STATE OF MICHIGAN

COURT OF APPEALS

EVA M. FRANSISCO,

Plaintiff-Appellee/Cross-Appellant,

v

MARK EDWARD SEVERANCE,

Defendant-Appellant/Cross-Appellee,

and

NORTHERN MICHIGAN METAL ROOFING, L.L.C.,

Defendant/Third-Party Plaintiff,

and

DURA-LOC ROOFING SYSTEMS, LTD.,

Third-Party Defendant.

UNPUBLISHED
August 11, 2009

No. 279839
Cheboygan Circuit Court
LC No. 05-007495-CZ

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

Defendant Mark Severance appeals as of right from a circuit court judgment in favor of plaintiff in the amount of $30,000, plus interest, costs, and case evaluation sanctions. Plaintiff cross appeals as of right the same order, challenging the circuit court's failure to award her attorney fees under the Michigan Consumer Protection Act ("MCPA"), MCL 445.901 *et seq*. We affirm in part, reverse in part, and remand for entry of judgment against defendant Northern Michigan Metal Roofing, L.L.C. ("NMMR") only.

We first address defendant Severance's argument that the trial court erred by determining as a matter of law that he owed and breached a legal duty to plaintiff independent of the contract between plaintiff and NMMR. Whether Severance owed plaintiff a duty is a question of law that this Court reviews de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). Moreover, whether the trial court erred by determining as a matter of law that

Severance breached a duty owed to plaintiff is also a question of law that this Court reviews de novo.[1] *Id.*

To establish a prima facie negligence claim, a plaintiff must show: (1) that the defendant owed a duty of care, (2) that the defendant breached that duty, (3) that the plaintiff suffered injury, and (4) causation. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff." *Fultz, supra* at 463. This question is an issue to 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, a court considers the foreseeability and nature of the risk as well as the relationship between the parties. *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993). "[F]or a duty to arise[,] there must exist a sufficient relationship between the plaintiff and the defendant." *Id.*

Relying on *Fultz,* Severance argues that the only duties owed in this case arose from the contract between plaintiff and NMMR and that, because there existed no duty separate and distinct from that contract, he cannot be held personally liable for negligence. In *Fultz, supra* at 461-462, the plaintiff was injured when she slipped and fell while walking across an icy parking lot owned by "Comm-Co," one of the defendants. Comm-Co had contracted with "CML," its codefendant, to provide snow removal services for the lot. The plaintiff sued both Comm-Co and CML for negligence. *Id.* at 462. Our Supreme Court stated "lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a 'separate and distinct' mode of analysis." *Id.* at 467. The Court held that a tort action might stem from misfeasance of a contractual obligation if "the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Id.*

Severance's reliance on *Fultz* is misplaced because plaintiff was a party to the contract at issue. Our Supreme Court specifically recognized in *Fultz* that its holding applied to actions in which a plaintiff is not a party to the contract at issue.[2] *Fultz, supra* at 467. Nevertheless, pursuant to *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997), on which the *Fultz* Court relied, Severance correctly contends that plaintiff must allege a duty "separate and distinct" from that imposed by contract to give rise to tort liability.

In *Rinaldo's Constr Corp, supra* at 67-68, the plaintiff alleged that the defendant telephone company was negligent in failing to transfer the plaintiff's telephone service to its new address, resulting in the loss of business revenue. In determining whether the plaintiff could

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[1] We disagree with plaintiff that these issues are not preserved for our review. The record shows that Severance opposed the trial court's expressed intent to instruct the jury that he owed plaintiff a duty that he breached. Moreover, Severance opposed plaintiff's amendment of the complaint to add a negligence claim based on his contention that he owed no duty to plaintiff outside of that imposed by contract.

[2] See *Garrett v Sam H Goodman Bldg Co, Inc*, 474 Mich 948; 706 NW2d 202 (2005), in which our Supreme Court opined that this Court erred by applying *Fultz* to a defendant with which the plaintiff shared contractual privity.

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), quoting 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." *Rinaldo Constr Corp, supra* at 84. Because the plaintiff failed to allege the "violation of an independent legal duty distinct from the duties arising out of the contractual relationship[,]" the Court in *Rinaldo's Constr Corp* held that there existed no cognizable action in tort, "'regardless of the variety of names [plaintiff gives the] claim[.]'" *Id*. at 85, quoting *Valentine v Michigan Bell Tel Co*, 388 Mich 19, 22; 199 NW2d 182 (1972) (second set of brackets in original), abrogated on other grounds by *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733 (2001).

Here, the trial court erroneously determined that Severance owed plaintiff a duty, separate and distinct from the contract, to accurately inform her regarding the Dura-Loc roofing materials. Although, as plaintiff argues, agents and officers of a corporation may be held individually liable for torts committed while acting on the corporation's behalf, *Baranowski v Strating*, 72 Mich App 548, 559-560; 250 NW2d 744 (1976), a promise to perform arising solely from a contract does not support an action in tort. *Rinaldo's Constr Corp, supra* at 84.

The evidence shows that Severance, on behalf of NMMR, promised to install a roof on plaintiff's home using Dura-Loc roofing materials. After assuring plaintiff that the use of Dura-Loc materials would eliminate leaks as well as snow and ice buildup, plaintiff entered into the contract with NMMR, relying on Severance's recommendation. Pursuant to the agreement, NMMR promised plaintiff a "Lifetime No-Leak Warranty" on the Dura-Loc roof. The evidence demonstrates that in executing the agreement, Severance was acting on behalf of NMMR in making representations to plaintiff. Indeed, accompanying the proposal for the contract was an August 1, 2003, cover letter signed by Severance, on behalf of NMMR, stating, "If you are in agreement with the proposal and would like *Northern Michigan Metal Roofing* to do the proposed work, please sign and date both copies." (Emphasis added.) Consistent with the letter, the heading of the contract clearly states "Northern Michigan Metal Roofing." The roof's failure to perform as warranted was a breach of NMMR's contractual duty to install a roof that would not leak or accumulate ice and snow rather than a breach of a legal duty that Severance owed plaintiff independent of the contractual relationship. *Rinaldo's Constr Corp, supra* at 85. Thus, although Severance may have been careless in recommending Dura-Loc materials for plaintiff's roof without knowledge of the Dura-Loc manual's specifications, this failure was not separate and distinct from a duty arising pursuant to the contract with NMMR. *Id*. at 84. Accordingly, liability may not be imputed to Severance.

Further, because Severance owed no duty to plaintiff, the trial court erred by determining as a matter of law that Severance breached the purported duty. "Only after finding that a duty exists may the factfinder determine whether, in light of the particular facts of the case, there was a breach of the duty." *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). Thus, notwithstanding that the trial court, rather than the factfinder, determined that Severance breached a duty owed to plaintiff, there could be no breach absent such a duty. Therefore, the trial court's determination in this regard was erroneous.

Severance also argues that the trial court erred by entering a judgment against him and NMMR, jointly and severally. Although plaintiff suggests that this issue is not preserved for our review because Severance did not object to the trial court's jury instruction or to the verdict form, Severance preserved this issue by repeatedly arguing against the imposition of joint and several liability in the trial court. Whether the trial court erred by entering a judgment against Severance and NMMR, jointly and severally, is a question of law that this Court reviews de novo. *Fultz, supra* at 463. Further, this Court reviews de novo issues involving both statutory and contractual interpretation. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

"Traditionally, before tort reform, under established principles of joint and several liability, when the negligence of multiple tortfeasors produced a single indivisible injury, the tortfeasors were held jointly and severally liable." *Kaiser v Allen*, 480 Mich 31, 37; 746 NW2d 92 (2008). "The tort-reform statutes have replaced joint and several liability in most cases, with each tortfeasor now being liable only for the portion of the total damages that reflects that tortfeasor's percentage of fault." *Id.* Severance argues that the trial court's imposition of joint and several liability contravened the tort reform statutes, specifically MCL 600.2956, because plaintiff's negligence claim against him lied in tort and sought recovery for property damage as set forth in that provision. MCL 600.2956 provides:

> Except as provided in section 6304,[3] in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

As discussed previously, the trial court erred by determining that Severance owed plaintiff a duty independent of the contract between plaintiff and NMMR. Thus, the negligence claim against Severance should have been dismissed, leaving only the breach of express warranty claim based on the contract, regarding which the jury found NMMR liable. Recently in *Zahn v Kroger Co of Michigan*, 483 Mich 34, 40; 764 NW2d 207 (2009), our Supreme Court held that "MCL 600.2956 does not apply to contract actions" and that "the language chosen by the parties as contained in the contract is controlling" regarding damages if the contract is breached. See also *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 642; 734 NW2d 217 (2007).

Courts should accord contractual language its plain and ordinary meaning and, where unambiguous, enforce the contract as written. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). Here, the roofing contract plainly states that the express warranty is provided by NMMR. Although Severance executed the contract, he did so on behalf of NMMR, and is not personally liable under the contract. See *Livonia Bldg Materials Co v*

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[3] MCL 600.6304 pertains to the allocation of damages and fault.

Harrison Constr Co, 276 Mich App 514, 523-524; 742 NW2d 140 (2007). Had the parties intended that Severance and NMMR be jointly and severally liable for any damages resulting from the contract, they could have provided as such in the contract. The contract's plain and unambiguous language, however, contains no such provision, and this Court's interpretation of the contract "is limited to the actual words used[.]" *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). As such, the trial court erred by entering judgment against Severance and NMMR, jointly and severally, on the breach of express warranty claim.

On cross appeal, plaintiff argues that the trial court erred by failing to award her attorney fees against Severance under the MCPA. We review for an abuse of discretion a trial court's determination regarding an attorney fee award under the MCPA. *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292, 296; 463 NW2d 261 (1990). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

"The MCPA is a remedial statutory scheme designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals." *Newton v Bank West*, 262 Mich App 434, 437; 686 NW2d 491 (2004) (quotation marks and citation omitted). Under MCL 445.911(2) of the MCPA, "a person who suffers loss as a result of a violation" of the MCPA may recover reasonable attorney fees. The MCPA exempts, however, "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a). In *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 213-215; 732 NW2d 514 (2007), our Supreme Court interpreted this exemption to include licensed residential homebuilders.

Plaintiff argues that Severance is not exempt from the MCPA, and is therefore subject to the provision authorizing the payment of attorney fees, because he is not individually licensed as a residential homebuilder. Rather, only NMMR is a licensed residential builder. Plaintiff's argument is misplaced because the trial court granted a directed verdict for Severance on plaintiff's MCPA claim and, accordingly, Severance was not found liable under the MCPA. As previously stated, MCL 445.911(2) provides that "a person who suffers loss as a result of a violation" of the MCPA may recover reasonable attorney fees. Here, it was never determined that Severance violated the MCPA. In fact, the trial court granted a directed verdict in Severance's favor on that claim. Further, as previously discussed, although Severance executed the contract between plaintiff and NMMR, he did so on behalf of NMMR and is not personally liable under the contract. See *Livonia Bldg Materials Co*, *supra* at 523-524. Accordingly, the trial court properly denied plaintiff's motion for an attorney fee award against Severance under MCL 445.911(2).

In sum, we reverse the trial court's judgment against Severance and remand for entry of judgment against NMMR only. In light of this conclusion, we need not address Severance's arguments pertaining to case evaluation sanctions and the amended case evaluation award. Further, we affirm the trial court's denial of attorney fees in plaintiff's favor and against Severance under the MCPA.

Affirmed in part, reversed in part, and remanded for entry of judgment against defendant NMMR only. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher