STATE OF MICHIGAN

COURT OF APPEALS

RANDOLPH MARKHAM, ELIZABETH MARKHAM, and MARKHAM OIL COMPANY, Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED September 9, 2008
v	No. 272163 Ingham Circuit Court
SUNOCO OIL COMPANY, Defendant/Counter-Plaintiff-Appellant.	LC No. 03-002208-CK

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment for plaintiffs on their breach of contract and negligence claims, and dismissing defendant's breach of contract counterclaim. We reverse and vacate the judgment in favor of plaintiffs, and remand for entry of judgment in favor of defendant and for further proceedings on defendant's counterclaim.

I. Facts and Procedural History

Defendant is a manufacturer and marketer of petroleum products. Before 2003, defendant marketed its fuel using three different methods. The first two methods were direct-supply channels, which involved the direct sale of defendant's fuel to its own gas stations and dealer operations. The third method was a distribution network, where defendant sold its fuel to third party distributors, who in turn sold it to their customers. Plaintiffs own and operate gas stations, as well as supply petroleum products to certain stations. As part of defendant's distributor network, plaintiffs, at the time of trial, supplied nine of defendant's gas stations owned either by plaintiffs or plaintiffs' customers.

In June of 1998, defendant and plaintiffs entered into a distribution agreement (1998 Agreement). Under this contract, plaintiffs agreed to buy certain amounts of fuel from defendant and to resell that fuel to plaintiffs' customers. The 1998 Agreement was to remain in effect for 12.5 years and it required plaintiffs to purchase an increasing volume of fuel each year.

Before entering into the 1998 Agreement, the parties engaged in oral negotiations and agreed upon a prior proposal (1998 Proposal), which became the basis for the 1998 Agreement. The 1998 Proposal contained the following language: "Markham understands Sunoco does not establish geographic boundaries with its Distributors." The parties did not include this language in the 1998 Agreement, which remained silent with respect to geographic restrictions. The 1998 Agreement contained an integration clause indicating that it was the complete understanding between the parties and canceling all prior agreements between the parties.

In early 2003, defendant divested some of its assets, thereby eliminating all of its direct-supply marketing channels and converting its Michigan market to a distributor network. The divesture, termed the Spring Project, involved selling defendant's interests in its retail sites across the state. Defendant undertook the project in three phases. Under Phase I, the defendant offered to sell its company-owned stations to the lessee dealers who operated them. Phase II involved a sealed bid auction to sell any unsold stations, including company owned and operated stations not included in Phase I. The last phase, Phase III, assigned defendant's direct-supply contracts to third party distributors of its fuel. As a condition of sale under Phases I and II, buyers were required to enter into ten year supply contracts with distributors that sold defendant's fuel. In furtherance of this condition, defendant provided purchasers with a list of approved distributors in their market area from whom they could purchase fuel. Plaintiffs, located in Okemos, were not included in the distributor lists under Phases I and II.

Under Phase II, in order assign its existing supply agreements, defendant created two distributor lists, one for the metropolitan Detroit area and another for all locations outside Detroit, for purchases of fuel under Phase III. Plaintiffs were not included on the metropolitan Detroit list under this phase, but were included on the other list. Defendant also notified all Michigan distributors that defendant intended to control the movement of accounts under all phases of the project and that distributors were not to contact or accept calls from new owners.

Shortly after these events, plaintiffs filed suit against defendant, based on theories of breach of contract, negligence, promissory estoppel, and specific performance. These claims concerned three distinct factual scenarios regarding the parties' relationship and the Spring Project. First, plaintiffs alleged that defendant breached an agreement it had with defendant when it did not include plaintiffs in its distributor lists for the Spring Project. According to plaintiffs, defendant had agreed not to establish geographic boundaries amongst its distributors. Plaintiffs also claimed that defendant was negligent for failing to include plaintiffs because it breached its duty to ensure that plaintiffs were included on the lists and to allow plaintiffs to contact and supply stations. Lastly, plaintiffs argued that the promise must be enforced to avoid injustice.

Second, plaintiffs claimed that defendant promised plaintiffs a right of first refusal with respect to the sale of a station located in East Lansing, which was included in Phase II of the Spring Project. Defendant agrees that it promised plaintiffs during contract negotiations that plaintiffs would have a right of first refusal with respect to the station. This agreement, however, was never put into writing and was not included in the 1998 Agreement. During Phase II, defendant entered into a contract of sale for the East Lansing station with Mark Yaldo. Defendant informed Yaldo of plaintiffs' right of first refusal, but Yaldo's contract of sale did not contain language reflecting plaintiffs' right. Defendant then informed plaintiffs that it had

accepted an offer for the station and that plaintiffs could exercise their right by executing an Agreement of Sale matching the buyer's offer. In the interim, plaintiffs and Yaldo attempted to create an arrangement where Yaldo would own the station and plaintiffs would supply it. These negotiations failed and plaintiffs exercised their right of first refusal by signing the Agreement of Sale for the property matching the buyer's price. Defendant then countersigned the Agreement of Sale. Having entered into two contracts for the sale of the station, defendant tried to convince plaintiffs and Yaldo to resurrect their supply agreement. When Yaldo's and plaintiffs' negotiations failed, defendant withdrew from both offers. Based on these facts, plaintiffs claimed that defendant's breached the agreement granting plaintiffs a right of first refusal. Plaintiffs also alleged that defendant was negligent because it breached its duty to offer the property to plaintiffs first and its duty not to enter into a contract of sale with another individual until plaintiffs' right of first refusal expired. In addition, plaintiffs requested equitable relief, including specific performance of their right of first refusal and enforcement of the agreement based on a theory of promissory estoppel.

Third, plaintiffs alleged that defendant promised not to brand a certain service station, the DeWitt station, which is approximately 1.1 miles from a service station that plaintiffs supplied with defendant's oil. Plaintiffs further alleged that defendant promised to allow plaintiffs to supply the DeWitt station if defendant decided to brand that station a Sunoco station. Defendant's negotiating agent testified that he never made such a promise to plaintiffs. Subsequently, defendant allowed Mooney Oil Company to brand and supply the station, allegedly amounting to a breach of 1998 Agreement.

Defendant denied these allegations and counterclaimed, alleging that plaintiffs failed to meet the volume requirements under the 1998 Agreement for the years 2003 and 2004. At the close of discovery, the parties cross-motioned for summary disposition under MCR 2.116(C)(10) (genuine issue of material fact), with defendant moving on all counts and plaintiffs moving with respect to their contract and negligence claims on the right of first refusal. The court denied both motions.

The matter went to trial. At the close of plaintiffs' case, defendant motioned for a directed verdict, which the court denied. After closing arguments, the court presented the jury with instructions regarding plaintiffs' contract and negligence claims, and defendant's contract counterclaim. The jury returned a verdict finding defendant liable on all counts of breach of contract and negligence, awarding plaintiffs $2,336,000 in money damages, and awarding defendant no damages on its counterclaim because it found that defendant substantially breached causing plaintiffs' breach. The court then entered judgment consistent with the jury's verdict. Soon thereafter, defendant motioned for judgment notwithstanding the verdict. The court denied defendant's motion. Defendant appeals this decision as of right.

II. Standards of Review

We review de novo the lower court's grant or denial of a motion for judgment notwithstanding the verdict (JNOV). *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004). In conducting this review, we view "the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Id.* (internal quotation marks and citation omitted). Judgment notwithstanding the verdict is properly granted for the moving party only if

the evidence fails to establish a claim as a matter of law. *Id.* We also review de novo matters of contract interpretation. *Hamade v Sunoco, Inc*, 271 Mich App 145, 165; 721 NW2d 233 (2006). If a contract is clear and unambiguous, we must enforce it according to its terms. *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 185; 678 NW2d 647 (2003). To the extent that we review the court's evidentiary decisions, we will review its decision to admit or preclude evidence for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). When the decision to admit evidence involves a preliminary question of law, we review that decision de novo. *Id.* at 159.

III. 1998 Agreement Contract Claims

Defendant's first argument on appeal is that the court erred when it failed to grant defendant's motion for JNOV with respect to plaintiffs' contract claims under the 1998 Agreement. We agree.

Specifically, plaintiffs alleged, and the jury found, two instances of breach under the agreement: (1) when defendant did not include plaintiffs on the distributor lists for the Spring Project and (2) when defendant branded the nearby DeWitt station but did not require that station to use plaintiffs as its supplier. In a suit for breach of contract, the complaining party seeks to enforce the contract's terms and his rights thereunder against the party who has breached the contract's terms. See *Wall v Zynda*¸ 283 Mich 260, 264-265; 278 NW 66 (1938). In other words, the complaining party has the burden of showing that the legal duties created under the contract were not performed.

Upon review of the 1998 Agreement, we simply see no term granting plaintiffs the right to be included in the approved distributor lists for the Spring Project, nor do we see a term that would prevent defendant from branding the DeWitt station. We think plaintiffs failed, as a matter of law, to establish a breach of the contract because plaintiffs did not show that defendant failed to abide by the contract's terms. Put another way, the terms of the 1998 Agreement do not confer the rights that plaintiffs allege defendant violated.

Plaintiffs, however, argue that certain extrinsic evidence, which the lower court admitted, supports their claim regarding the Spring Project distribution lists. We cannot agree with plaintiffs because the court erred when it admitted this evidence.

Extrinsic evidence is permissible to assist a jury in the interpretation of an ambiguous contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). A contract is ambiguous when its terms are susceptible to more than one meaning, or when two provisions irreconcilably conflict. *Coates v Bastian Brothers, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). Courts may not create ambiguities where none exist. *Id.* If a contract is unambiguous, courts must enforce the terms of the contract as written. *Id.* Whether a contract is ambiguous is a question of law determined by the court. *Id.* at 504.

In the present matter, plaintiffs sought to admit the following the following extrinsic statement from the 1998 Proposal: "Markman understands Sunoco does not establish geographic boundaries with its Distributors." Plaintiffs argued before the trial court, and now before this Court on appeal, that the evidence should be admitted because it would assist the jury by

resolving any ambiguities in the Agreement. At trial, the court agreed with plaintiffs' reason and denied defendant's motion in limine to exclude the 1998 Proposal. The court stated:

> The [1998 Proposal] has terms that are different that the [1998 Agreement]. To the extent that the [1998 Proposal] could help clarify any ambiguity in the [1998 Agreement] would, again, be helpful for the trier of fact. Whatever weight is given by the jury is the jurors' determination, not the Court.

This reasoning is erroneous. The fact that the 1998 Proposal contains different terms than the 1998 Agreement is insufficient, as a matter of law, to create an ambiguity within the four corners of the 1998 Agreement. An ambiguity exists where terms irreconcilably conflict or where the contract is susceptible to more than one interpretation. *Id.* at 503. The trial court did not point out any specific ambiguous language in the 1998 Agreement, but simply adopted plaintiffs' proposition at the motion hearing. Because our review of the 1998 Agreement indicates that the contract contains no ambiguities, we find that the court's contrary decision, in effect, created an ambiguity where none exists. See *id*. This was error and the 1998 Proposal was not admissible on the basis that the 1998 Agreement was ambiguous.

Plaintiff's also argue that an exception to the parol evidence rule, namely that the 1998 Proposal is consistent with the 1998 Agreement, properly allowed the entry of the 1998 Proposal. Again, we disagree. The parol evidence rule posits that "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 597 NW2d 411 (1998) (citation omitted, alteration by *UAW-GM* Court). This rule is subject to several exceptions, which this Court articulated in *Hamade*, *supra* at 145:

> First, it is a prerequisite to application of the parol evidence rule that there be a finding that the parties intended the written instrument to be a complete expression of their agreement with regard to the matters covered. For this reason, "[e]xtrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an 'integrated' agreement." *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407, 410; 285 NW2d 770 (1979). Second, extrinsic evidence may be presented to attack the validity of the contract as a whole. Thus, extrinsic evidence may be presented to show (1) that the writing was a sham, not intended to create legal relations, (2) that the contract has no efficacy or effect because of fraud, illegality, or mistake, (3) that the parties did not integrate their agreement or assent to it as the final embodiment of their understanding, or (4) that the agreement was only partially integrated because essential elements were not reduced to writing. *Id.* at 410-411. [*Id*. at 167-168.]

When the parties include an explicit integration clause within a contract that clause is conclusive that the parties intended the contract to be a final and complete expression of their agreement and parol evidence is not admissible to show that the contract is not integrated. *Id.* at 169; *UAW-GM*, *supra* at 502. The exception to this rule is where fraudulent circumstances invalidate the integration clause or where the contract is facially incomplete such that parol evidence is

"necessary for the 'filling of gaps.'" *UAW-GM*, *supra* at 502, quoting 3 Corbin, Contracts, § 578, p 411.

Because the 1998 Agreement is unambiguous and fully integrated,[1] the parol evidence rule applies and extrinsic evidence could not be admitted unless plaintiffs demonstrated that the contract was a sham, illegal, the product of mistake, or that the statement should be admitted under some other recognized exception. See *Hamade*, *supra* at 167-168. However, plaintiffs' argued, and the court agreed, that the 1998 Proposal should be admitted because it was not inconsistent with the 1998 Agreement's terms.[2] The court provided the following reasoning in its judgment denying the defendant's motion for judgment notwithstanding the verdict:

> This Court finds that the Defendant's argument that the parol evidence rule is [sic] without merit. In this case, Plaintiffs' and Defendant's prior agreement, (1998 proposal) stated that Plaintiffs had no geographic limitation which is consistent with the 1998 [Agreement]. Thus there is an exception to the parol evidence rule when a prior agreement (1998 Proposal) is consistent with the written language (1998 [Agreement]). [Citing *Union Oil Co v Newton*, 397 Mich 486; 245 NW2d 11 (1976).]

Plaintiffs, in support of the court's reasoning, contend that the Supreme Court's decision in *Union Oil*, *id.*, would allow for the admission of parol evidence consistent with the contract's terms where the contract is unambiguous and fully integrated. Both plaintiffs and the court misinterpreted the holding of the *Union Oil* Court. In that case, the contract at issue did not contain an integration clause and the contract was latently ambiguous. *Id.* at 487-488. The

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[1] The 1998 Agreement's integration clause provided the following:

> All prior contracts between the parties concerning the purchase and sale of Motor Fuel and other products covered hereby are canceled as of the date the term of this Agreement commences. Both parties fully release each other from all liability arising out of such prior contracts . . . .
>
> All representations, understanding, and promises with respect to the subject matter covered by this Agreement, are fully set forth herein. The person negotiating this Agreement on behalf of Company is without authority to make any promise or agreement with Distributor which is not set forth herein, or made a part of this Agreement, and executed by a duly authorized representative of Company.

[2] We note in passing the perplexing nature of the court's reasoning. On the one hand, the court makes the implicit finding that the 1998 Agreement is ambiguous and admits the agreement on that basis. By definition then, the parol evidence rule would not apply because the rule only applies to unambiguous contracts. Despite the court's finding, it then provided an additional basis for admitting the 1998 Proposal through a supposed exception to the parol evidence rule.

Court opined that parol evidence consistent with the contract is properly admitted into evidence to show that a latent ambiguity exists. *Id*. In our view, *Union Oil* does not create an additional exception to the parol evidence rule, as plaintiffs would have this Court believe. Rather, the proposition announced in the *Union Oil* case allows a party to show that a contract is ambiguous through parol evidence to the extent that that evidence is consistent with the underlying contract.

That is not the case here. The 1998 Agreement was fully integrated and plaintiffs did not seek to admit the 1998 Proposal to show that a latent ambiguity existed, as was the case in *Union Oil*. The court admitted the 1998 Proposal for purposes of clarifying any supposed ambiguities in the 1998 Agreement in order to assist the jury. For us to agree with plaintiffs' argument that consistent parol evidence is admissible despite the existence of an integrated unambiguous contract, would violate the basic proposition and purpose of the rule. Extrinsic evidence that adds to, contradicts, or varies a contract's terms is not admissible when a contract is clear and unambiguous. See *UAW-GM, supra* at 492. To allow otherwise would permit parties to avoid the obligations they had agreed to under the contract. *Hamade, supra* at 167. Accordingly, we conclude that the court misapplied the parol evidence rule, and erred as a matter of law, when it admitted the 1998 Proposal into evidence.

Next, with respect to the DeWitt station, plaintiffs argue that defendant violated its duty of good faith and fair dealing implicit in the 1998 Agreement. Plaintiffs contend that defendant's decision to brand the DeWitt station, which is located 1.1 miles from one of plaintiffs' stations, conflicts with their ability to fulfill their obligation under the agreement. As noted, there is no explicit obligation under the agreement that would prevent defendant from branding a fuel station. Further, plaintiffs' attempt to base its breach of contract claim on the covenant of good faith and fair dealing must fail because "Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Fodale v Waste Mgt of Michigan, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006). Therefore, the court erred when it did not dismiss plaintiff's complaint with respect to this claim.

In sum, in consideration of the evidence and all reasonable inferences drawn in the light most favorable to plaintiffs, we conclude that plaintiffs' claims under the 1998 Agreement must fail as a matter of law. Therefore, the court erred when it did not grant defendant's motion for JNOV. Because we dispose of these matters of this ground, we find it unnecessary to consider defendant's argument regarding the court's decision to admit opinion testimony.

IV. Right of First Refusal Contract Claim

Defendant next argues that the court erred when it denied defendant's motion for JNOV with respect to plaintiffs' right of first refusal claim because defendant did not breach plaintiffs' right. We find that defendant did breach plaintiffs' right of first refusal, but we conclude that the Agreement of Sale supersedes plaintiffs' right of first refusal and that judgment was proper for defendant.

As this Court noted in *In re Egbert R Smith Trust*, 274 Mich App 283; 731 NW2d 810 (2007):

> A right of first refusal . . . empowers its holder with a preferential right to purchase property on the same terms offered by or to a bona fide purchaser. It

> limits the right of the owner to dispose freely of his other property by compelling him or her to offer it first to the party who has the first right to buy. Nor may the owner accept an offer made to him by a third party. [*Id.* at 287, quoting 17 CJS, Contracts, § 56, p 503 (omission by *Smith Trust* Court).]

In other words, once a bona fide purchaser makes an offer to buy the property, the holder's right of first refusal ripens into an option to purchase the property on the same terms offered by the third party. See *id*. at 287-288. The holder does not have to exercise the option, however, the owner must offer the property to the holder before accepting an offer from a third party. *Bristol-Myers Squibb Co v Ikon Office Solutions, Inc*, 295 F3d 680, 685 (2002).

It is uncontested in this case that plaintiffs have a right of first refusal with respect to the East Lansing station. Defendant offered plaintiffs the option to exercise their right of first refusal after it accepted Yaldo's offer to purchase the East Lansing station. Defendant therefore breached its agreement with plaintiffs because it accepted another offer before plaintiffs could exercise their right.

Defendant, however, argues that the Agreement of Sale bars plaintiffs' claim because it contained an integration clause and thereby governed the parties' relationship. Defendant further contends that the court erred because it admitted the Agreement of Sale only for purposes of showing the sequence of events based on its concern that the agreement's liquidated damages clause, which would not allow plaintiffs to recover lost profits, was unconscionable. On these points, we agree.

In order to consider whether the Agreement of Sale bars plaintiffs' claims, we must first consider whether the court erred when it admitted the agreement only for purposes of demonstrating the sequence of events. In the instant case, the court provided the following reasoning for limiting the admissibility of the Agreement of Sale:

> [The Agreement of Sale has been] admitted for purposes of sequestration (sic) of events. It's not admitted for the Defendant to argue that this is a prevailing document. The Complaint, amended complaint is based on a theory that the Right of First Refusal was not honored or protected by the Defendant. And, that is the argument with respect to damages. That's where the unconscionability was used in this Court – in this connection that it's unconscionable to not allow . . . . That's the word used by the Plaintiff to recover for lost profit would be unconscionable. The lost profit might be the business and/or the property or maybe no cause.

The court also made the following statement several pages earlier in the transcript with respect to its decision:

> [It] would be unconscionable, to force any limitation on recovery of lost profits in this case . . . . Unconsionabilty is a valid consideration in commercial setting [sic] where a purchaser is deprived of relief.

The court's reason for limited the admissibility of the Agreement of Sale is unclear to us. On the one hand, the court may have excluded the agreement's substance because it viewed the

agreement as irrelevant because plaintiffs' based their claim on the oral agreement granting them a right of first refusal. Alternatively, the court may have precluded the substance of the Agreement of Sale because its liquidated damages clause was unconscionable. Whatever the case may be, we believe the court erred.

First, the Agreement of Sale was relevant to the disposition of plaintiffs' claim. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In this case, the parties' assent to the Agreement of Sale tends to show that plaintiffs' waived their right of first refusal and that the Agreement of Sale became the operative document, meaning that the Agreement of Sale would control the parties' rights in case of breach. Clearly, the Agreement of Sale is of consequence to the disposition of plaintiffs' claim.

Further, if indeed the liquidated damages provision was unconscionable the remedy would have been to void that clause, not to exclude the substance of the contract. See *Curran v Williams*, 352 Mich 278, 282-283; 89 NW2d 602 (1958). We think, therefore, that the court's decision to exclude the contract's entire substance falls outside the principled range of outcomes. Further, after a review of the liquidated damages clause, we find, as a matter of law, that that provision was not unconscionable and accordingly, the entire contract should have been admitted. We will void a provision or contract if we find both procedural and substantive unconsionability. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 143; 706 NW2d 471 (2005). We will find procedural unconsionability where the weaker party has "no realistic alternative to the acceptance of [a] term" and has no freedom to accept or reject that term. *Id*. at 144. Substantive unconsionability exists if a term is not substantively reasonable. *Id.* In other words, the term must be so extremely inequitable as to shock the conscience. *Id*.

In the instant matter, procedural unconscionability is lacking. Plaintiffs had no obligation to enter into the Agreement of Sale and did not have to enter into the agreement if they found the damages provision unfavorable. We also find any substantive unconsionability lacking. The liquidated damages clause provided for the return of plaintiffs' earnest deposit money and precluded any consequential damages. Nothing about this remedy shocks the conscious. In sum, we conclude that the court abused its discretion when it excluded from evidence the substance of the Agreement of Sale.

Had the court reached the proper result and admitted the Agreement of Sale, plaintiffs' claim would be barred as a matter of law because the Agreement of Sale contained an integration clause. An integration clause nullifies all previous agreements. *UAW-GM, supra* at 502. With respect to whether a later contract containing an integration clause supersedes a former contract concerning the same subject matter, the Supreme Court has stated the following:

> [An integration clause in the later contract] provides clear evidence . . . that the parties *did* intend the later contract to supersede the earlier contract. Therefore, the existence of an integration clause in the later contract necessarily indicates that the parties intended the later contract to supersede the earlier contract, and thus provides dispositive evidence with regard to which contract is controlling. [*Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 414 n 16; 646 NW2d 170 (2002) (emphasis added by *Archambo* Court).]

In this case, the oral agreement conferring plaintiffs a right of first refusal concerned the same subject matter as the Agreement of Sale, mainly the sale of the East Lansing station. Despite defendant's breach of plaintiffs' right of first refusal, plaintiffs, knowing of defendant's breach, exercised their right according to defendant's terms and both parties subsequently signed the Agreement of Sale that purported to be the full agreement with respect to the purchase and sale of the East Lansing station. Because the parties entered into a valid and binding contract, its terms became effective and it supersedes, and in effect extinguishes, plaintiffs' right of first refusal. As this Court noted in *UAW-GM*, *supra* at 495: "This conclusion accords respect to the rules that the parties themselves have set forth to resolve controversies arising under the contract. The parties are bound by the contract because they have chosen to be so bound." Additionally, we think that because plaintiffs entered into the Agreement of Sale knowing that defendant had breached plaintiffs' right of first refusal, that plaintiffs waived any claims they may have had against defendant based on their right of first refusal. See cf. *Pearson v Sullivan*, 209 Mich 306, 313; 176 NW 597 (1920).

We conclude that the evidence cannot support plaintiffs' claim as a matter of law and judgment for defendant was proper. Accordingly, the court erred when it denied defendant's motion for JNOV with respect to plaintiffs' claim that defendant breached the agreement granting plaintiffs a right of first refusal. Because we dispose of plaintiffs' claim on this basis, it is unnecessary for us to consider defendant's claim of instructional error.

V. Negligence Claims

Lastly, defendant argues that the court erred because it should have granted defendant's motion for JNOV with respect to plaintiffs' negligence claims. We agree. An action for negligence arising from a contract will not exist unless there is a separate and distinct duty, independent of any duties owed under the contract. *Fulz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). In this matter, plaintiffs raised negligence claims with respect to both the Spring Project distribution lists and the sale of the East Lansing station. However, plaintiffs based both of these claims on their contractual relationship with defendant. As such, plaintiffs failed to show a cognizable duty separate from the underlying contract and their claims must fail. Defendant was entitled to judgment as a matter of law. Given our conclusion, we do not consider defendant's allegation of instructional error.[3]

VI. Defendant's Counterclaim

Because plaintiffs' claims predicated on the 1998 Agreement fail as a matter of law, we also conclude that the lower court erred when it denied defendant's motion notwithstanding the verdict on defendant's counterclaim.

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[3] Defendant also argues that the court should have granted its motion for a new trial because the verdict was against the great weight of the evidence. Because we vacate the court's judgment with respect to defendant's liability, we do not consider this argument.

Vacated with respect to plaintiffs' claims and remanded for entry of judgment for defendant. We also vacate the court's judgment of no cause of action with respect to defendant's counterclaim and remand for further proceedings regarding the issue of damages. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly