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UNPUBLISHED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.

PER CURIAM.

In Docket Number 322917, defendant, Stockade Buildings Inc.,[1] appeals by leave granted[2] an order granting it partial summary disposition. Plaintiff, Albion College, cross-appeals the same order. In Docket Number 327866, defendant appeals by leave granted[3] an order denying defendant's second motion for summary disposition. In Docket Number 322917, we affirm in part and reverse in part the order granting defendant partial summary disposition. In Docket Number 327866, we reverse the order denying defendant's motion for summary disposition.

I. BACKGROUND FACTS

Plaintiff is a private postsecondary educational institution located in Albion, Michigan. 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 reputation as "one of the preeminent designers and providers of equestrian engineered facilities." In 2004, representatives of both parties had conversations regarding construction of the equestrian facility. 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. 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 roof of the equestrian facility and promptly notified Mercer. As a result, Andy Neelis, a Mercer field operations manager, went to the equestrian facility and inspected the roof. Upon inspecting the roof, it was discovered that a number of roof screws had been sheared off and the screw holes had become elongated. 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.

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 of the problem with the screws, and 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.

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[1] Stockade Buildings Inc. will be referred to as defendant, as it is the only defendant on appeal.

[2] *Albion College v Stockade Buildings Inc*, 498 Mich 877 (2015).

[3] *Albion College v Stockade Buildings Inc*, unpublished order of the Court of Appeals, entered October 15, 2015 (Docket No. 327866).

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 again 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.

In the spring of 2012, plaintiff observed a number of roof leaks and promptly notified defendant and Mercer. In June 2012, defendant conducted an investigation of the roof and determined that the roof leaks were a "workmanship issue." 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 undertook the necessary repairs on the roof.

In July 2012, plaintiff hired Robert Darvas Associates (Darvas), a consulting structural engineering firm, to investigate the design of the equestrian facility. Upon review of the design documents, Darvas concluded that the leaky roof was a result of the design of the facility that was "improper, inadequate and deficient in numerous respects."

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

II. PROCEDURAL HISTORY

Because it was apparent the parties had differences of opinion regarding who should be liable for the roof leaks, plaintiff filed a complaint against defendant and Mercer alleging (1) breach of contract, (2) breach of express warranty, and (3) breach of implied warranty of fitness for a particular purpose.

In lieu of filing an answer, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). With regard to plaintiff's breach of contract and breach of express warranty claims, defendant argued that plaintiff was unable to state a claim for which relief could be granted because defendant and plaintiff never entered into a contract. Defendant also argued that plaintiff's breach of implied warranty claim was barred by Michigan's version of the Uniform Commercial Code's (UCC) four year statute of limitation because the dispute involved the sale of goods — the building materials defendant supplied to Mercer — and plaintiff failed to file its lawsuit within the required four years after tender of the goods.

After defendant filed its motion for summary disposition, plaintiff filed a first amended complaint that added two causes of action against defendant: (1) breach of contract by a third party beneficiary and (2) negligence.

In response to defendant's motion for summary disposition, plaintiff filed a response and argued that the four-year statute of limitations did not apply to its claim for breach of the implied

warranty of fitness for a particular purpose because the UCC did not apply. Rather, plaintiff asserted that its claim was governed by the six-year statute of limitation period set forth in MCL 600.5827. Additionally, plaintiff asserted that the claim began to accrue, pursuant to MCL 600.5833, when the breach of warranty was discovered or reasonably should have been discovered, and that it filed its claim timely.

The trial court heard oral arguments on defendant's motion and the parties argued consistent with their briefs. Initially, the trial court discussed the two counts that were added by way of plaintiff's first amended complaint, but invited the parties to submit supplemental briefs on those two causes of action. Defendant filed a supplemental brief (plaintiff did not) arguing that plaintiff's third party breach of contract claim was unsustainable for two reasons: (1) plaintiff failed to attach the contract to its complaint and (2) the contract between defendant and Mercer did not grant plaintiff third party beneficiary status.

After receiving defendant's supplemental brief, the trial court entered a written order and opinion granting summary disposition to defendant on four of plaintiff's claims. First, the trial court granted summary disposition to defendant on plaintiff's breach of contract claim because plaintiff failed to demonstrate the existence of a contract when it failed to attach the contract to its pleadings. Second, the trial court granted summary disposition to defendant on the breach of express warranty claim because plaintiff was not in privity of contract with defendant. Third, the trial court granted summary disposition to defendant on plaintiff's third party beneficiary breach of contract claim because the dealership agreement between defendant and Mercer "made no mention of the Albion project." The trial court further stated, "More broadly, the agreement includes no representations regarding the quality of the designs and materials Stockade would furnish to Mercer. In sum, nothing in the agreement between [defendant] and Mercer provides even a hint that [plaintiff] would benefit from that agreement in any way." With regard to plaintiff's negligence claim, the trial court determined that the claim was barred by the applicable limitations period.

The only claim that survived defendant's motion for summary disposition was plaintiff's claim of breach of the implied warranty of fitness for a particular purpose. The trial court determined that this claim was not governed by the UCC because any agreement between plaintiff and defendant involved the design and construction of the equestrian facility, not the sale of goods. The trial court then stated:

> Defendant Stockade had no written contract with Plaintiff Albion, so [defendant] cannot rely upon a disclaimer to defeat [plaintiff's] cause of action for breach of an implied warranty of fitness for a particular purpose. Beyond that, "[o]ur Supreme Court has held, as least in certain circumstances, that an injured plaintiff who is not in privity of contract with a remote manufacturer may nonetheless enforce an implied warranty against the manufacturer[,]" *Heritage Resources*, 284 Mich App at 638, so lack of privity between [plaintiff] and [defendant] may not foreclose [plaintiff's] claim against [defendant] for breach of an implied warranty of fitness for a particular purpose. See *id*. at 639 (noting unsettled state of Michigan law on this point). Although [plaintiff's] implied-warranty claim against [defendant] most assuredly does not fall within the heartland of recognized theories under the law in Michigan, the Court cannot conclude that the claim is "so clearly unenforceable as a matter of law that no factual development

could possibly justify recovery." See *Maiden*, 462 Mich at 119. Accordingly, the Court must deny relief to [defendant] pursuant to MCR 2.116(C)(8).

After determining that plaintiff stated a claim for which relief could be granted, the trial court determined that plaintiff's claim for breach of the implied warranty of fitness for a particular purpose was timely filed as the claim was filed within six years of the discovery of the breach.

Defendant subsequently filed an application for leave to appeal in this Court, which was denied for failing to persuade of the need for immediate appellate review. *Albion College v Stockade Buildings Inc*, unpublished order of the Court of Appeals, entered February 9, 2015 (Docket No. 322917). Defendant then filed an application for leave to appeal to the Michigan Supreme Court.

While the application to the Supreme Court was pending, and after discovery was completed, defendant filed a second motion for summary disposition, this time under MCR 2.116(C)(10). With this motion, the trial court had additional evidence to consider, unlike when it decided defendant's first motion under MCR 2.116(C)(8). Defendant argued that an "exemplar warranty" expressly described the warranties given to plaintiff and that it also disclaimed all implied warranties. Defendant contended that because the exemplar warranty disclaimed implied warranties to plaintiff, plaintiff's claim for breach of implied warranty of fitness for a particular purpose was barred. Furthermore, defendant argued that the exemplar warranty only provided a five-year statute of limitations period which began to accrue at the date of completion of the project, which was in 2007, and plaintiff filed its claim more than five years later in 2013.

Plaintiff argued, in response, that it timely filed its claim as no evidence was presented that it knew or should have known that the design of the building was causing the leaky roof. Additionally, plaintiff contended that defendant's reliance on the exemplar warranty was misplaced because it was not signed by the parties.

The trial court denied defendant's second motion for summary disposition, determining that a genuine issue of material fact existed regarding whether plaintiff knew or should have known about the alleged design defects before it received the Darvas report in 2012. The trial court also stated that the statute of limitations period did not begin to accrue while efforts of remediation occurred. The trial court also determined that plaintiff was not bound by the terms of the exemplar warranty because it was not signed by plaintiff.

After defendant's second motion for summary disposition was denied, defendant filed another application for leave to appeal with this Court challenging the order denying this second motion for summary disposition. While defendant's second application for leave to appeal was pending in this Court, the Supreme Court entered an order remanding defendant's first application to this Court "for consideration as on leave granted." *Albion College v Stockade Buildings, Inc*, 498 Mich 877 (2015). This Court subsequently entered an order granting defendant's second application for leave to appeal and consolidated defendant's two appeals. *Albion College v Stockade Buildings Inc*, unpublished order of the Court of Appeals, entered October 15, 2015 (Docket No. 327866).

III. ANALYSIS

A. DOCKET NUMBER 322917

1. DEFENDANT'S APPEAL

Defendant contends that the trial court erred when it denied its motion for summary disposition because plaintiff failed to state a claim upon which relief could be granted. We review a grant or denial of summary disposition de novo. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted." *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). All well-pleaded allegations are accepted as true and are construed in the light most favorable to the nonmoving party. *Id*. A motion under this subrule is properly granted if no factual development could possibly justify recovery. *Id*.

When determining a cause of action, it is well established in Michigan that a court is not bound by the label a party assigns to its claims. *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 228-229; 859 NW2d 723 (2014). Instead, a court must consider the suit based on a reading of the complaint as a whole. *Id*. at 228.[4]

After a review of the complaint as a whole, and only the complaint, plaintiff alleged a breach of the implied[5] warranty of fitness for a particular purpose for the allegedly defective design and engineering services rendered by defendant. The allegations contained in plaintiff's complaint do not assert the existence of faulty or defective goods, but rather plaintiff asserts a claim for the allegedly deficient services of designing and engineering the equestrian facility. Accordingly, we proceed by determining whether an implied warranty of fitness applies to these alleged services.

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[4] The parties provide substantial arguments regarding the predominant purpose test set forth in *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 534; 486 NW2d 612 (1992). The predominant purpose test is used to assess whether a *contract* is governed by the common law or the UCC by determining whether the contract's predominant purpose was for the rendition of services (with goods incidentally involved), or a sale of goods (with labor incidentally involved). *Id*. In this case, however, plaintiff and defendant did not enter into a contract. Without a contract between plaintiff and defendant, we are unable to discern the primary purpose of such a contract as there are no terms from which to discern its purpose. Because there is no contract between the plaintiff and defendant, we must look to the pleadings to determine whether plaintiff pleaded a cause of action under the common law or under the UCC.

[5] While plaintiff's complaint does not indicate that it is alleging a breach of an implied warranty, Count II alleges a breach of the express warranties allegedly provided to it by defendant. By reading the complaint as a whole, it logically follows that Count III is alleging a breach of an implied warranty, otherwise plaintiff's claim would be redundant. Additionally, both parties agree that plaintiff was alleging breach of an implied warranty.

a. GENERAL PRINCIPLES

As initially developed in Michigan common law, the implied warranty of fitness for a particular purpose[6] only applied to the sale of goods. See, e.g., *Hoover v Peters*, 18 Mich 51, 55 (1869) (The implied warranty of fitness for a particular purpose attached to the sale of hog carcasses to be used as food); *Little v G E Van Syckle & Co*, 115 Mich 480, 483; 73 NW 554 (1898) (Implied warranty of fitness for a particular purpose applied to the sale of a piano); *Tufts v Verkuyl*, 124 Mich 242, 243; 82 NW 891 (1904) (Implied warranty of fitness for a particular purpose applied to sale of a fountain).

Our Legislature codified the common law implied warranty of fitness for a particular purpose, first in 1915 in Section 15 of Michigan Sales Act, see *Patterson Foundry & Mach Co v Detroit Stove Works*, 230 Mich 518, 519-520; 202 NW 957 (1925), and again in 1964 with the enactment of Michigan's version of Article 2 of the UCC, *In re Dean Monagin, Inc*, 18 Mich App 171, 175; 170 NW2d 924 (1969), which only applies to transactions of goods. MCL 440.2102. As it stands today, under the UCC, the implied warranty of fitness for a particular purpose is as follows:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose. [MCL 440.2315.]

"Although such a warranty is usually applied in the context of articles which have been sold or purchased, it has been extended to articles which have been leased or bailed." *Clancy v Oak Park Village Athletic Center*, 140 Mich App 304, 306; 364 NW2d 312 (1985), citing *Jones v Keetch*, 388 Mich 164, 165; 200 NW2d 227 (1972). But because plaintiff does not allege this implied warranty in the context of a transaction of goods, the UCC simply does not apply. We turn to the common law.

A case relied upon by plaintiff to establish that the implied warranty of fitness for a particular purpose applies in the service context is *Weeks v Slavik Builders, Inc*, 24 Mich App 621; 180 NW2d 503 (1970), aff'd 384 Mich 257 (1970). In *Weeks*, the plaintiffs entered into a sales agreement for the purchase of a new home, which was to be built by the defendant. *Id*. at 622. One of the features of the home was a cement tile roof. *Id*. at 622-623. Shortly after taking possession of the home, a rainstorm occurred, which caused the roof to leak. *Id*. at 623. The defendant attempted to cure the leaking roof, but failed in doing so. *Id*. As a result, the plaintiffs filed an action against the defendant who had built a home, alleging, among other causes of

[6] When addressing the implied warranty, courts have, unfortunately, referred to the implied warranty of fitness for a particular purpose merely as "the implied warranty of fitness" or "the implied warranty of purpose." We use the full and proper term "the implied warranty of fitness for a particular purpose" to avoid any unnecessary confusion.

action, a "breach of implied warranty of fitness for purpose." *Id*. at 622. At trial, the defendant moved for a directed verdict, which was denied by the trial court. *Id*.

On appeal, the defendant argued the implied warranty of fitness for a particular purpose did not apply to the sale of real property. This Court was required to determine, as a case of first impression, whether any implied warranties attached to the sale of new residential homes. *Id*. at 624. The *Weeks* Court recognized that other states have "moved away" from the theory of *caveat emptor*[7] and have adopted some form of implied warranty in the purchase of new family dwelling houses. *Id*. The Court explained the policy reasons underlying these other jurisdictions' decisions to extend an implied warranty to the purchase of a new family home as follows:

> The states who have joined the vanguard in interring the ancient doctrine have recognized that in many cases, especially where there are large developments involved, the individual buyer is not on an equal footing and is not in a position to bargain at arm's length with the builder-vendor. The individual purchaser of a newly constructed home is no more able or competent to inspect for latent defects or to protect himself than is the buyer of a mass-produced automobile. [*Id*. at 624-625.]

After reviewing these decisions from other jurisdictions, the Court extended the implied warranty of fitness to the sale of new residential dwelling houses. *Id*. at 627-628. However, we have since concluded that the implied warranty recognized in *Weeks* was "the implied warranty of habitability," *Smith v Foerster-Bolster Constr Inc*, 269 Mich App 424, 430-431; 711 NW2d 421 (2006), because it dealt with residential housing and it never mentioned the implied warranty of fitness "for a particular purpose." This classification is logical because the "fitness" of a home naturally depends on its "habitability." In any event, the *Weeks* Court limited its holding to the facts of the case and only extended the implied warranty of fitness to the purchase of certain new residential dwelling houses. *Weeks*, 24 Mich App at 627-628.

Approximately two years later, the implied warranty of fitness for a particular purpose was expanded to sale of electricity. In *Buckeye Union Fire Ins Co v Detroit Edison Co*, 38 Mich App 325; 196 NW2d 316 (1972), the plaintiffs, two insurance companies and a homeowner, filed a lawsuit against the defendant, Detroit Edison Company, for damages resulting from a fire that destroyed the owner's building. *Id*. at 327. Specifically, the plaintiffs alleged that the fire was caused by defendant's negligence in supplying electricity to the house and that the fire resulted from defendant's breach of the implied warranties of fitness and merchantability. *Id*.

At the close of plaintiff's proofs, the defendant moved for a directed verdict on the breach of the implied warranty of fitness, which was granted because the trial court determined that electricity is not a good and no implied warranty attached. *Id*. at 328. The trial court held that

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[7] "Latin for 'let the buyer beware.' " *Roberts v Saffell*, 280 Mich App 397, 402 n 1; 760 NW2d 715 (2008), quoting Black's Law Dictionary (7th ed.). "A doctrine holding that purchasers buy at their own risk." *Roberts*, 280 Mich App at 402 n 1.

the sale of electricity is a service, and that Article 2 of the UCC and the implied warranties contained therein were not applicable. *Id*.

On plaintiff's appeal, this Court agreed with the trial court that electricity is not a "good" as defined by the UCC,[8] but held that "the product liability of sellers is not restricted to those situations covered in the [UCC]." *Id*. Because the Court determined that plaintiff's recovery was not governed by the UCC, the plaintiff's remedy would be governed by the common law. *Id*. 328-329. The Court then stated:

> We are of the opinion that the implied warranties, as defined by the courts of this state, should apply to the sale of services as well as to the sale of goods. We see no reason upon which a logical distinction can be based, especially when, as here, we are dealing with the production and sale of a form of energy which, under certain circumstances, can be inherently dangerous. [*Id.* at 329.]

The *Buckeye* Court then reviewed two cases from Pennsylvania and New Jersey—jurisdictions that apply implied warranties to services as well as to goods. *Id*. at 329-330. After review of the cases, the Court held:

> We are in accord with the approach taken by the New Jersey and Pennsylvania Courts. We see no reason why the concepts of implied warranty should depend upon a distinction between the sale of a good and the sale of a service. We therefore hold that the trial court's reason for directing the verdict in defendant's favor is in error.
>
> However, rather than make any sweeping generalizations by holding that implied warranties attach to the rendering of all services, we prefer to limit the scope of this decision to the sale of electricity. We are sure that sellers of some services, such as here when a dangerous force is involved, should give the warranties, while others should not. For the present, we feel that the expansion of the law in this area should proceed on a case by case basis at least until some general principles can be evolved.
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> * * *

[8] We have also noted, albeit in a different context, that once electricity reaches a customer's meter, "it becomes a finished good." *Detroit Edison Co v Dep't of Treasury*, 303 Mich App 612, 627; 844 NW2d 198 (2014), aff'd in part, rev'd in part, 498 Mich 28 (2015). Other jurisdictions have held that electricity is a good under the UCC. See, e.g., *Helvey v Wabash County REMC*, 278 NE2d 608 (Ind Ct App 1972) (holding electricity is a good under the UCC). While we question the soundness of *Buckeye Union*'s conclusion that the sale of electricity is a service and not a good, that decision is very limited in scope and application and has not been extended beyond the facts in more than 40 years.

> . . . [P]laintiffs must . . . show that there was a defect in the electricity at the time it left the manufacturer and that the defect was the proximate cause of the plaintiffs' damages [*Id*. at 330.]

As can be seen from this passage, *Buckeye Union* did not extend implied warranties to *all* services; it only expanded the implied warranty of fitness to the sale of electricity because of the unique and dangerous qualities of electricity. *Williams v Detroit Edison Co*, 63 Mich App 559, 564-565; 234 NW2d 702 (1975). And as we have noted, although the *Buckeye Union* Court left open the possibility that the implied warranty of fitness for a particular purpose could attach to other services, no court has done so.

Having reviewed the relevant statute and the pertinent case law, the implied warranty of fitness for a particular purpose attaches to (1) the transactions of goods under the UCC, and (2) the sale of electricity.

b. APPLICATION

Turning to the case at hand, plaintiff failed to state a claim upon which relief can be granted. As mentioned, plaintiff's complaint alleges a breach of the implied warranty of fitness for a particular purpose with regard to architectural and design services. Accordingly, Article 2 of the UCC is not implicated as plaintiff's claim does not involve a transaction of goods. Additionally, plaintiff's claim does not involve the sale of electricity, so no common law precedent exists to support a common law cause of action.

Furthermore, while *Buckeye Union* left open the possibility that implied warranties could be extended to other services other than the sale of electricity, we decline to extend the implied warranty of fitness for a particular purpose to architectural and design services. None of the concerns articulated by the Court in *Buckeye Union* or *Weeks* apply to this situation, where a private college contracted with a general contractor to build a large scale facility for the school. There is no unequal bargaining power, nor, of course, is there an issue involving any inherently dangerous product or service. We also note that our decision to decline to extend the implied warranty of fitness for a particular purpose to the architectural and design services is consistent with the longstanding rule that an architect (absent a specific promise) is not a warrantor of his designs, plans, and specifications. *Borman's Inc v Lake State Development Co*, 60 Mich App 175, 183; 230 NW2d 363 (1975). "The law does not imply such a warranty, or the guaranty of the perfection of [an architect's] plans. * * * The law only requires the exercise of ordinary skill and care in the light of present knowledge." *Id*. at 182-183, quoting *Chapel v Clark*, 117 Mich 638, 640; 76 NW 62 (1898). Accordingly, plaintiff's claim for breach of the implied warranty of fitness for a particular purpose for the design and engineering of the equestrian facility is not supported by Michigan law. Therefore, plaintiff failed to state a claim upon which relief can be granted and the trial court erred when it denied defendant's motion for summary disposition. *Zaher*, 300 Mich App at 139. Having concluded that plaintiff failed to state a claim upon which relief can be granted, it is unnecessary to discuss defendant's other argument in this appeal.

2. PLAINTIFF'S APPEAL

In plaintiff's cross-appeal, it argues that the trial court erred when it granted summary disposition to defendant on its third-party beneficiary breach of contract claim. MCL 600.1405 provides a cause of action for a third party beneficiary:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

"Only intended beneficiaries, not incidental beneficiaries, may enforce a contract under [MCL 600.]1405." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 429; 670 NW2d 651 (2003). In determining whether a plaintiff can enforce the contract as a third party beneficiary, the court must "turn to the contract itself to see whether it granted the plaintiff third-party beneficiary status." *Id*. at 428. To create a third-party beneficiary, there must be a valid contract and the "contract must expressly contain a promise to act to benefit the third party." *White v Taylor Distrib Co, Inc*, 289 Mich App 731, 734; 798 NW2d 354 (2010) (citation omitted).

Here, plaintiff's first amended complaint alleges that it was the intended beneficiary in a contract between defendant and Mercer. On appeal, plaintiff relies on a dealership agreement and certain order forms between defendant and Mercer, and argues that the dealership agreement designates plaintiff as a third party beneficiary. However, when an action is based on a written contract, it is necessary to attach a copy of the contract to the complaint, unless the party explains its failure to do so. MCR 2.113(F). Plaintiff failed to attach this contract between defendant and Mercer to its first amended complaint. Because plaintiff failed to comply with the mandatory language of MCR 2.113(F) by not attaching to its first amended complaint the written contract upon which its claim was based, and failed to provide a reason why it did not do so, plaintiff's pleadings were legally insufficient to state a claim for breach of contract as a third-party beneficiary. *Id*.

In any event, the dealership agreement between defendant and Mercer did not grant third-party beneficiary status to plaintiff. While there was a valid contract between defendant and Mercer, the contract only discussed the relationship between defendant and Mercer. For example, the contract discussed how orders were to be made by Mercer and how and when payment was to be made. The contract makes no mention of plaintiff or the equestrian facility and did not "expressly contain a promise to act to benefit [plaintiff]." *White*, 289 Mich App at 734. Accordingly, plaintiff failed to state a claim upon which relief can be granted.

B. DOCKET NUMBER 327866

The issues in Docket Number 327866 revolve around plaintiff's breach of the implied warranty of fitness for a particular purpose claim. Since we have already concluded that plaintiff failed to state a claim upon which relief can be granted with regard to this claim, review of these issues is unnecessary.

In Docket Number 322917, we affirm in part and reverse in part the order granting defendant partial summary disposition. In Docket Number 327866, we reverse the order denying defendant's motion for summary disposition. We remand for entry of summary disposition in favor of defendant. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ Christopher M. Murray