STATE OF MICHIGAN

COURT OF APPEALS

LANSING PAVILION, L.L.C.,

Plaintiff-Appellant,

v

EASTWOOD, L.L.C.,

Defendant/Counter-Plaintiff/Third-Party-Plaintiff-Appellee,

and

L.L. & 127, L.L.C.,

Defendant/Counter-Plaintiff-Appellee,

v

STS CONSULTANTS, LTD.,

Third-Party-Defendant/Third-Party-Plaintiff-Appellee,

and

D.J. MCQUESTION & SONS, INC., J.R. ANDERSON DEVELOPMENT CO., and JEFFREY R. ANDERSON REAL ESTATE, INC.,

Third-Party-Defendants.

UNPUBLISHED
August 6, 2009

No. 281811
Ingham Circuit Court
LC No. 02-001734-CK

LANSING PAVILION, L.L.C.,

Plaintiff/Counter-Defendant-Appellant,

v

No. 282332

Ingham Circuit Court
EASTWOOD, L.L.C., LC No. 02-001734-CK

Defendant/Counter-Plaintiff/Third-Party-Plaintiff-Appellee,

and

L.L. & 127 L.L.C.,

Defendant/Counter-Plaintiff/Appellee,

v

J.R. ANDERSON DEVELOPMENT COMPANY, and JEFFREY R. ANDERSON REAL ESTATE, INC.,

Third-Party-Defendants-Appellants,

and

D.J. MCQUESTION & SONS, INC.,

Third-Party-Defendant-Appellee,

and

STS CONSULTANTS, LTD.,

Third-Party-Defendant/Third-Party-Plaintiff-Appellee.

LANSING PAVILION, L.L.C.,

Plaintiff/Counter-Defendant,

v No. 283071
Ingham Circuit Court
EASTWOOD, L.L.C., LC No. 02-001734-CK

Defendant-Counter-Plaintiff-Third-Party-Plaintiff-Appellee,

and

L.L. & 127, L.L.C.,

Defendant/Counter-Plaintiff-Appellee,

v

J.R. ANDERSON DEVELOPMENT COMPANY and JEFFREY R. ANDERSON REAL ESTATE, INC.,

Third-Party-Defendants-Appellants,

and

STS CONSULTANTS, LTD.,

Third-Party-Defendant/Third-Party-Plaintiff-Appellee,

and

D.J. MCQUESTION & SONS, INC.,

Third-Party-Defendant-Appellee.

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

I. Introduction

In these consolidated appeals, plaintiff Lansing Pavilion, L.L.C., and third-party defendants J. R. Anderson Development Co. and Jeffrey R. Anderson Real Estate, Inc. (collectively the Anderson entities), appeal as on leave granted a series of circuit court orders concerning the parties' claims arising out of the development of commercial real estate in Lansing.

In Docket No. 281811, Lansing Pavilion challenges the court's order granting defendant/third-party plaintiff Eastwood and defendant L.L. & 127, L.L.C.'s (collectively

Eastwood[1]) renewed motion for summary disposition regarding the effect of the October 31, 2001, signature release agreement and the order denying its motion for reconsideration. In Docket No. 282332, Lansing Pavilion and the Anderson entities take issue with two orders granting Eastwood partial summary disposition on Lansing Pavilion's breach of contract, negligence and misrepresentation claims, as well as the order denying Lansing Pavilion's motion for summary disposition on the superseding effect of the parties' Amended and Restated Site Development Agreement. The Anderson entities also challenge the court's order denying their joint motion for summary disposition/motion in limine. In Docket No. 283071, the Anderson entities appeal the order granting Eastwood's motion in limine to exclude soil defenses pertaining to the parties' oral grading contract. We affirm all of the disputed orders with the exception of the court's order in Docket No. 283071 granting Eastwood's motion in limine, which we reverse only insofar as it held Anderson Real Estate to be a party to the oral grading contract. In all other respects, we affirm that order as well.

II. Background

This case arises out of the development of the Eastwood Towne Center, a retail shopping center located on a 192-acre parcel in Lansing. Lansing Pavilion is a corporation owned by Jeffrey Anderson and J. R. Anderson, upscale retail shopping developers. The Andersons are also the principal owners of Anderson Development and Anderson Real Estate. Eastwood and L.L. & 127 are owned by real estate developer Michael Eyde.

Sometime in 2000, the Anderson entities entered into a series of informal agreements with AIG Baker, Inc., to develop a shopping center later known as the Lansing Pavilion site. Due to the inability to finalize a site development agreement, AIG terminated its involvement in May 2001, and the Andersons began negotiations with Eastwood for joint development of the site.

In June 2001, Anderson Development and Eastwood entered into a Ground Lease/Option to Purchase Agreement in which Anderson Development agreed to lease from Eastwood 35 acres of the 192-acre shopping center for development of a lifestyle shopping center, i.e., a complex containing restaurants and retail stores. Also around this time, Anderson Development and Eastwood entered into an oral grading contract, under which Eastwood agreed to mass balance the soils of the site (i.e., move soil to make the site flat for construction) in exchange for Anderson Development's payment of 20.8 percent of the total cost of mass balancing.[2] After entering into these contracts, Eastwood hired D. J. McQuestion & Sons, Inc., to perform soil grading, but later retained STS Consultants, Ltd., to oversee this work.

On August 8, 2001, Lansing Pavilion obtained a loan commitment from Huntington Bank for $45,000,000. As conditions to financing, Lansing Pavilion was required to obtain

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[1] All agreements entered into by L.L. & 127 were assigned to Eastwood.

[2] Lansing Pavilion is Anderson Development's assignee and "successor in interest" to both the oral grading contract and Ground Lease.

Eastwood's signature on all pre-closing documents – including a site development agreement (SDA) – and be in a position to commence the project immediately. Closing was scheduled for November 1, 2001. On August 31, 2001, Eastwood and Anderson Real Estate entered into a Management and Consulting Agreement (MCA) under which Anderson Real Estate agreed to find "big box" tenants (such as Wal-Mart, Sam's, and Lowe's Home Center) and act as manager of the site upon its completion.

In the days leading up to the loan closing, the parties exchanged numerous emails and telephone calls in an effort to finalize the pre-closing documents. As part of this exchange, on October 31, 2001, in an email time-stamped 3:32 p.m., Eastwood approved the proposed changes to and authorized attachment of its signature page to the Declaration of Easements and Covenants and Restrictions (ECR). Eastwood also noted that it would confirm site development discussions between J. R. Anderson and Eyde "supplementing the parties' duties and addressing matters that were not specifically covered in the [SDA]" in a letter later that day.

At 10:22 p.m. that same day, Eyde faxed to Jeffrey Anderson the signature release agreement letter (SRA). This document purported to memorialize the side agreements reached between the parties in the October 31, 2001, negotiations made in lieu of document revisions to ensure financing would close in a timely fashion. Significantly, the SRA conditioned attachment of Eastwood's signature page to the SDA on Lansing Pavilion's acceptance of the terms contained in the SRA – most notably that Lansing Pavilion found the site sufficiently graded and would accept the site "as is."

Lansing Pavilion attached Eastwood's signature to the SDA and proceeded to close on financing the following day, November 1, 2001. Notably, despite receiving the faxed SRA, Jeffrey Anderson and J. R. Anderson – both of whom attended the loan closing – averred that they did not see the SRA until after closing was finished. In any event, sometime after closing on November 1, 2001, J. R. Anderson sent Eyde a letter indicating receipt of and general agreement with the SRA, albeit with several exceptions – including Lansing Pavilion's agreement to accept the site "in its current condition" and pay 20.8 percent of the costs if it was determined on November 6, 2001, that McQuestion could not complete the soil grading on time.

The parties subsequently agreed at the November 6, 2001, meeting to allow McQuestion to continue the soil grading, despite problems with the grading process. On March 25, 2002, Lansing Pavilion and Eastwood executed the Amended and Restated Site Development Agreement (Amended SDA) in order to provide notice to Eastwood's lender, to clarify the payment schedule, and to identify Eastwood as the general contractor.

After expending approximately $3.5 million to remediate mass grading problems, Lansing Pavilion initiated suit against Eastwood alleging, *inter alia*, breaches of the Ground Lease, oral grading contract, SDA, and warranty as well as misrepresentation and negligence claims. Eastwood counterclaimed that Lansing Pavilion breached the Ground Lease and SDA and also filed a third-party complaint against the Anderson entities for breach of the MCA and reimbursement of 20.8 percent of McQuestion's mass grading work under the oral grading contract. After the court ruled on multiple motions for summary disposition and motions in limine, the instant appeals ensued.

III. Docket No. 281811

A. The Effect of the SRA

Lansing Pavilion first argues that the court erred in ruling that Lansing Pavilion accepted the terms of the SRA. In making this argument, Lansing Pavilion attacks both the court's order granting Eastwood's renewed motion for summary disposition and the order denying its motion for reconsideration.

This Court reviews de novo an appeal from an order granting a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Additionally, the existence and interpretation of a contract are questions of law reviewed de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). The decision whether to grant a motion for reconsideration, however, is reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

i. The Meeting of the Minds Regarding the SRA

In challenging the court's ruling, Lansing Pavilion initially contends that there was no meeting of the minds regarding the SRA. We disagree. "In order to form a valid contract, there must be a meeting of the minds on all the material facts. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). "A party's intention must be gathered not from what a party now says he then thought but from the contract itself." *Fletcher v Bd of Ed of School Dist Fractional No 5*, 323 Mich 343, 348; 35 NW2d 177 (1948) (citation omitted).

Here, an objective review of the parties' words and visible acts reveals that the parties entered into a valid contract according to the terms of the SRA. After extensive negotiations and a number of email exchanges, Eastwood, in the 3:32 p.m. email of October 31, 2001, authorized attachment of its signature to the ECR. Notably, Eastwood *did not* expressly authorize attachment of its signature to the SDA in that email. On the contrary, Eastwood only indicated that a letter pertaining to the SDA would be forthcoming. Significantly, that forthcoming letter – the SRA – constituted the *only* express authorization for attachment of Eastwood's signature to the SDA – an attachment which was contingent upon Lansing Pavilion's acceptance of the terms in the SRA.

Because the SRA specifically provided that attachment of Eastwood's signature indicated agreement with the SRA's terms, the letter constituted an offer that sought acceptance by performance. Consequently, because Lansing Pavilion attached Eastwood's signature to the SDA and proceeded to closing, the trial court correctly found that Lansing Pavilion's acceptance

by performance formed a unilateral contract. *In re Certified Question* (*Bankey v Storer Broadcasting Co*), 432 Mich 438, 446; 443 NW2d 112 (1989); *Papas v Gaming Control Bd*, 257 Mich App 647, 663; 669 NW2d 326 (2003). Thus, looking at the parties' words and visible actions at the time the contract was formed, Lansing Pavilion's attachment of Eastwood's signature to the SDA evidenced a meeting of the minds.[3] *In re Costs & Attorney Fees*, 250 Mich App 89, 96-97; 645 NW2d 697 (2002); *Kamalnath*, *supra* at 558.

Lansing Pavilion relies on Eastwood's email sent at 3:35 p.m. indicating, "The change is fine[,]" to show that Eastwood authorized attachment of the signature page before sending the SRA. However, it is unclear to what "change" the email references. Regardless, it is clear the 3:35 email *did not* authorize attachment of Eastwood's signature to the SDA and that the 3:32 email unequivocally indicated that a letter would be forthcoming on that issue. "[I]f either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a contract." Restatement of Contracts, 2d, § 27, comment b; see also *Angelo DiPonio Equipment Co v Dep't of State Highways*, 107 Mich App 756, 761; 309 NW2d 566 (1981). Thus, any reliance on the 3:35 p.m. email is unavailing.

Lansing Pavilion counters that affidavits showing that Lansing Pavilion was unaware of the SRA until after the loan closing on November 1, 2001, undercut the conclusion that there was a meeting of the minds. This argument fails for several reasons.

First, Lansing Pavilion did not submit the affidavits supporting this argument until filing its motion for reconsideration, which was not filed until nearly two years after Eastwood's first summary disposition motion on this issue and nearly two months after Eastwood's renewed summary disposition motion. Given that a court considers evidence available to it when ruling on a summary disposition motion, there can be no error relative to the summary disposition order on this issue. *Maiden*, *supra* at 125 n 9.

Second, as these affidavits were those of parties involved in this action or the site development project, they could have been presented the first or even second time this issue was argued. As the trial court stated, "The motion also presents, *for the first time* . . . [a]ffidavits and . . . attempt[s] to inject new arguments on the issue that could have been made in the exhaustive briefing and argument to this [c]ourt previously, but were not made." (Emphasis supplied.) This Court will "find no abuse of discretion in the denial of a motion for reconsideration that rests on

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[3] Lansing Pavilion asserts the SRA amounted to nothing more than a confirmation memorandum containing a conditional assent term. See *American Parts Co v American Arbitration Ass'n*, 8 Mich App 156, 173-174; 154 NW2d 5 (1967). Notwithstanding that *American Auto Parts Co* dealt with a contract under the Uniform Commercial Code, this argument fails given that at no time prior to the SRA did Eastwood authorize attachment of its signature to the SDA.

testimony that could have been presented the first time the issue was argued." *Churchman*, *supra* at 233.[4]

Finally, even if the affidavits were considered, their presentation to the trial court at such a late stage in the litigation is arguably akin to the indefensible position of one, who after entering into a contract, claims he did not read it or supposed it was different in its terms when enforcement was sought. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 59; 664 NW2d 776 (2003). For these reasons, Lansing Pavilion's reliance on the affidavits to show ignorance of the SRA before closing is to no avail.

ii. No Genuine Issue of Material Fact Precluded Summary Disposition

Lansing Pavilion next contends that genuine issues of material fact precluded summary disposition. First, Lansing Pavilion points out that the November 1, 2001, letter sent in response to the SRA contradicts the SRA and that portions of the SRA contradict the original SDA. This, however, is of no consequence given that a contract was already formed when Lansing Pavilion attached Eastwood's signature to the SDA and proceeded to closing. Indeed, the whole point of the SRA was to memorialize side agreements to the SDA in lieu of rewriting the entire document. The SRA was clear on this point, and, even more critically, clear on the terms granting Lansing Pavilion permission to execute the SDA on Eastwood's behalf. To reiterate, the SRA was the *only* document clearly and unambiguously granting this permission. Thus, the November 1, 2001, letter cannot create any genuine issue of material fact. See *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998) ("This court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.")

Second, Lansing Pavilion cites Eastwood's failure to reply to J. R. Anderson's November 1, 2001, letter sent in response to the SRA and also Eastwood's written representations to third parties that the SDA was not amended to show genuine issues of material fact.[5] However, as noted above, we may not look to such extrinsic evidence where the SRA was clear and unambiguous. *Id*. In any event, neither action (or inaction) by Eastwood is inconsistent with the fact that the SRA was in effect at the time the SDA was executed. In other words, the SRA did not amend the SDA because the SDA was only executed in accordance with the SRA.[6] Thus, no genuine issues of material fact precluded summary disposition.

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[4] In light of this conclusion, Lansing Pavilion's argument that the court made "impermissible" findings and assumptions of fact on this issue fails.

[5] Lansing Pavilion cites *KRW Assoc v Cabo, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 1998 (Docket No. 200179), in support of this argument. However, we decline to address unpublished opinions, which are not binding under stare decisis. MCR 7.215(C)(1).

[6] Similarly, that the SRA contained a "joint responsibility" proposal not contained in the SDA does not support Lansing Pavilion's argument. Indeed, Lansing Pavilion did not have
(continued…)

iii. The MRPC and the Statute of Frauds

Alternatively, Lansing Pavilion asserts that the rules of professional responsibility and the statute of frauds preclude enforcement of the SRA. We disagree. Questions of law, including application of the statute of frauds, are reviewed de novo. *In re Handelsman*, 266 Mich App 433, 435; 702 NW2d 641 (2005).

Regarding professional responsibility, Lansing Pavilion alleges that two ex parte communications (a telephone conversation[7] and the SRA, which was not faxed to Lansing Pavilion's attorneys) violated MRPC 4.2, and therefore, the SRA is not enforceable.[8] MRPC 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." With respect to the telephone conversation, the 3:32 p.m. email plainly states that Lansing Pavilion's counsel not only permitted, but also instructed Eastwood's counsel to engage in a telephone conversation with Jeffrey Anderson. Thus, it appears consent was obtained, and no violation occurred. Similarly, regarding the SRA, no violation of MRPC 4.2 occurred where Eyde – and not Eastwood's counsel – faxed the SRA to Jeffrey Anderson. Indeed, by its plain language, MRPC 4.2 applies only to a lawyer, a fact that is made in the persuasive comment to MRPC 4.2 that the rule does not apply to communications between parties. MRPC 1.0(c).

Turning to the statute of frauds, Lansing Pavilion claims that the SRA is unenforceable since Lansing Pavilion did not sign that document, which affected a real estate interest. This argument, however, misreads the statute of frauds. Indeed, MCL 566.106 requires the party *granting* the interest to sign the deed or conveyance at issue. Here, it was Eastwood that leased the 35-acre lifestyle center to Lansing Pavilion, and therefore Eastwood was the party granting an interest. Thus, under the plain language of MCL 566.106, it was Eastwood – and not Lansing Pavilion – that was required to execute the SRA to satisfy the statue of frauds. Because Eyde signed the SRA on behalf of Eastwood, even if the statute of frauds were applicable, the statute of frauds defense is of no avail to Lansing Pavilion.[9]

(…continued)

permission to execute the SDA until *after* Eastwood expressly provided it in the SRA. Thus, there was no prior contract for the SRA to contradict.

[7] Although Lansing Pavilion fails to specify the exact telephone conversation in question, it appears Lansing Pavilion references a conversation held October 31, 2001, as that is the date of the negotiations underlying this appeal.

[8] Contracts violating the MRPC are unethical and therefore unenforceable because they contradict public policy. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 188; 650 NW2d 364 (2002).

[9] Lansing Pavilion also notes that the SRA violated the SDA, which adopted the statute of frauds and required any modification or amendment to be signed by the party against whom enforcement was sought. However, as already discussed, the SRA did not modify or amend the SDA because it was the SRA that authorized Lansing Pavilion to execute the SDA on Eastwood's behalf.

B. Eastwood's Renewed Motion for Summary Disposition and Lansing Pavilion's Motion for Reconsideration

i. Eastwood's Renewed Motion for Summary Disposition

Next, Lansing Pavilion contends that the trial court abused its discretion in treating Eastwood's renewed motion as a motion for summary disposition under MCR 2.604(A) as opposed to an untimely-filed motion for reconsideration under MCR 2.119(F). The proper interpretation and application of a court rule is a question of law that this Court reviews de novo. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

The trial court did not err in granting the motion. First, the renewed motion pertained to an order that adjudicated fewer than all the parties' claims. Also, no order of final judgment has been entered in this case. Thus, revision of the order at issue was proper under MCR 2.604(A). Second, because MCR 2.116(E)(3) permits a party to file more than one motion under MCR 2.116, a trial court's denial of one summary disposition motion does not bar a subsequent motion for summary disposition, even if filed on identical grounds. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997); *Goodrich v Moore*, 8 Mich App 725, 728; 155 NW2d 247 (1967).

Finally, regarding the timing of the motion, MCR 2.116(B)(2) provides that a motion for summary disposition may be filed at any time consistent with subrules (D) and (G)(1). MCR 2.116(D) neither limits the time nor the number of summary disposition motions that a party may file. MCR 2.116(G)(1) indicates that the general practice of filing motions under MCR 2.119 applies to motions for summary disposition with the exception of certain filing requirements in MCR 2.119(G), which are not applicable here.[10] In light of this, the trial court properly reviewed Eastwood's renewed motion for summary disposition, which was timely filed.[11]

Even if Eastwood's motion were viewed as a motion for reconsideration, however, the court did not abuse its discretion. Indeed, while MCR 2.119(F)(1) requires a motion for reconsideration to be served and filed not later than 14 days after entry of an order deciding the motion,[12] the rule provides an exception where "another rule provides a different procedure for reconsideration of a decision (see, e.g., MCR 2.604[A], 2.612) . . . ." Thus, as the court relied upon MCR 2.604(A) in granting the renewed motion, there was no abuse of discretion.

ii. Lansing Pavilion's Motion for Reconsideration

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[10] Neither MCR 2.116(G) nor MCR 2.119 defines a renewed motion for summary disposition.

[11] The parties' reliance on *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 680-681; 444 NW2d 534 (1989), is unavailing because no issue was raised in that case concerning whether the motion at issue was timely filed and because the trial court in this case did not treat the renewed motion for summary disposition as a motion for reconsideration.

[12] The 14-day time limit was raised to 21 days in 2008.

Lansing Pavilion next argues that the trial court abused its discretion in denying its motion for reconsideration of the order granting Eastwood's renewed motion for summary disposition. This argument also fails. The decision whether to grant a motion for reconsideration is reviewed for an abuse of discretion. *Churchman, supra* at 233. A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "The movant must show that the trial court made a palpable error and that a different disposition would result from correction of the error. MCR 2.119(F)(3). Moreover, a motion for reconsideration that merely presents the same issues already ruled on by the court generally will not be granted." *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82-83; 669 NW2d 862 (2003).

Lansing Pavilion cannot show palpable error. Indeed, in claiming the SRA was ineffective because Lansing Pavilion's November 1, 2001, letter rejected the terms in the SRA, Lansing Pavilion essentially reasserted a position already extensively argued in opposing the renewed motion for summary disposition. *Id*. While Lansing Pavilion points out that the plain language of MCR 2.119(F)(3) does not hinder a court's discretion to address a previously raised issue, the trial court did not abuse its discretion in denying the motion for reconsideration because its prior ruling concerning the effect of the November 1, 2001, letter fell within the range of reasonable and principled outcomes. As such the court did not base its denial of reconsideration on a constrictive reading of a court rule.[13]

Ultimately, Lansing Pavilion frames this issue as one of fairness – in other words, the trial court unfairly entertained Eastwood's renewed motion for summary disposition, but refused to apply the same standard and entertain Lansing Pavilion's motion for reconsideration. However, despite Lansing Pavilion's effort to cast Eastwood's motion as one for reconsideration, the fact is that Eastwood's motion was a renewed motion for summary disposition – a practice supported by court rule and case law. Thus, different standards applied to the different motions. Also noteworthy are the grounds upon which the court acted. Specifically, the court granted Eastwood's renewed motion because the court misunderstood the facts before it. In contrast, the court denied Lansing Pavilion's motion because it was based on arguments already presented and facts that Lansing Pavilion could have, but failed to previously present to the court. In light of this, the court did not abuse its discretion.

IV. Docket No. 282332

[13] As previously discussed, Lansing Pavilion's arguments and evidence attacking formation of the unilateral contract (i.e., that no one from Lansing Pavilion was aware of the SRA until after the loan closing) were insufficient to support its motion for reconsideration as Lansing Pavilion failed to timely submit the affidavits supporting this position. *Churchman, supra* at 233. That Lansing Pavilion points to *Michigan Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 646; 419 NW2d 439 (1988), in which a motion for reconsideration was granted even though the affidavits were not timely filed, does not, *ipso facto*, mean that the trial court abused its discretion in this case. Indeed, the trial court's decision needed only fall within the range of reasonable and principled outcomes to be affirmed.

A. The Effect of the Amended and Restated SDA

Lansing Pavilion argues that the court erred in ruling that the SRA remained in effect until the parties executed the Amended and Restated SDA ("Amended SDA"). The interpretation of a contract is a question of law that this Court reviews de novo. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

"The main goal of contract interpretation generally is to enforce the parties' intent. But when the language of a document is clear and unambiguous, interpretation is limited to the actual words used . . . ." *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004) (citations omitted). Where two contracts cover the same subject matter but contain inconsistent terms such that the two cannot stand together, the subsequent contract supersedes the earlier contract – even in the absence of an integration clause – unless the parties intended otherwise. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 414 n 16; 646 NW2d 170 (2002); *Joseph v Rottschafer*, 248 Mich 606, 610-611; 227 NW 784 (1929). Where the parties intended otherwise, "the intention of the parties must be gleaned from all the agreements." *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 346-347; 561 NW2d 138 (1997).

While the SRA and Amended SDA differ with respect to whether Eastwood was solely responsible for "Shopping Center Improvements," the plain language of the Amended SDA reveals that the parties did not intend the Amended SDA to supersede retroactively the original SDA.[14] Indeed, the Amended SDA clearly provides an effective date of March 25, 2002, and makes no mention of the parties' responsibilities and liabilities prior to that date.[15]

Additionally, while the Amended SDA contains a clause expressly providing that the Amended SDA "supersedes and cancels all prior negotiations between the parties with respect to the construction of the Shopping Center Improvements . . . [,]" omitted from the clause is any reference to whether the Amended SDA superseded prior *agreements*. The absence of such language is notable in light of the fact that the Ground Lease, over which the SDA was controlling, contained a clause providing that "any and all previous negotiations, arrangements, *agreements* or representations and understandings" (emphasis supplied) were superceded and canceled. As the legal maxim *expressio unius est exclusio alterius* provides, the expression of one thing implies the exclusion of the other. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 248; 704 NW2d 117 (2005). As such, the exclusion of the term "agreement" in the Amended SDA implies the parties did not intend to include it. Indeed, had the parties intended otherwise, they could have written the clause to include the term "agreements" with the term "representations." This conclusion is consistent with the principles of contractual

[14] Eastwood's assertion that the Amended SDA has no superseding effect because different parties executed the SRA ignores that L.L. & 127 assigned all contracts to Eastwood. Thus, the involvement of different parties is of no consequence.

[15] That a construction schedule attached to the Amended SDA provides completion dates of projects prior to the effective date does not undermine this conclusion, but rather is merely an incorporation of the construction schedule already set forth in the original SDA.

construction that a contract should be construed so that all provisions are enforced, *MSI Constr Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995), and that contracts should be enforced by the language of the parties. *Burkhardt*, *supra* at 656.

While Lansing Pavilion contends that it "makes no sense" that Eastwood would be liable for liquidated damages even though Lansing Pavilion would be jointly responsible,

> [t]he judiciary may not rewrite contracts on the basis of discerned "reasonable expectations" of the parties because to do so is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." [*Id*. at 656-657 (quotations and citation omitted).]

Lansing Pavilion points out that the trial court's finding regarding the superseding effect of the Amended SDA is inconsistent with its ruling that the SRA modified the original SDA. However, this argument is premised upon the false assumption that the SRA modified a pre-existing agreement, when as previously discussed, the SDA was only executed in accordance with the terms of the SRA. Thus, there was no SDA contract for the SRA to supersede. Lansing Pavilion also notes that Eastwood expressly re-affirmed that it was solely responsible for timely completion of the "Shopping Center Improvements." However, Lansing Pavilion fails to elaborate any argument or citation to the record to support this assertion. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).[16]

B. The Enforceability of the Phrases "Joint Responsibility" and "As Is"

We also reject Lansing Pavilion's alternative arguments that the phrases "joint responsibility" and "as is" lack sufficient definition to be enforceable.[17] "[A]n agreement may be enforced as a contract even though incomplete or indefinite in the expression of some term, if it is established that the parties intended to be bound by the agreement, particularly where one or another of the parties has rendered part or full performance." *J W Knapp Co v Sinas*, 19 Mich App 427, 431; 172 NW2d 867 (1969).

Regarding "joint responsibility," while the SRA does not delineate the specific actions that this phrase contemplates, it is clear the parties intended to be bound by the agreement.[18]

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[16] Lansing Pavilion also cannot show that Eastwood waived any breach of the SRA by entering into the Amended SDA where the plain language of the Amended SDA evidences the parties' intent not to retroactively supersede the SRA. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003) (a waiver "is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract.")

[17] Eastwood moved for summary disposition on the issue of "joint responsibility" to defeat Lansing Pavilion's claim for liquidated damages.

[18] The SRA indicates Lansing Pavilion's agreement to work jointly to complete construction
(continued…)

Indeed, Lansing Pavilion executed the SDA on Eastwood's behalf only following extensive negotiations and after receiving the SRA in accordance with the 3:32 email.

Lansing Pavilion counters that parol evidence – particularly the November 1, 2001, letter, and Eastwood's representations that it was the general contractor and that the SDA was not amended – would demonstrate that the parties were not jointly responsible or would at least limit the scope of help that Lansing Pavilion was responsible for providing. Although "parol evidence is always competent to show the nonexistence of a contract[,]" *Tepsich v Howe Constr Co*, 377 Mich 18, 23; 138 NW2d 376 (1965), in this case the proffered parol evidence goes to the parties' contemporaneous understanding of the term "joint responsibility," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469-470; 663 NW2d 447 (2003). Specifically, the November 1, 2001, letter expressly acknowledges that the Anderson entities will lend its expertise to "jointly complete these timelines." Similarly, Eastwood holding itself out as the general contractor and representing that the SDA remains in effect does not, *ipso facto*, render the term "joint responsibility" too vague for enforcement. Thus, because interpretation of an ambiguous contract through the use of extrinsic evidence is a question of fact, *id*. at 469, the trial court did not err in declining to decide this issue as a matter of law.

Like "joint responsibility," the phrase "as is" as used in the SRA is neither vague nor ambiguous. Indeed, the plain language of the SRA clearly provides that Lansing Pavilion agreed to accept the site "as is" as it had determined that the mass grading and final grading were sufficient. Thus, contrary to Lansing Pavilion's argument, the phrase "as is" does not admit of an interpretation limiting its applicability to only the site's current grade or elevations, and recourse to any dictionary definition of "grade" as Lansing Pavilion urges cannot not change this fact. Given this conclusion, recourse to the parol evidence cited by Lansing Pavilion to show genuine issues of material fact is improper. *UAW-GM Human Resource Center*, *supra* at 491. While the trial court noted how the parties interpreted mass grading throughout the proceedings, this statement was incidental to its finding that "the language [of the SRA] by its very terms, is not so broad as to cover absolutely anything. And it's not so limited that it only applies to final elevations. It applies to exactly what is says, mass grading." Therefore, the court properly disposed of Lansing Pavilion's claims relating to site balancing.

Lansing Pavilion's reliance on *Patrich v Muscat*, 84 Mich App 724; 270 NW2d 506 (1978), in support of its argument that the phrase "as is" is ambiguous is misplaced. In *Patrich*, this Court found the "as is" clause in a land contract ambiguous given its potential conflict with a warranty provision. *Id*. at 731. Here, however, there is no conflicting provision in the SRA. Moreover, while *Patrich* noted that the phrase "as is" has different meanings in contracts for real estate and the sale of personal property, this finding was not central to its holding and as such constituted dicta. *Maskery v Bd of Regents*, 468 Mich 609, 620 n 10; 664 NW2d 165 (2003). In any event, this Court has explained the valid purpose and conditions under which "as is" clauses operate in real estate transactions:

> "As is" clauses allocate the risk of loss arising from conditions unknown to the parties . . . [and] also transfer the risk of loss where the defect should have

(…continued)

timelines.

> reasonably been discovered upon inspection, but was not. They do not, however, transfer the risk of loss where a seller makes fraudulent representations before a purchaser signs a binding agreement." [*Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994) (citations omitted).]

Thus, *Patrich* is distinguishable from the case at hand.

C. The Ground Lease Express Warranty

Lansing Pavilion argues that the trial court erred in dismissing its breach of Ground Lease claim on the ground that Eastwood did not breach the warranty in Paragraph 36. In challenging the trial court's ruling, Lansing Pavilion asserts that the court effectively interpreted the warranty to mean that a condition must render full potential development impossible, rather than merely restrict development, to constitute a breach. Lansing Pavilion posits that, contrary to the court's ruling, the following conditions restricted the development of the site within the meaning of the warranty:[19] (1) deficiencies in the subgrade known as organics; (2) unsuitable soils which were not removed; (3) fill materials placed without being tested; (4) failure to utilize proper compaction equipment; and (5) failure to consistently use proper compaction standard. We disagree.

As an initial matter, we note that the court had previously ruled that Paragraph 36 was limited to conditions existing on the site as of June 12, 2001, because the provision uses the present tense, "there exists." Lansing Pavilion does not challenge this finding. Regarding the conditions Lansing Pavilion claims restricted site development, only the first two pertain to restrictions existing as of June 12, 2001. With respect to the first two conditions, the TEC Report does indicate that as of July 25, 2000, soil "with traces of organics were found in a number of borings" and the Contour Report of May 10, 2001, notes that the soil contains fill materials and glacial till soils. However, despite Richard Anderson's (Eastwood's soil expert) claim that he would not have recommended putting structures (or even a doghouse) on the site given the combination of known organics, "undesirable material," and improperly engineered fill in the soil following the commencement of site preparation, the Contour Report advised that adequate site preparation would allow construction of the proposed structures. Thus, adequate site preparation could alleviate the specific conditions Lansing Pavilion cites.

In light of this, Lansing Pavilion has failed to demonstrate the existence of natural conditions or restrictions existing as of June 12, 2001, that "*restrict[ed]* the full potential development of the Premises by Tenant." (Emphasis supplied.)[20] Instead, Lansing Pavilion's argument amounts to a collateral attack on site preparation. Indeed, Lansing Pavilion's reliance on the geotechnical evaluation report of January 24, 2002, confirming that unsuitable soils were

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[19] The warranty provides in relevant part: "There exists no natural conditions or restrictions of any type that restrict the full potential development of the Premises by Tenant as a shopping center . . . ."

[20] The *Random House Webster's Unabridged Dictionary* (2nd ed, 1998), defines restrict as "to confine or keep within limits, as of space, action, choice, intensity, or quantity."

not removed prior to the most recent filling further buttresses this conclusion. Summary disposition was appropriate.

D. Lansing Pavilion's Misrepresentation Claims

Lansing Pavilion also contends the trial court erred in dismissing its claim that Eastwood misrepresented the soil condition of the site. Lansing Pavilion is incorrect. "A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation." *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998); *Foreman v Foreman*, 266 Mich App 132, 141; 701 NW2d 167 (2005). "A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Fejedelem v Kasco*, 269 Mich App 499, 502; 711 NW2d 436 (2006) (internal quotation marks and citation omitted). Reliance on the representation must be reasonable to sustain an action for misrepresentation. *Foreman*, *supra* at 141-142; *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999).

Turning to the misrepresentation claims, although Lansing Pavilion's asserts that Eastwood altered STS soil reports, Leo Trumble, an STS consultant, admitted that the test results were recalculated using a new project specification (i.e., one recalculated from a modified proctor to a standard proctor). The STS report of July 28, 2001, accurately reflects this, providing that while more tests met the modified proctor specification, all tests satisfied the standard proctor specification. Thus, even though STS on behalf of Lansing Pavilion disagreed with Eastwood regarding which measurement specifications to apply, Eastwood did not provide false representations of the soil conditions in its reports to Lansing Pavilion.

Additionally, despite Lansing Pavilion's claim that Eastwood failed to timely provide the reports, Lansing Pavilion admits it received the STS Report of July 28, 2001, and similar reports at least one week before the October 31, 2001, closing on the Ground Lease.[21] Moreover, even if the information provided were false or misleading, Lansing Pavilion had ample opportunity for further inquiry throughout this time period as evidenced by the STS memorandum of July 24, 2001, to Lansing Pavilion detailing disagreements between STS and Don Cuthbert, the site superintendent, regarding soil compaction and density requirements. Consequently, Lansing Pavilion's reliance was unreasonable because "the means of knowledge regarding the truthfulness of the representation [were] available to the plaintiff and the degree of their utilization [was] not . . . prohibited by the defendant." *Webb v First of Mich Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). Indeed, Lansing Pavilion cannot claim misrepresentation where it was "presented with the information and chose to ignore it or had some other indication that further inquiry was needed." *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 501; 686 NW2d 770 (2004). Thus, both misrepresentation claims are without merit.

E. Eastwood's Duty in Contract

[21] The July 28, 2001, STS report is the only report of misrepresentation to which Lansing Pavilion cites.

We also reject Lansing Pavilion's argument that the court erred in dismissing its negligence claim on the grounds that Eastwood owed no duty independent of contact. Whether a party owes another a duty in a negligence action is a question of law that this Court reviews de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

To establish a prima facie case for negligence, a plaintiff must show: (1) a duty; (2) a breach of that duty; (3) causation; (4) and damages or injuries. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law." *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). In determining the existence of a duty, the Court considers not only the foreseeability and nature of the risk, but most importantly the relationship of the parties. *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993).

In opposing Lansing Pavilion's claim, Eastwood relies on *Fultz* for the proposition that Lansing Pavilion must allege a duty "separate and distinct" from any duty imposed under the contract to sustain its negligence claim. *Fultz*, *supra* at 461-462. Although Eastwood is correct that Lansing Pavilion must allege a duty "separate and distinct" from that imposed under contract, its reliance on *Fultz* is misplaced. *Fultz* applied the "separate and distinct" analysis to a negligence action brought by a third party to a contract, *id*. at 467, and Lansing Pavilion was not a third party to the oral grading contract. Rather, controlling here is the case upon which *Fultz* relied - *Rinaldo's Constr Corp v Michigan Bell Telephone Co*, 454 Mich 65, 84; 559 NW2d 647 (1997).

In *Rinaldo's Constr*, the plaintiff alleged that the defendant telephone company was negligent in failing to transfer the plaintiff's telephone service to its new address, thereby resulting in economic damages. *Id*. at 67-68. In determining whether the plaintiff could maintain an action in tort, the Court stated, "the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." *Id*. at 84. Relying on *Hart v Ludwig*, 347 Mich 559, 565; 79 NW2d 895 (1956), which quoted Prosser, Handbook of Torts, 1st ed, § 33, p 205, the Court elaborated that "if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not." *Id.* Given that the plaintiff failed to allege tortious activity or a duty independent of one arising from the contractual relationship, the Court in *Rinaldo's Constr* found no cognizable action in tort, "regardless of the variety of names [plaintiff gives the] claim." *Id*. at 85, quoting *Valentine v Michigan Bell Telephone Co*, 388 Mich 19, 22; 199 NW2d 182 (1972).

Turning to the instant case, under the negligence count of the complaint, Lansing Pavilion alleged that Eastwood owed a duty to perform the grading and soil work "in a good and workmanlike manner in conformity with industry standards for contractors performing such work."[22] At the outset, Lansing Pavilion correctly asserts that the mere existence of a contract did not permit Eastwood to commit misfeasance in performing the grading and soil work.

[22] Lansing Pavilion made this same allegation with respect to the oral grading contract.

Rinaldo's Constr, *supra* at 84. However, here, Lansing Pavilion's negligence claim goes directly to Eastwood's performance of the grading and soil work under the oral grading contract. Indeed, without enforcing the contract promise itself, Eastwood has no relationship with Lansing Pavilion giving rise to an independent legal duty. *Id*. at 84; see also, *Garden City Osteopathic Hosp v HBE Corp*, 55 F3d 1126, 1134-1135 (CA 6, 1995) (applying Michigan law in finding that where the work site was allegedly not balanced in conformity with project specifications, the plaintiff's negligence claim that the defendant breached a duty to perform "in a skillful, careful, diligent and workmanlike manner" established no duty independent of contract). In other words, regardless of the names Lansing Pavilion gives its claim, the duty to perform site balancing "in a good and workmanlike manner in conformity with industry standards" is not "separate and distinct" from the duty created in contract. *Rinaldo's Constr*, *supra* at 84. The trial court properly dismissed Lansing Pavilion's negligence claim.

F. The Anderson entities' Joint Motion For Summary Disposition/Motion in Limine

The Anderson entities' challenge the trial court's November 14, 2007, order dismissing the joint motion for summary disposition/motion in limine as untimely and argue that the motion related to the SDA and should have been heard on the merits. "This Court reviews for an abuse of discretion a trial court's decision to decline to entertain motions filed after the deadline set forth in its scheduling order." *Kemerko Clawson, LLC v RxIV*, 269 Mich App 347, 349; 711 NW2d 801 (2005); MCR 2.116(D)(4); MCR 2.401(B)(2).

Following the court's denial of the Anderson entities' joint motion for summary disposition/motion in limine and after the parties filed for leave to appeal, the Anderson entities separately filed motions in limine in the trial court. The court subsequently granted Anderson Development's motion in limine, but denied Anderson Real Estate's as premature. In light of the fact that both motions in limine merely reframed the issue of the prior joint motion, this issue on appeal is moot because the court addressed the Anderson entities' arguments from the joint motion on the merits. See *RCO Engineering, Inc v ACR Industries, Inc*, 246 Mich App 510, 514 n 3; 633 NW2d 449 (2001) (identifying a motion in limine as merely a refiled motion for summary disposition that was originally stricken as untimely). In any event, the court did not abuse its discretion in denying the joint motion, which was filed over three months after the filing cutoff date was extended. MCR 2.401(B)(2)(a)(ii).

V. Docket No. 283071

A. Eastwood's Motion In Limine

The Anderson entities argue the trial court erred in granting Eastwood's motion in limine to preclude the presentation of evidence that Eastwood's soil preparation work was performed in violation of the oral grading contract. We disagree. This Court reviews the trial court's decision to grant a motion in limine for an abuse of discretion. *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986). Where a court's decision to admit evidence involves a preliminary question of law, this Court reviews that issue de novo. *Barnett v Hidalgo*, 478 Mich 151, 159; 732 NW2d 472 (2007).

Initially, the Anderson entities frame this issue as one of piercing the corporate veil. However, this miscasts the claims and interests involved. Indeed, despite the fact that J. R.

Anderson and Jeffrey Anderson own Lansing Pavilion and are principals of the Anderson entities, the court did not grant Eastwood's motion under such a theory. Instead, the court granted the motion on the basis of the Anderson entities' admission that they were parties to the oral grading contract as alleged by their successor in interest, Lansing Pavilion, whose claims of deficient performance under that contract were already dismissed. Furthermore, Eastwood made no allegation that Lansing Pavilion was an instrumentality of the Anderson entities or that Lansing Pavilion was used to commit a fraud or wrong as required to establish a piercing the corporate veil claim. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996). Rather, the Anderson entities' relation to Lansing Pavilion hinges on the admission that Lansing Pavilion was a successor in interest to the oral grading contract.

Regarding the successor in interest relationship, Anderson Real Estate correctly points out that nothing in the record supports the court's conclusion that Anderson Real Estate was a party to the oral grading contract. Indeed, both the trial court and Eastwood relied upon the Anderson entities' answer in support of this conclusion. That answer, however, provides that only Anderson Development entered into the oral grading contract with Eastwood and that Lansing Pavilion is Anderson Development's successor in interest to that contract. Thus, Anderson Real Estate is not liable under the oral grading contract because it was never a party to that contract. See *Nat'l Sand, Inc v Nagel Construction, Inc*, 182 Mich App 327, 331; 451 NW2d 618 (1990) (contractual privity is required to obtain damages for breach of contract). The court's conclusion to the contrary underlying its decision to grant Eastwood's motion with respect to Anderson Real Estate was incorrect.

The trial court did not err, however with respect to Anderson Development. As previously noted, Anderson Development admitted to entering into the oral grading contract with Eastwood and admitted that Lansing Pavilion was its successor in interest and that it assigned the contract to Lansing Pavilion. Anderson Development further admitted that its reasons for not paying Eastwood under the oral grading contract were based on the allegations contained in Lansing Pavilion's first amended complaint. However, the trial court had already dismissed those allegations.

Anderson Development counters that its answer does not merely incorporate Lansing Pavilion's allegations, but rather asserts broader issues of Eastwood's failure to perform in accordance with the contract and industry standards. However, the Anderson entities' answer plainly provides that such references are "more fully alleged" in Lansing Pavilion's first-amended complaint, which does, in fact, expand upon the failure to perform in accordance with the contract and industry standards. Specifically, the first amended complaint outlines that Eastwood "failed to perform the work in conformity with the standards of the industry . . . and failed to perform in conformity with the contract documents" and proceeds to delineate these failures.

Additionally, Anderson Development contends that because it assigned the oral grading contract to Lansing Pavilion, it cannot be bound by Lansing Pavilion's subsequent acceptance of the site "as is" under the SRA to which Anderson Development was not a party. In making this argument, Anderson Development points to *Litchfield v Garratt*, 10 Mich 426, 431-432 (1862), in which the Supreme Court held that "[w]hen a contract has been absolutely assigned, and a subsequent variation is made with the assignee alone, it cannot be held to be the assignor's

contract, because he neither reaps its benefits nor shares its responsibilities." *Litchfield*, however, is inapplicable as it does not appear the oral grading contract was absolutely assigned.

Regarding the assignment of a contract, the Second Restatement of Contracts provides the following guidance:

> (1) Unless the language or the circumstances indicate the contrary, as in an assignment for security, an assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of the assignor's rights and a delegation of his unperformed duties under the contract.
>
> (2) Unless the language or the circumstances indicate the contrary, the acceptance by an assignee of such an assignment operates as a promise to the assignor to perform the assignor's unperformed duties, and the obligor of the assigned rights is an intended beneficiary of the promise. [Restatement Contracts, 2d, § 328, pp 44-45.]

Under the oral grading contract, Anderson Development was required to pay Eastwood 20.8 percent of the total cost incurred for mass grading. Curiously, although Anderson Development claims to have assigned the oral grading contract to Lansing Pavilion, Anderson Development makes no argument that it is incumbent *only* upon Lansing Pavilion to pay the 20.8 percent of mass grading costs pursuant to the assignment.

Instead, Anderson Development admits it is not liable because Eastwood failed to complete the work under the contract or perform in accordance with industry standards as alleged by Lansing Pavilion and argues that it should be permitted to present evidence in defense of that argument. This position necessarily presupposes that the assignment did not absolve Anderson Development of its obligation to pay 20.8 percent of the mass grading, for if the assignment did so, Eastwood's performance would be irrelevant to the determination of Anderson Development's liability under the oral grading contract.

Having taken this position, Anderson Development's purported assignment was not only not absolute as provided in *Litchfield*, but was not an assignment at all. Indeed, as Corbin explains: "An assignment is a transfer, but a transfer is not necessarily an assignment. If the transfer is less than absolute, it is not an assignment . . . ." 9 Corbin, Contracts (revised ed), § 47.1, p 130, quoting *Kelly Health Care, Inc v Prudential Ins Co*, 226 Va 376, 379; 309 SE2d 305 (1983), citing Restatement Contracts, 2d, § 317(1), pp 14-15.

Furthermore, the circumstances surrounding the oral grading contract and acceptance of the SRA support this conclusion, rather than indicate the contrary. For example, in J. R. Anderson's November 1, 2001, letter to Eyde, Anderson – although signing on behalf of Lansing Pavilion – expressly acknowledges Anderson's duties under the oral grading contract. Specifically, Anderson indicated that, under certain conditions, "*Anderson* will pay its 20.8 percent of the McQuestion contract." Even more telling is J. R. Anderson's indication that "*the Anderson team* will lend its expertise to help [to jointly complete construction timelines] whenever feasible." (Emphasis supplied.) Similarly, the SRA, although addressed to Lansing Pavilion, was sent "c/o Anderson Real Estate." Thus, despite the fact that Anderson Real Estate was not a party to the oral grading contract, it is clear the parties were, at best, careless in

distinguishing between Lansing Pavilion and Anderson Development in addressing the oral grading contract. Given this, the circumstances cut against the conclusion of an assignment.

In light of this, Anderson Development's claim that it is not bound to the SRA because as an assignor, it was neither a party to the SRA nor bound by the assignee's acceptance of the site "as is" cannot stand. Thus, Anderson Development is bound by its admission that it did not pay 20.8 percent of the contract on account of Eastwood's deficient performance as alleged by Lansing Pavilion. Given that the trial court dismissed that claim as alleged by Lansing Pavilion, the trial court did not err in granting Eastwood's motion in limine.

VI. Conclusion

We affirm all of the disputed orders with the exception of the court's order in Docket No. 283071 granting Eastwood's motion in limine, which we reverse only insofar as it held Anderson Real Estate to be a party to the oral grading contract. In all other respects, we affirm that order as well. Costs to appellees as prevailing parties. MCR 7.219(A).

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens