact are binding on the court, but stipulations of law are not binding. *Id.* Even assuming that the signatures of counsel on the final pre-trial order indicated approval of submitting the breach of implied warranty claim to the jury, the parties' stipulation or agreement was not binding upon the trial court. The trial court had the responsibility of instructing the jury based on the evidence admitted at trial and the appropriate law. Thus, the trial court was entitled to review the evidence presented and examine the jury instructions to determine whether the instructions were an accurate reflection of the law and whether the evidence supported the instruction. *Case, supra*. Therefore, this challenge is without merit.

Within the discussion of this issue, plaintiff continues to assert that the trial court erroneously treated the breach of implied warranty claim as the prior negligence claim, and that the trial court erred in characterizing the claim as a tort claim. However, plaintiff's claim of error is not substantiated by the trial court's decision. Review of the record reveals that the parties attended a settlement conference and addressed the implied warranty claim. However, the parties did not reduce any agreement to writing. Therefore, when the issue of the propriety of the breach of implied warranty claim arose during the discussion of the jury instructions, the trial court did not have written orders or transcripts available to review any prior decision. Therefore, the trial court requested that the parties present their prior pleadings and took a brief recess to address the breach of implied warranty claim.

Upon returning to the bench, the trial court continued to hold that dismissal of the negligence action was proper. The trial court then held that, although the breach of implied warranty claim was not expressly pleaded as a separate count, defendant was on notice of the claim because it was contained in the allegations raised in the negligence claim. However, the trial court further held that the allegations supporting the breach of implied warranty theory were contained within the terms of the contract itself. Specifically, the trial court noted that plaintiff sought to allege a separate claim for breach of implied warranty when the contract itself contained express warranty provisions. Thus, plaintiff's characterization of the trial court's ruling does not reflect the trial court's actual decision. The trial court never held that the breach of implied warranty claim was merely a restatement of the negligence or tort claim and did not improperly characterize the claim as an exclusive tort claim. Thus, this claimed error does not provide plaintiff with any relief.

Lastly with regard to this issue, plaintiff asserts that the trial court erred in dismissing the breach of implied warranty theory when there was substantial evidence for the jury to conclude that the road was not fit for its intended purpose. This alleged error misses the precise nature of the trial court's ruling. Review of the trial court's decision reveals that it held that there was no independent duty running between plaintiff and defendant, which was not described with great particularity in the contract. The substance of the trial court's ruling was that a breach of implied warranty instruction was unnecessary where the voluminous contract set forth the obligations. Therefore, the court held, it was unnecessary to imply a warranty where the contract delineated defendant's express warranty obligations.

Based upon our review of the contract and Michigan law, the trial court did not err in dismissing the breach of implied warranty claim. The law will not imply a contract when there is an express contract covering the same subject matter. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). For example, review of the contract revealed that it described the general requirements for materials and workmanship. The contract provided that defendant was to provide materials or work that was performed according to the standards recognized by architects, engineers, and the trade. Testimony at trial revealed that the life expectancy for road construction was a 20 to 25 year period. In light of the express requirements, standards, and warranties contained in the contract itself, there was no need to imply a breach of warranty condition. *Barber, supra*. Therefore, the trial court did not err by dismissing plaintiff's breach of implied warranty theory and by rejecting a corresponding instruction.

Lastly, plaintiff contends that the trial court erred by failing to grant judgment notwithstanding the verdict (JNOV), or in the alternative a new trial when there was uncontroverted evidence that defendant failed to adhere to the specifications of the contract and assumed ultimate responsibility for the concrete work. We disagree. The denial of a motion for JNOV requires this Court to examine the evidence and all legitimate inferences arising from the evidence in the light most favorable to the nonmoving party. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 18-19; 684 NW2d 391 (2004). A motion for JNOV should be granted only where insufficient evidence was presented to create a jury-triable issue. *Id.* A decision regarding a motion for new trial is reviewed for an abuse of discretion. *Id.*

Plaintiff alleges that it established defendant's breach of contract through the uncontroverted testimony of its expert. However, a defendant need not present contrary evidence to defend an action. Rather, the jury could have rejected the testimony of plaintiff's expert. "A jury is entitled to believe all, part, or none of a witness's testimony." *Brown v Pointer*, 41 Mich App 539, 552; 200 NW2d 756 (1972), rev'd on other grounds 390 Mich 346; 212 NW2d 201 (1973). Irrespective of the expert testimony that there were lapses in air content and the slump for the concrete specifications in *certain* locations, the entire roadway was deteriorating. Moreover, the testimony of plaintiff's expert was contradicted by the fact that the contract language provided for occasional batches of concrete to fall outside the specifications.¹

¹ On the verdict form, the question posed to the jury was: "Did the defendant ... aim to breach its contract with the City of Romulus for construction of a section of a battered road?" The jury answered this question in the negative. Although plaintiff contends that the evidence was
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Despite the fact that plaintiff retained NTH to provide daily reports of the mixture specifications, there was never an instance where concrete was rejected by plaintiff. Thus, arguably, the occasional specification disparities did not constitute a breach of contract. Further, although defendant assumed responsibilities for the performance of the contract, defendant did not provide an unconditional guarantee of performance outside of the period governed by the performance bond. Accordingly, the trial court did not err by denying plaintiff's motion for JNOV or new trial.

Affirmed.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

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uncontroverted that the specifications were breached, the contract provided for occasional batches of concrete that fell outside of specifications. In light of the language of the contract, it is unclear if the jury concluded that the concrete was nonetheless acceptable. We note that plaintiff did not submit a special verdict form to the jury addressing individual items such as whether the concrete was outside of the specifications of the contract or whether occasional batches outside the specification levels were acceptable under the terms of the contract. A special verdict form that directs the jury to address discrete issues assists the deliberative process as well as the task of judicial review. See *Peisner v Detroit Free Press*, 421 Mich 125, 135-136; 364 NW2d 600 (1984). A defendant may waive an issue by failing to object to the verdict form and failing to request instructions addressing fault. See *Dedes v Asch*, 233 Mich App 329, 334-335; 590 NW2d 605 (1998), rev'd on other grounds 469 Mich 487 (2003). Reversal of a verdict is required only when allowing the verdict to stand would be inconsistent with substantial justice. *Zdrojewski v Murphy*, 254 Mich App 50, 64-65; 657 NW2d 721 (2002). When a jury renders a general verdict without being asked to delineate specific findings, we cannot conclude that a party has been denied substantial justice. *Id.* Under the circumstances, the trial court did not err in denying plaintiff's motion for JNOV or, in the alternative, new trial.