STATE OF MICHIGAN

COURT OF APPEALS

MID-MICHIGAN DIAGNOSTIC CORPORATION,

Plaintiff/Counter-Defendant-Appellant,

v

MICHIGAN INTERNAL MEDICINE, P.C.,

Defendant/Counter-Plaintiff-Appellee,

and

KAZEM HAK, M.D., and SAMI ELIAS ASMAR, M.D.,

Defendants-Appellees,

and

K & E ASSOCIATES, L.L.C.,

Defendant.

UNPUBLISHED
March 4, 2014

No. 307320
Genesee Circuit Court
LC No. 09-092743-NZ

MID-MICHIGAN DIAGNOSTIC CORPORATION,

Plaintiff/Counter-Defendant-Appellee,

v

MICHIGAN INTERNAL MEDICINE, P.C.,

Defendant/Counter-Plaintiff-Appellant,

No. 307863
Genesee Circuit Court
LC No. 09-092743-NZ

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and

KAZEM HAK, M.D., and SAMI ELIAS ASMAR, M.D.,

Defendants-Appellants,

and

K & E ASSOCIATES, L.L.C.,

Defendant.

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

In Docket No. 307320, plaintiff appeals by right from a judgment of no cause of action in favor of defendants, Michigan Internal Medicine, P.C., and Dr. Kazem Hak, M.D., and Dr. Sami Elias Asmar, M.D., following a bench trial. In Docket No. 307863, defendants appeal by right from the trial court's postjudgment order denying their motion for an award of contractual attorney fees. We affirm in both appeals.

I. FACTS AND PROCEEDINGS

In 2007, defendants Dr. Hak and Dr. Asmar, principals of defendant Michigan Internal Medicine, P.C., spoke to plaintiff's principal, Zakwan Aboudane, about plaintiff subleasing office space in a basement suite at 3400 Fleckenstein Road ("Fleckenstein building"), for plaintiff's use as a CT scan facility. The sublease was executed in September 2007. Plaintiff assumed the costs of modifying the space as necessary for the installation and operation of a CT scan machine. Plaintiff began serving patients in late 2008. In April 2009, the basement flooded. Defendants' building manager, Sharon Gibbons, consulted with Suzanne Kubic, a civil engineer with the Genesee County Drain Commission, and William Goodreau, the civil engineer who designed the Fleckenstein building's site plan and storm drainage system. Both engineers determined that the flood was caused by blockage in the four-inch outlet pipe that fed into the county drain. Water was unable to flow from the four-inch pipe to the county drain, and backed up into the property's underground detention basin, and then up through an eight-inch drain pipe near the eastern side of the building. The water flowed down a slope and into the basement level windows on the eastern side.

At Kubic's recommendation, Gibbons hired a building contractor to fabricate a "trash screen" or "trash rack" from chicken wire, to prevent debris from blocking the four-inch outlet pipe. Goodreau recommended a costlier trash screen, and Kubic recommended sealing off the eight-inch pipe and installing a second sump pump to prevent flooding through the basement windows, but defendants did not adopt these measures.

After the April 2009 flood, Aboudane asked Drs. Hak and Asmar if the building had a flooding problem, and if they could correct the problem. They replied that they were working on the problem. Aboudane alleges that he relied on their assurances that they would prevent floods in the future, and decided to remain in the Fleckenstein building despite his concerns that a basement flood could damage or destroy the CT scanner. On June 17, 2009, 3.46 inches of rain fell on Flint Township between 6:00 a.m. and 2:00 p.m. Water flowed out of the detention basin through the eight-inch pipe, and flowed through the windows at the eastern side of the building. At least one foot of water accumulated in the basement. The exposure to water and humidity rendered the CT scan machine inoperable.

Plaintiff filed this action against defendants, asserting claims for promissory fraud, common-law fraud, breach of the lease agreement, and breach of a contract allegedly formed when defendants assured Aboudane that they would fix the flooding problem. The factual basis for plaintiff's claims was that defendants knew that the location of the eight-inch pipe near the eastern side of the building created a risk that water would flow out of the detention basin and into the basement through the eastern windows. Following a bench trial, the trial court found that the June 2009 flood was not caused by defendants' acts or omissions, but rather by excessive rainfall, which caused the county storm drain to become overwhelmed and unable to accept water from defendants' property drainage system. The trial court granted defendants' motion for a directed verdict with respect to the promissory fraud claim. At the conclusion of the trial, the trial court issued a judgment of no cause of action in favor of defendants with respect to plaintiff's remaining claims.

II. DOCKET NO. 307320

Plaintiff's claims for relief are predicated on its factual contention that the Fleckenstein building flooded in June 2009 because defendants failed to correct known deficiencies in the building's storm drainage system. The trial court found that the evidence did not support plaintiff's contention that the flood was caused by problems with the building's drainage system, but rather was attributable to the county drain becoming overwhelmed. Plaintiff initially argues that the trial court erred in finding that the cause of the flood was the overburdened county drain and not deficiencies caused by defendants.

This Court reviews a trial court's findings of fact at a bench trial for clear error and reviews its conclusions of law de novo. *Knight Enterprises, Inc v RPF Oil Co*, 299 Mich App 275, 279; 829 NW2d 345 (2013). Although plaintiff argues that the trial court's findings are contrary to the great weight of evidence, in the context of a bench trial, a great weight argument is addressed under the "clearly erroneous" standard. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652 n 14; 662 NW2d 424 (2003). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 251; 792 NW2d 781 (2010). "An appellate court will give deference to the trial court's superior ability to judge the credibility of the witnesses who appeared before it." *Ambs*, 255 Mich App at 652 (citation and internal quotations omitted).

The trial court did not clearly err in finding that the cause of the flood was the overburdened county drain instead of alleged deficiencies caused by defendants. Plaintiff's

expert, Richard Anderson, testified that the eight-inch pipe was the "Achilles's heel" in the system, but Anderson did not address whether backups through the eight-inch pipe were likely to occur if water was properly flowing from the detention basin into the county drain. Goodreau, however, testified that the eight-inch pipe backflow would happen only if drainage to the county drain was obstructed. Goodreau's testimony supports a conclusion that there were only two events that could have caused obstruction to the county drain: (1) solid debris in the four-inch pipe, or (2) sufficient rain to fill the county drain to capacity. The evidence supports an inference that the latter cause was present. Scott McLaughlin testified that water was flowing over the drains on Fleckenstein Road. The intersection of Miller-Bristol-Fleckenstein roads was flooded, creating a hazard for motorists. These observations are circumstantial evidence that water falling on public roads was accumulating in those roads because the drainage process could not keep up with the rainfall. Additionally, there was no evidence that the four-inch pipe was blocked. Kevin Wells, a contractor hired by Gibbons to remediate flood damage, testified that he saw "water pumping out of [the four-inch pipe] like it was a fire hose." Gibbons testified that Wells cleaned out the four-inch drain after the April flood or floods, and no witness testified that any debris was found in the pipe after the June flood. This evidence supports a finding that there was no blockage in the four-inch pipe, and that defendants' choice of the cheaper chicken wire screen over Goodreau's PVC screen was not a cause of the June 2009 basement flood, leaving as the only probable remaining cause that the county drain became unable to receive any more water, causing a backup through the system.

Plaintiff asserts several arguments attacking the trial court's factual findings. Plaintiff argues that there was no evidence of a pressure head forming in the county drain. However, there also was no evidence that a pressure head was a requisite condition in the event that the county drain was overburdened. Plaintiff also argues that the testimony of its civil engineering expert, Anderson, was unrebutted. Defendants did not rebut Anderson's testimony that water would flow out of the detention basin through the eight-inch pipe if the water level in the basin rose to the level of the pipe. However, defendants presented evidence that the water would not rise that high if the water was flowing at a normal rate into the county drain, which would not happen unless the four-inch outlet pipe was clogged or the county drain was filled to capacity. Anderson failed to testify that water could back up through the eight-inch pipe even if there was no obstruction to the county drain. Anderson admitted that he did not review all relevant weather data for June 17, 2009. Anderson also admitted that he had no information concerning whether the chicken wire cone was blocked with debris at the time of the June 2009 flood. Anderson did not give a definitive conclusion regarding the significance of standing water in the street on the afternoon of June 17, 2009. Defendants also presented Goodreau's testimony that Anderson's proposal for a catch valve in the eight-inch pipe was not a standard feature in drainage systems. Irrespective of the deficiencies in the testimony by plaintiff's experts, the trier of fact was entitled to disbelieve the testimony, even if uncontroverted. *Taylor v Mobley*, 279 Mich App 309, 314 n 5; 760 NW2d 234 (2008).

Plaintiff contends that none of the three engineers who testified at trial concluded that the June 2009 flood was caused by the county drain being filled to capacity. However, Goodreau's testimony supports an inference that the drains were filled to capacity. Anderson opined that the flood was caused by the eight-inch pipe, but he did not rule out the possibility that the eight-inch pipe backup was secondary to the obstruction of water into the county line. Kubic did not give an opinion regarding the cause of the June 2009 flood. Plaintiff emphasizes that Wells testified

that he observed water flowing into the county drain. However, Wells did not specify the time he made this observation.

In sum, we find no clear err in the trial court's finding that the cause of the flood was the overburdened county drain and not deficiencies caused by defendants. *Knight Enterprises, Inc*, 299 Mich App at 279.

Plaintiff also challenges the trial court's judgment for defendants on each of plaintiff's specific claims. The basis for plaintiff's theory of defendants' liability for breach of the lease agreement is unclear. Plaintiff's first amended complaint did not set forth a separate claim for breach of the lease, but instead raised a claim for breach of contract as an alternative to its claim for common-law fraud. Plaintiff's position at trial, as it is on appeal, is that defendants breached an alleged contractual duty by failing to properly maintain the drainage system. Plaintiff appears to rely on the implied covenant of quiet enjoyment to argue that defendants breached this implied covenant by failing to prevent the June 2009 flood. "[T]he covenant of quiet enjoyment is breached only 'when the landlord obstructs, interferes with, or takes away from the tenant in *a substantial degree* the beneficial use of the leasehold.'" *Slatterly v Madiol*, 257 Mich App 242, 258; 668 NW2d 154 (2003), quoting 49 Am Jur 2d, Landlord and Tenant, § 606, p 500 (emphasis added by the *Slatterly* Court).

In *Bowen v Clemens*, 161 Mich 493; 126 NW 639 (1910), our Supreme Court held that the defendant tenant was not excused from its obligation to pay rent to the plaintiff landlord after a fire destroyed the building on the plaintiff's rented property. *Id.* at 494-495. The Court held that a tenant is excused from payment of rent after the rental property is destroyed or damaged if the tenant "has the right to go on and rebuild, and whether the loss covers the land as well as the building." *Id.* at 494. The Court also rejected the defendant's argument that the plaintiff breached the covenant of quiet enjoyment by the tenant. The Court stated:

> The suggestion that there is something in the contract relation which changes the rule is based apparently upon the covenant for quiet enjoyment. But accidental injuries to the premises from natural causes, which interfere with the lessee's enjoyment of the premises, are not considered a breach of the lessor's covenant for quiet enjoyment. 18 Am & Eng Enc Law (2d Ed), p 628. The fact that the building was damaged and that the owner recovered the insurance does not release the lessee from the payment of the rent. [*Bowen*, 161 Mich at 494-495.]

The key principle derived from these authorities is that a landlord breaches the covenant of quiet enjoyment when it "obstructs, interferes with, or takes away from the tenant . . . the beneficial use of the leasehold," and that "accidental injuries to the premises from natural causes . . . are not considered a breach of the lessor's covenant for quiet enjoyment." These authorities require a direct act by the landlord, or at least a failure to take action that was reasonably necessary to enable the tenant to enjoy the benefit of the lease.

To the extent that defendants had a duty to use reasonable care to prevent flooding of plaintiff's basement suite, that duty did not encompass a guarantee that no flood would ever occur, no matter what the cause. The evidence supported a finding that defendants made

reasonable efforts to prevent future floods after the April 2009 incidents. Defendants consulted both the civil engineer who designed the site plan and a civil engineer from the Genesee County Drain Commission. Defendants added a trash screen to the four-inch outlet pipe, opened drains in the window wells, and redirected downspouts. Although defendants did not implement every suggestion they received, they addressed the primary cause of the April flood, namely the clogged four-inch drain. Under these circumstances, the trial court did not err in concluding that defendants were not liable for breach of the lease.

Plaintiff next challenges the trial court's decision granting defendants' motion for a directed verdict on plaintiff's promissory fraud claim. Initially, contrary to what plaintiff argues, the trial court was not required to view the evidence in the light most favorable to itself, as the nonmoving party, when addressing the promissory fraud claim. A directed verdict "orders the jury to find no cause of action," *Auto Club Ins Ass'n v Gen Motors Corp*, 217 Mich App 594, 601; 552 NW2d 523 (1996), and therefore is only proper in a jury trial, *Stanton v Dachille*, 186 Mich App 247, 261; 463 NW2d 479 (1990). Accordingly, when a defendant moves for a directed verdict in a bench trial, the motion is properly treated as a motion for involuntary dismissal pursuant to MCR 2.504(B)(2). *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 235 n 2; 615 NW2d 241 (2000); *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Involuntary dismissal is proper when "the trial court, . . . sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Id.* at 639, quoting MCR 2.504(B)(2). "Unlike [a] motion for directed verdict, a motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983) (internal citations omitted).

Generally, a claim for fraud must be based on allegations that the defendant misrepresented a past or existing fact. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336-338; 247 NW2d 813 (1976). However, a claim for promissory fraud may arise when the defendant makes a promise with fraudulent intent, i.e., with no present intention of fulfilling the promise. *Id*. at 338-339.

Plaintiff argues that defendants' failure to implement any of the civil engineers' recommendations except the simpler and cheaper version of the trash screen establishes that defendants never intended to resolve the flooding problem. We disagree. Defendants could reasonably decide that the trash screen was sufficient to prevent obstructions to any runoff water's entry into the county drain, which was the cause of the April flood. Indeed, the absence of evidence that the four-inch pipe was clogged in June 2009 supports an inference that the chicken wire screen was adequate, at least on that date. Additionally, less than two months had passed between the April and June floods. Defendants could not have known that June 2009 would bring one of the heaviest rainfall days in the history of Flint. In hindsight, defendants' attempt to start with inexpensive corrections might have been shortsighted, but defendants' failure to predict and prepare for the worst does not prove that their promises to fix the problem were fraudulent. Defendants' failure to implement a full range of preventative measures, and their failure to take into consideration other possible causes of floods other than the cause experienced in April 2009 does not invalidate the trial court's finding that defendants did not make promises with a false intent.

Plaintiff also construes Dr. Hak's comment about flood insurance as proof that Dr. Hak did not intend to fulfill his promise to fix the problem. This argument relies on plaintiff's subjective interpretation of Dr. Hak's comment and motives, which the trial court was not obligated to accept as proven fact. *Taylor*, 279 Mich App at 314 n 5.

We also reject plaintiff's argument that defendants' failure to call Dr. Asmar as a witness should have been interpreted as proof that he could not truthfully testify that he intended to fulfill his promise to repair the flooding problem. Plaintiff's reliance on *Schimke v Scott*, 361 Mich 654; 106 NW2d 142 (1960), in support of this argument is misplaced. The Supreme Court in *Schimke* did not address the defendant's argument that a key defense witness's failure to testify should be construed in the plaintiff's favor. Rather, the Court stated that the evidence was sufficient to support the trial court's finding that the defendants committed fraud, and concluded that the trial court's findings regarding a witness's failure to testify "were merely an additional reason for the finding for the plaintiff." *Id.* at 660. Moreover, even if *Schimke* could be read as permitting a trial court to find that a defense witness's failure to testify can be used to support an inference that the witness was not able to truthfully deny the plaintiff's allegations, a trial court would not be obligated to make such a finding whenever a defendant fails to testify. *Taylor*, 279 Mich App 309, 314 n 5. Here, defendants may have decided not to call Dr. Asmar as a witness because it did not believe that plaintiff had satisfied its own burden of proof, or because it simply believed that his testimony was unnecessary. Accordingly, *Schimke* does not support plaintiff's argument on appeal.

Plaintiff next challenges the trial court's finding of no cause of action with respect to plaintiff's common-law fraud claim. "The elements of fraud are: (1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury." *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254 n 8; 701 NW2d 144 (2005).

Plaintiff alleges that defendants made false representations concerning the building's susceptibility to flooding. However, Aboudane did not testify that any defendant or agent of defendant made a statement favorably representing the state of the building. Aboudane testified that he asked Drs. Hak and Asmar "do you have a problem that I should know about; did you have a problem with this building; is this gonna happen all the time[?]", and that they told him, "No . . . *this will never happen again*, we promise you; *we'll take care of it*." These responses could be construed as a tacit acknowledgment that a current problem existed, which defendants intended to fix, in which case there would be no misrepresentation of an existing fact. Defendants' response of "no" to plaintiff's question about a "problem" also does not establish a misrepresentation. In context, plaintiff's question about a "problem" refers to a flooding problem, but in consideration of the evidence presented at trial, defendants' negative answer is not necessarily a material misrepresentation of fact. The cause of the 2006 or 2007 flood was not explained by the evidence. The first flood in April 2009 was a sanitary sewer backup, and unrelated to the alleged problems in the storm drainage system. The second flood was allegedly caused by blockage in the four-inch outlet drain leading to the county storm drain. One witness, Kevin Wells, testified that there was a third flood in April 2009, but other witnesses disputed this

assertion. Evidence also permitted a finding that the June 2009 flood was not caused by a blockage in the outlet pipe. Evidence that different flooding events had different or unknown causes supported a finding that there was no defect in the drainage system and no unified flooding problem, and that the frequency of floods in the spring and early summer of 2009 was an unlucky coincidence. The trial court did not err in finding that plaintiff failed to establish defendants' liability for fraud. *Knight Enterprises, Inc*, 299 Mich App at 279.

Plaintiff also argues that the trial court erred in finding no cause of action with respect to plaintiff's alternative breach of contract claim. Plaintiff asserted this breach of contract claim as an alternative to its claim for common-law fraud. The basis for this claim is that plaintiff and defendants formed a contract in which defendants promised to resolve the flooding problem in exchange for plaintiff's promise to continue leasing the suite in the Fleckenstein building.

A valid contract is formed when the parties bargain for and exchange a promise, each incurring a legal detriment in exchange for the same from the other. See *Higgins v Monroe Evening News*, 404 Mich 1, 20; 272 NW2d 537 (1978). "A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). The elements of a valid contract are: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). The term "mutuality of obligation" means that "there must be consideration, without which there is no obligation on either party because there is no binding contract." *Hall v Small*, 267 Mich App 330, 334; 705 NW2d 741 (2005) (citations and internal quotations omitted). "Thus, the enforceability of a contract depends . . . on consideration and not mutuality of obligation." *Id.* (citations and internal quotations omitted).

The trial court concluded that plaintiff failed to prove its breach of contract claim because plaintiff was ignorant of the prior 2007 flood, and that any agreement to prevent future flooding was limited to addressing the cause of the April 2009 floods, i.e., the clogged pipe. Plaintiff questions the relevance of the trial court's reference to its lack of knowledge of the prior 2007 flood. However, that observation does not detract from the validity of the trial court's reasoning regarding any agreement to prevent future flooding. The trial court found that if a contract was formed, defendants' side of the agreement was to address the cause of the April 2009 flood, namely the blockage in the four-inch outlet pipe. The trial court's finding that defendants fulfilled that promise is supported by the evidence that defendants hired Pro Build to clean debris and silt from the pipe and installed a trash screen. The trial court did not err by declining to find that defendants promised to prevent all future floods from all causes. Moreover, Aboudane did not expressly testify that he communicated to defendants his intent to leave unless defendants made a promise to fix the problem. Accordingly, the trial court did not err in granting judgment for defendants on this claim.

Because we conclude that the trial court did not err in granting a judgment for defendants on all of plaintiff's claims, it is not necessary to address plaintiff's additional argument relating to damages.

III. DOCKET NO. 307863

Defendants argue that the trial court erred in denying their postjudgment motion for attorney fees pursuant to the lease agreement. We disagree.

When this Court reviews a trial court's decision on a motion for attorney fees, the trial court's findings of fact are reviewed for clear error, and any questions of law are reviewed de novo. *Brown v Home-Owners Ins Co*, 298 Mich App 678, 689-690; 828 NW2d 400 (2012). Here, defendants contend that they are entitled to attorney fees pursuant to a provision in the lease agreement. The interpretation of a contract is a question of law reviewed de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). In interpreting a contractual term, a court must give effect to every word, phrase, and clause. *Id.* at 468. "An unambiguous contractual provision is reflective of the parties' intent as a matter of law, and if the language of the contract is unambiguous, we construe and enforce the contract as written." *Coates v Bastion Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007) (citation and punctuation omitted). A dictionary may be consulted to determine the plain and ordinary meaning of an undefined contractual term. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010).

Paragraph 19 of the parties' lease provides:

> In case suit should be brought for recovery of the premises, or for any sum due hereunder, *or because of any act which may arise out of the possession of the premises*, by either party, the prevailing party shall be entitled to all costs incurred in connection with such action, including a reasonable attorney's fee. [Emphasis added.]

Defendants contend that they are entitled to attorney fees under the provision allowing the prevailing party to recover attorney fees and costs in an action involving "any act which may arise out of the possession of the premises." Plaintiff contends that its lawsuit arose from defendants' failure to take appropriate corrective measures, and that failure to act cannot be an act within the meaning of this phrase. Defendants argue that plaintiff's lawsuit arose from plaintiff's possession of the premises because plaintiff alleged that defendants interfered with its quiet possession of the premises, which is an act arising out of the possession of the premises.

Black's Law Dictionary (7th ed) defines "act" as follows:

> Something done or performed, esp. voluntarily; a deed.
>
> 2. The process of doing or performing; an occurrence that results from a person's will being exerted on the external world . . . Also termed *positive act; act of commission*. [*Id.*, p 24.]

This definition includes the following commentary:

> "The term act is one of ambiguous import, being used in various senses of different degrees of generality. When it is said, however, than an act is one of the essential conditions of liability, we use the term in the widest sense of which it is

> capable. We mean by it any event which is subject to the control of the human will. Such a definition is, indeed, not ultimate, but it is sufficient for the purpose of the law." John Salmond, *Jurisprudence* 367 (Glanville L. Williams ed., 10th ed. 1947). [Black's Law Dictionary (7th ed), pp 24-25.]

Black's Dictionary includes a separate listing for "act of omission," which refers to the definition of "negative act." The definition for "negative act" refers to the second definition for "act."

> "Arise" is defined as follows:
>
> > 1. To originate; to stem (from) < a federal claim arising under the U.S. Constitution >. **2.** To result (from) < litigation routinely arises from such accidents >. **3.** To emerge in one's consciousness, to come to one's attention < the question of appealability then arose >. [Black's Law Dictionary (7th ed), pp 102-103.]

The relevant definitions of "possession" are as follows:

> **1.** The fact of having or holding property in one's power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. [*Id.* at 1183.]

Neither the parties nor the trial court considered the definition of "omission," which is nonetheless relevant to this analysis. "Omission" is defined as follows:

> **1.** A failure to do something; esp., a neglect of duty < the complaint alleged that the driver had committed various negligent acts and omissions >. **2.** The act of leaving something out < the contractor's omission of the sales price rendered the contract void > **3.** The state of having been left out of or not having been done < his omission from the roster caused no harm >. **4.** Something that is left out, left undone, or otherwise neglected < the many omissions from the list were unintentional >. [*Id.* at 1116.]

Plaintiff's contract claims against defendant arose from defendants' failure to implement corrections to the drainage system. These claims clearly arise from defendant's omissions, not acts. The attorney fees provision applies to lawsuits brought "because of any act which may arise out of the possession of the premises[.]" Although Salmond's commentary that the term act is used "in the widest sense of which it is capable," and means "any event which is subject to the control of the human will," the concept of "act" is distinguished from the concept of "omission." The lease provision does not state that attorney fees and costs are recoverable in connection with lawsuits that arise because of omissions that arise out of the possession of the premises. The

lease's plain language thus excludes attorney fees for lawsuits that arise because of alleged omissions that may arise out of the possession of the premises. Accordingly, the trial court did not err in denying defendants' motion for attorney fees.

Affirmed. No taxable costs are awarded because the parties failed to prevail in full.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Stephen L. Borrello