STATE OF MICHIGAN

COURT OF APPEALS

ALBION COLLEGE,

Plaintiff-Appellee/Cross-Appellant,

v

STOCKADE BUILDINGS, INC.,

Defendant-Appellant/Cross-Appellee,

and

R. W. MERCER CO.,

Defendant.

UNPUBLISHED
May 17, 2016

No. 322917
Calhoun Circuit Court
LC No. 2013-003308-CZ

ALBION COLLEGE,

Plaintiff-Appellee,

v

STOCKADE BUILDINGS, INC.,

Defendant-Appellant,

and

R. W. MERCER CO.,

Defendant.

No. 327866
Calhoun Circuit Court
LC No. 2013-003308-CZ

Before: O'CONNELL, P.J., and MARKEY and MURRAY, JJ.

O'CONNELL, P.J., (*concurring*).

I concur in the reasoning and the result of the well-written majority opinion only because I believe that the result is compelled by prior binding precedent that I am required to apply to the facts of this case. See *People v Kevorkian*, 205 Mich App 180, 191; 517 NW2d 293, vacated on other grounds, 497 Mich 436; 527 NW2d 714 (1994) (recognizing that this Court must follow precedent until it is overturned). I write separately, however, because I believe with all due respect that *Weeks v Slavik Builders, Inc*, 24 Mich App 621; 180 NW2d 503 (1970), aff'd 384 Mich 257 (1970), and *Smith v Foerster-Bolster Constr Inc*, 269 Mich App 424, 430-431; 711 NW2d 421 (2006), have created a jurisprudentially significant conundrum. But for *Weeks* and *Smith*, I would affirm the well-reasoned decision of the learned trial court, including the trial court's decision that the statute of limitations has not expired.

I. BACKGROUND FACTS

The majority opinion has adequately and fairly set forth the facts of the case. But because of the egregiousness of these facts I will, in part, repeat them here. Plaintiff is a private postsecondary educational institution located in Albion, Michigan. Plaintiff is not involved in the building trades, nor is it schooled in the nuances of the construction industry. The facts in this case demonstrate that plaintiff should confine its activities to education and leave the nuisances of construction industry to those who have sufficient experience in the building trades.

In 2003, plaintiff decided to construct a new equestrian facility at its campus. While planning the equestrian facility, plaintiff became aware of defendant and its self-proclaimed reputation as "one of the preeminent designers and providers of equestrian engineered facilities." In 2004, representatives of both parties had conversations regarding construction of a very large equestrian facility. It appears from the lower court record that defendant has never designed or supervised the construction of an equestrian facility of this magnitude before.

During the course of the conversations, defendant represented that it "had the necessary experience and expertise to design and engineer an equestrian facility suitable for [plaintiff's] needs and requirements." Defendant also represented that the structure would be "backed by one of the most comprehensive, written warranties in the industry." Defendant represented to plaintiff that it would be responsible for the "design and engineering" of the facility, but that construction of the equestrian facility would be completed by R.W. Mercer Co. (Mercer), an "authorized local Stockade builder and highly qualified local contractor." In reliance on defendant's representations, plaintiff entered into an agreement with Mercer to undertake the construction of the equestrian facility. However, contrary to normal business practices, plaintiff did not enter into a contract with defendant Stockade, the entity who had claimed that they were the expert in "design and engineering" of equestrian facilities. While it appears that defendant designed, engineered, and supplied most of the materials for the project, defendant and plaintiff never entered into a contractual relationship. To add insult to injury, defendant Stockade claims in this lawsuit that it has an existing warranty with plaintiff for the construction of this facility, but the trial court found that the parties never executed the warranty agreement. As I stated earlier, plaintiff should stay in the business of education and out of the business of construction.

The equestrian facility was to be completed in two phases. Phase I of the project commenced in March, 2004, and was completed in September, 2004. In December 2004, George Halkett, plaintiff's equestrian director, became aware of 21 leaks in the facility's roof

and promptly notified Mercer. As a result, Andy Neelis, a Mercer field operations manager, went to the equestrian facility and inspected the roof. Neelis discovered that a number of roof screws had been sheared off and the screw holes had become elongated. Mercer contacted defendant, the "expert in design and engineering of equestrian facilities." As a result, Neelis and Halkett made the necessary repairs to fix the leaks by either using larger screws or applying sealant around the screw holes. At this point it appears no one bothered to ask why the roof screws had sheared off and the screw holes had become elongated.

In 2005, Halkett informed Mercer of more leaks in the roof of the equestrian facility. Neelis once again inspected the roof and again saw that many of the screw holes were elongated and that many of the screws were sheared off. Neelis informed defendant Stockade, the "expert in design and engineering," of the problem with the screws. In response, defendant sent Mercer larger screws to use when repairing the roof. Neelis subsequently made the repairs with the larger screws and applied sealant to the problem areas. As a result of naivety or a simple lack of a common understanding of the construction industry, plaintiff relied upon both defendant and Mercer to fix the problem with larger screws and sealant. I am surprised that defendant did not simply suggest using duct tape, the cure for all building problems.

Within two to four months, Neelis was once again informed of more roof leaks at the equestrian facility. Neelis inspected the roof for a third time and again noticed that the larger screws were "pulling free" and that their screw holes were "a little elongated." In an attempt to fix the problem, Neelis again installed new screws and applied sealant to the roof.

In November 2006, Phase II of the project commenced. At that time, plaintiff became aware of more leaks in the roof. The cause of the leaks was the same as before—the screws had been sheared off and the screw holes had become elongated. Again, defendant sent larger screws and fasteners to be installed. The repairs were promptly made by Neelis. The equestrian facility was completed in August, 2007. Plaintiff was confident that the defendant and Mercer's repairs had solved the roof problem.

In the spring of 2012, plaintiff observed a number of roof leaks and promptly notified defendant and Mercer. In June 2012, defendant investigated the roof[1] and determined that the roof leaks were a "workmanship issue." Consistently throughout this process, defendant represented to plaintiff that it was Mercer's workmanship that was the cause of the roof leaks. Plaintiff accepted defendant's representations that it was in fact a "workmanship issue." Eventually, in response, Mercer conducted its own inspection of the roof and determined that the roof leaks were not a workmanship issue but rather a design issue. Nonetheless, Mercer agreed to once again patch the roof with larger nails and more sealant.

Totally frustrated with defendant's and Mercer's attempts to fix the roof, plaintiff, in July 2012, hired Robert Darvas Associates (Darvas), a consulting structural engineering firm, to

[1] It is important to note that defendant was still supervising the project, representing that it was still in charge of the project and, at the same time, denying that its faulty design was the cause of the roof leaks.

investigate the design of the equestrian facility. On review of the design documents, it was obvious to Darvas that the leaky roof was a result of faulty design. Darvas concluded that the design was "improper, inadequate and deficient in numerous respects." No amount of larger screws and sealant (or duct tape) would cure the defect.

Plaintiff subsequently notified defendant of Darvas's findings. Once again, defendant denied any design deficiencies and attributed the cause of the roof leaks to faulty and deficient workmanship, construction, and installation by Mercer.

II. APPLICATION OF THE LAW TO THE FACTS

The central issue in this case concerns whether the implied warranty of fitness for a particular purpose doctrine applies to "design and engineering services." In the present case, defendant represented that it "had the necessary experience and expertise to design and engineer an equestrian facility suitable for [plaintiff's] needs and requirements." Defendant also represented that the structure would be "backed by one of the most comprehensive, written warranties in the industry." Finally, defendant represented to plaintiff that it would be responsible for the "design and engineering" of the facility. Viewing the facts in the light most favorable to plaintiff, none of these representations are true. In fact, plaintiff's new equestrian facility is not fit for the purpose it was intended, unless of course one does not mind getting wet while riding a horse in an indoor facility.

III. MAJORITY OPINION

The majority opinion does an excellent survey of the law as it applies to the facts of this case. I conclude there is no need to repeat or to embellish the law in this opinion. The majority opinion's conclusion that the current state of the law does not support a cause of action for the implied warranty of fitness for a particular purpose as it applies to "design and engineering services" is a reasonable interpretation of the current state of the law. However, plaintiff asks this Court, based upon the egregious facts of this case, to extend the implied warranty of fitness for a particular purpose to "design and engineering services." Based upon the majority opinion's survey of the law, this is actually an open question in Michigan jurisprudence. While no Michigan case has so applied the law, other jurisdictions seem to have adopted this approach.

IV. CONCLUSION

Whether to extend the law of implied warranty for a particular purpose to include "design and engineering services" is a policy question best left to the Legislature or the Michigan Supreme Court. Based on the equities of this case, it appears a reasonable alternative, but such an action requires resolution by our Supreme Court or an act of the Legislature. If I were writing on a clean slate, I would conclude that this facility is not fit for the purposes it was intended and that the design and engineering services provided by defendant are defective. But the doctrine of judicial restraint, as applied to this intermediate Court, prevents me from reaching this conclusion. The Michigan Supreme Court may want to review this jurisprudentially significant conundrum.

/s/ Peter D. O'Connell
/s/ Jane E. Markey