STATE OF MICHIGAN

COURT OF APPEALS

RICHARD LEVINE and MELISSA LEVINE, d/b/a HART EMS MONROE, Plaintiffs-Appellants,	UNPUBLISHED July 29, 2010
v	No. 288844 Monroe Circuit Court
MONROE COUNTY EMERGENCY MEDICAL AUTHORITY and MONROE COUNTY, Defendants-Appellees.	LC No. 06-021923-CK

Before: GLEICHER, P.J., and O'CONNELL and WILDER, JJ.

GLEICHER, P.J. (*concurring*).

I concur fully in the result reached by the majority. I write separately to respectfully highlight an error in the portion of the majority opinion applying a duty analysis derived from tort law to the facts of this case.

As governmental entities, defendants are "immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., defines a "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). Indisputably, defendants have statutory authorization for the operation of an emergency medical services program. Furthermore, the emergency medical services act, MCL 333.20901 *et seq*., imbues defendants with the authority to "contract with a person to furnish" an ambulance operation. MCL 333.20948(1). Consequently, governmental immunity bars plaintiffs from suing defendants in tort on any ground relating to plaintiffs' ambulance service activities in Monroe County.

Plaintiffs' complaint sets forth the following pertinent allegations:

> 10. That realizing EMS services for the County of Monroe would necessarily operate at a loss, the Defendants, armed with such knowledge and the complete information contained in the study by the Ludwig Group, LLC, knowingly and intentionally conspired to conceal that information, and invite competitive bids from private parties for providing such services, knowing full well that such private providers would operate at a significant financial loss, and that said operations would eventually become insolvent, resulting in an

> interruption of EMS services to the people of Monroe County, posing a danger to the public health and safety.
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> 11. That at all times pertinent hereto and herein mentioned, the Defendants, MONROE COUNTY EMERGENCY MEDICAL AUTHORITY and MONROE COUNTY, did owe a fiduciary duty of full disclosure to all parties submitting bids, including Hart Medical EMS, Inc. and the Plaintiffs herein as its successors in interest, and did violate said duty by withholding and concealing the information contained in the study commissioned by MONROE COUNTY, and performed and submitted by The Ludwig Group, LLC, on or about January of 2002.
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> 12. That the Defendants did knowingly and intentionally violate[] their fiduciary duty owed to Plaintiffs by failing to disclose said study, said failure also constituting either a negligent or intentional misrepresentation, a breach of duty of full disclosure, and therefor[e] a breach of the implied warranty of fair dealing and full disclosure, and breach of contract.

Plaintiffs' "negligent or intentional misrepresentation" contention sounds in tort. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 502; 686 NW2d 770 (2004); *Graves v Warner Bros*, 253 Mich App 486, 501; 656 NW2d 195 (2002). Similarly, to the extent that plaintiffs aver that defendants misled them into signing the contract, tort law governs such a claim. See *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 371; 532 NW2d 541 (1995), in which this Court favorably quoted as follows from *Williams Electric Co, Inc v Honeywell, Inc*, 772 F Supp 1225, 1237-1238 (ND Fla, 1991): "Fraud in the inducement, however, addresses a situation where the claim is that one party was tricked into contracting. It is based on pre-contractual conduct which is, under the law, a recognized tort."

Because governmental immunity precludes plaintiffs' claims for damages premised on defendants' tort liability, the majority's discourse on tort duties has no relevance to the proper disposition of this case. And no case law supports the majority's effort to engraft a tort duty analysis into the law governing the contract at issue here.

The majority opines that *Buczkowski v McKay*, 441 Mich 96; 490 NW2d 330 (1992), "sets forth the proper test to apply to determine whether defendants had a legal duty to disclose the Ludwig Report." *Ante* at 14. In *Buczkowski*, our Supreme Court considered "whether to impose a duty on a retailer to protect a bystander injured by the use of shotgun ammunition it sold to defendant McKay while McKay was intoxicated . . . ." *Id*. at 97. The Supreme Court grounded its analysis of this question in tort law, explaining that the question of duty depended on relationships defined in tort law: "Our ultimate decision turns on whether a sufficient relationship exists between a retailer and a third party to impose a duty under these circumstances. The duty to protect others against harm from third persons is based on a relationship between the parties. Prosser & Keeton, § 56, p 385." *Id*. at 103-104.

The majority opinion fails to distinguish between plaintiffs' tort and breach of contract claims. According to the majority, the duty analysis in *Buczkowski* applies to the breach of contract allegation set forth in paragraph 12 of plaintiffs' complaint. I believe that the majority's discourse on duty simply has no place in a breach of contract action.

The majority recognizes that our Supreme Court has decided a trio of breach of contract cases, beginning with *Hersey Gravel Co v State Hwy Dep't*, 305 Mich 333, 335-336; 9 NW2d 567 (1943), that involve claims asserting misrepresentations on the part of governmental entities. In my view, these cases articulate an analysis predicated on breach of contractual warranties, and the cases supply appropriate authority for resolving the instant case. In *Hersey*, *id*. at 335, the plaintiff entered into a contract with the State of Michigan to construct 5.17 miles of highway. The plaintiff claimed that it could not perform the contract within its bid because the state's "representations and warranties" regarding the soil conditions for that section of road were incorrect. *Id*. at 336. The Supreme Court dispensed with the state's argument that the plaintiff had alleged a tort action barred by governmental immunity:

> The State contends that plaintiff's pleadings and proofs hint at and sound in tort and, therefore, under the doctrine of sovereign immunity, the court erred in allowing any recovery. It does not necessarily follow that, because plaintiff sought to recover damages resulting from a misrepresentation of subsoil conditions, that its claim is in tort. Plaintiff did not know, when it made its bid, that the material to be excavated was different from that described on the plans; and, although the facts developed at the trial might have justified a tort action, the claim may still properly be for damages for breach of the contract. [*Id*. at 339.]

The Court adopted the findings of the trial judge that "there was a warranty in connection with the nature of the subsoil, and that this warranty had been breached because of a misstatement of the conditions actually existing." *Id*. at 338-339.

In *W H Knapp Co v State Hwy Dep't*, 311 Mich 186, 200; 18 NW2d 421 (1945), another case involving soil conditions, the Supreme Court characterized *Hersey* as "controlling in the instant case as to the duty of the State in preparing its specifications and resulting liability where the contractor was misled."[1] The Supreme Court also relied on *Hersey* in *Valentini v City of Adrian*, 347 Mich 530; 79 NW2d 885 (1956). The plaintiff in *Valentini* bid to construct a sewer and discovered "unusual quantities of quicksand and excessive subsoil water conditions which had not been shown on the plans and specifications on file for the sewer, as exhibited by the city; information as to which, although known to it, had been withheld by the city." *Id*. at 533. The Supreme Court observed, in relevant part:

> The withholding by the city of its knowledge of the known conditions, resulting in excessive cost of construction, forms an actionable basis for plaintiff's claim for damages. Nor does the requirement that the contractor examine the specifications and make a personal examination of the site bar the plaintiff from recovering damages caused by the undisclosed subsoil conditions. [*Id*. at 534.]

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[1] In *Knapp*, *id*. at 188, the Supreme Court briefly rejected the applicability of governmental immunity as follows: "Plaintiff does not count on tort, hence the doctrine of sovereign immunity does not bar its claim. A discussion of the principle of sovereign immunity as applied to similar facts is to be found in *Hersey* . . . ."

The legal principles underlying the breach of contract claims upheld in *Hersey*, *Knapp*, and *Valentini* derive from *United States v Spearin*, 248 US 132; 39 S Ct 59; 63 L Ed 166 (1918), and federal cases relying on the *Spearin* doctrine. *Spearin* constitutes "[t]he seminal case recognizing a cause of action for breach of contractual warranty of specifications . . . ." *Hercules Inc v United States*, 516 US 417, 424; 116 S Ct 981; 134 L Ed 2d 47 (1996). In *Hercules*, *id*., the United States Supreme Court summarized the facts of *Spearin*:

> Spearin had contracted to build a dry dock in accordance with the Government's plans which called for the relocation of a storm sewer. After Spearin had moved the sewer, but before he had completed the dry dock, the sewer broke and caused the site to flood. The United States refused to pay for the damages and annulled the contract. Spearin filed suit to recover the balance due on his work and lost profits.

The Supreme Court held in *Spearin*:

> [I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. . . . This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by [several earlier United States Supreme Court cases], where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications. [248 US at 136 (citations omitted).]

Justice Brandeis, writing for a unanimous Court, explained in *Spearin* that because the government had "prescrib[ed] the character, dimensions and location of the sewer," it "imported a warranty that if the specifications were complied with, the sewer would be adequate." *Id*. at 137. The *Spearin* doctrine dictates that

> [w]hen the Government provides specifications directing how a contract is to be performed, the Government warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications. The specifications will not frustrate performance or make it impossible. It is quite logical to infer from the circumstance of one party providing specifications for performance that that party warrants the capability of performance. [*Hercules*, 516 US at 425.]

In summary, the issue presented here is not whether defendants owed plaintiffs a common-law duty on the basis of the parties' relationship or an obligation of defendants to exercise due care, but whether defendants breached a warranty implied by the information given to bidders for the EMS contract. Justice Edwards's concurring opinion in *Valentini* buttresses my analysis: "[P]laintiff's case is founded mainly upon proving that the defendant city of Adrian violated its implied warranty of disclosure of all material knowledge which it then had which was essential to the proper bidding of this sewer contract." 347 Mich at 544-545. According to Justice Edwards,

> [p]laintiff Valentini prevailed in the court below by proving to the satisfaction of a jury that he had suffered damage to the extent of $115,741.15 as a result of the

> city of Adrian's violations of certain implied warranties which this Court has previously held to be made as a matter of law by public bodies when they solicit competitive bids on public works. The 2 essential implied warranties appear to be, first, that the material information furnished by the public body, and relied upon by the successful bidder, be true (at least to the extent of the public body's knowledge); and, second, that it represents all the material knowledge possessed by the public body at the time the bidding documents are prepared which knowledge would have an important bearing upon the execution of the contract. [*Id*. at 544.]

Plaintiffs have not identified any warranty contained in defendants' request for proposed bids (RFP). Although the parties neglected to incorporate the RFP into the record, no evidence reasonably suggests that defendants either made any representations about the potential profitability of the contract or supplied false or misleading information in this regard. Nor did defendants affirmatively misstate any details concerning Monroe County or its ambulance service needs. Notably, plaintiffs have failed to demonstrate that defendants made any warranties at all. Irrespective of defendants' *knowledge* of the opinions expressed in the Ludwig Report, defendants made no effort to suppress the information in the report or to overstate the advantages of entering into the emergency services contract. Absent any affirmative inaccuracies or misleading statements by defendants, no legal basis exists for a breach of contract action. Accordingly, I agree that the circuit court appropriately granted defendants' motion for summary disposition.

/s/ Elizabeth L. Gleicher