# STATE OF MICHIGAN

# COURT OF APPEALS

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| CONWAY GREENE COMPANY,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 16, 2003 |
| v<br><br>STATE OF MICHIGAN,<br><br>Defendant-Appellant. | No. 242177<br>Ingham Court of Claims<br>LC No. 00-017685-CM |

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| CONWAY GREENE COMPANY,<br><br>Plaintiff-Appellee, | |
| v<br><br>STATE OF MICHIGAN,<br><br>Defendant-Appellant. | No. 243695<br>Ingham Court of Claims<br>LC No. 00-017685-CM |

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

In this breach of contract case, defendant appeals as of right from an order of judgment in Docket No. 242177 awarding plaintiff $2,866,638 in lost future profits, and from a stipulated order in Docket No. 243695 granting plaintiff $60,211.78 in attorney fees and costs. The dispositive issue before this Court is whether the Legislative Council had the constitutional or statutory authority to bind any state agency other than itself when it entered into the contract at issue. We conclude that it did not. Accordingly, we reverse the trial court's order denying defendant's motion for summary disposition.

## I. Facts and Procedural History

This case involves the publication of the fourth compilation of the Michigan Administrative Code ("the Code"). The Code is the official compilation of the administrative rules promulgated by the agencies of the state's executive branch. MCL 24.201 *et seq*. The Secretary of State published the first two compilations of the Code in 1944 and 1954. Pursuant to 1970 PA 193, the Legislature placed the authority to compile and publish the Code in the

Legislative Council ("the Council"), a bipartisan entity created by the Michigan Constitution, Const 1963, art 4, § 15, to provide bill drafting, research and other services for members of the Legislature. The Council published the third compilation of the Code in 1979, and it supervised the private publication of the fourth compilation, the subject of this appeal, in 1999.

In January 1999, the Council entered into an eight-year contract with plaintiff, an Ohio corporation in the business of printing and publishing codes and other legal materials for a number of state governments. The contract allowed the Council to cancel the contract in the event the Council no longer needed to publish the Code due to changes in law. Plaintiff successfully negotiated the inclusion of a sentence into the contract's cancellation provision that provided the transfer of the contract to any "agency or source" that may subsequently be granted the authority to publish the Code.

In December 1999, the Legislature enacted 1999 PA 262-264, removing the authority to publish the Code from the Council and placing it within the Office of Regulatory Reform ("ORR") in the executive branch of government. The Council cancelled the contract and plaintiff filed suit for breach of contract, claiming that the contract should have been transferred to the ORR for performance. Defendant asserted that it had no power to bind the executive branch of government when it entered into the contract and to do so would violate the separation of powers principles. The trial court denied defendant's motion for summary disposition on the ground that the Legislature was bound to the contract and breached the contract when it changed the laws and because the Legislature's actions violated Const 1963, art 1, § 10 that prohibits the impairment of the obligations of contracts. A different panel of this Court denied defendant's application for leave to appeal from the court's order denying defendant's motion for summary disposition. *Conway Greene Co v State of Michigan*, order of the Court of Appeals, entered June 8, 2001 (Docket No. 233158). Subsequently, the trial court granted plaintiff partial summary disposition on the breach of contract claims and the case proceeded to a bench trial on the claims of fraud and conversion and on damages only for the breach of contract claims.

## II. Standard of Review

This Court reviews a trial court's decision to grant a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion granted under MCR 2.116(C)(10), this Court must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ. *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2000). The nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The construction and interpretation of a contract is a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc*, 463 Mich 504, 511; 620 NW2d 531 (2001). This Court reviews constitutional questions de novo. *McDonald v Grand Traverse Co Election Comm'n*, 255 Mich App 674, 679; 662 NW2d 804 (2003).

## III. Analysis

In this case, the trial court and the parties failed to look to the pertinent constitutional or statutory provisions to determine what authority, if any, the Council had to bind other state agencies when it entered into the contract at issue. We conclude that the Council lacked such authority and, accordingly, the court erred when it denied defendant summary disposition.

Michigan courts have long recognized the presumption that a contract has a legal purpose. *Stillman v Goldfarb*, 172 Mich App 231, 239; 431 NW2d 247 (1988). A contract will not be deemed illegal where it is capable of a construction that will validate it. *Id*. Where a contract is open to construction, the court must determine, if possible, the parties' intent. *Id*. To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). When a contract is ambiguous, this Court may construe the agreement in an effort to find and enforce the parties' intent. *Id*.

The pertinent portion of the cancellation provision in the contract is as follows:

> Council may also cancel this contract if the Council no longer needs the service or commodity specified in this contract due to program changes, changes in laws, rules, regulations, relocation of offices, or lack of funding, by giving Conway Greene written notice of such cancellation 30 days prior to the date of cancellation. If the service or commodity is being or will be offered through another agency or source, then Conway Greene's rights and obligations hereunder shall be transferred, along with this contract, to such other agency or source.

From the above, it is clear that the parties intended to allow the contract to survive in the event that the "service or commodity" was being offered by another "agency or source." With respect to the words "service or commodity," defendant asserts that the commodity being offered by the ORR was essentially different from that of the Council. Without providing any meaningful analysis to support its claim, defendant merely asserts that the "end production" of the Code followed "a course decidedly different from that followed before the passage of 1999 PA 262-264." Defendant presents nothing to refute plaintiff's claim that "[t]he commodity to be provided by the Council was the final text of the Michigan administrative rules, and the commodity to be provided by the ORR is the final text of the Michigan administrative rules."

With respect to the words "agency or source," defendant asserts that the Council had only the authority to bind other agencies within the legislative branch, while plaintiff asserts that the Council is an agency for the state of Michigan and had the authority to bind any state agency to the contract. We disagree with both arguments.

As a general proposition, parties are free to enter into any contract at their will, provided that the particular contract does not violate the law or contravene public policy. *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 383-384; 525 NW2d 891 (1994) (citations omitted). "Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution. *Sittler v Bd of Control*, 333 Mich 681, 687; 53 NW2d 681 (1952), quoting *Roxborough v Unemployment Compensation Comm*,

309 Mich 505, 510; 15 NW2d 724 (1944). The extent of such authority "is measured by the statute from which [the state agents or officials] derive their authority, not by their own acts and assumption of authority." *Id*., quoting *Lake Twp v Millar*, 257 Mich 135, 142; 241 NW 237 (1932). Further, as our Supreme Court explained:

> Courts usually have concluded that a state contractual obligation arises from legislation only if the legislature has unambiguously expressed an intention to create the obligation. In order to prove that a statutory provision has formed the basis of a contract, the language employed in the statute must be 'plain and susceptible of no other reasonable construction' than that the Legislature intended to be bound to a contract. As a general rule, vested rights are not created by a statute that is later revoked or modified by the Legislature if 'the Legislature did not covenant not to amend the legislation.' Yet, a statute can create a contract if the language and circumstances demonstrate a clear expression of legislative intent to create private rights of a contractual nature enforceable against the state. [*In re Certified Question (Fun 'N Sun RV, Inc v Michigan)*, 447 Mich 765, 777-778; 527 NW2d 468 (1994) (citations and quotations omitted).]

According to Const 1963, art 4, § 15, the Council is a bipartisan entity created by the Michigan Constitution to provide bill drafting, research and other services for members of the Legislature, as follows:

> There shall be a bipartisan legislative council consisting of legislators appointed in the manner prescribed by law. The legislature shall appropriate funds for the council's operations and provide for its staff which shall maintain bill drafting, research and other services for the members of the legislature. The council shall periodically examine and recommend the to the legislature revision of the various laws of the state.

There is nothing in the constitutional provision that would grant the Council the authority to publish the Code or to contract for the private publication of the Code and there is nothing to indicate that the Council was an agent of the state of Michigan for purposes of entering into state contracts. Rather, at the time the Council entered into the contract at dispute, the Council's authority over the compilation and publication of the Code derived from 1970 PA 193 (former MCL 8.41 *et seq*.), which provided in pertinent part that "[t]he legislative council shall provide for separate compilations of all general laws in force and administrative rules filed with the secretary of state . . . ." The Council's authority to enter into a contract for the private publication of the Code was derived from former MCL 8.45, which provided that:

> The council may enter into 1 or more contracts or provide for editorial work, printing, binding, indexing and other work which it deemed necessary, and may provide that the compilations be privately printed and published and sold and distributed by the publishers on such terms as the council may prescribe. The work of preparing, editing, indexing and publishing the laws and administrative rules *shall* be under the direction and supervision of the council. [1970 PA 193 (former MCL 8.45) (emphasis added).]

There is nothing in the language of the statute that grants the Council the authority to ensure the survival of the contract in the event the Council no longer had the authority to publish the Code or to bind any other agency, whether legislative or executive, to the contract. Importantly, the Legislature has not expressly promised not to amend the relevant Code statutes. *In re Certified Question, supra*. Rather, the evidence in this case indicates otherwise. The Request for Proposals ("RFP") that was issued for the publication of the Code in this case expressly provides the first sentence in the canceling provision at dispute, as follows:

> In the event the Council no longer needs the service or commodity specified in the proposal or contract due to program changes; changes in laws, rules, or regulations; relocation of offices; or lack of funding, the Council may cancel the contract by giving a proposer whose proposal is accepted written notice of such cancellation 30 days prior to the date of cancellation.

The above provision was incorporated into the contract and remained intact in the contract provision at dispute even though plaintiff successfully inserted the second sentence that allowed for the contract to survive in the event the Council no longer had the authority to publish the Code. The above language in the RFP and the first sentence in the contract provision indicate that the Council had no authority to determine the fate of the contract in the event the Council no longer needed to publish the Code due to changes in laws. The statutory language that grants the Council the authority to enter into contracts does not expressly grant the Council the power to bind the Legislature or any other agency within the legislative or executive branches of government. There is nothing to show an express legislative intent to be bound to the contract or a legislative promise not to change the laws. It follows that the Council had no authority to agree to plaintiff's request to insert into the contract the second sentence of the disputed provision. It also follows that plaintiff did not have a contract with the Legislature or with the State of Michigan.

Plaintiff argues that it entered into the contract with an understanding that it was contracting with agents of the State of Michigan because the Code was for the state's use. As our Supreme Court explained, "[t]he powers of State officers being fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the State, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred." *Sittler, supra*, quoting *Roxborough, supra*. Here, the Council lacked any authority to bind any state agency other than itself, and plaintiff knew that its rights under the contract were subject to cancellation upon a change in the laws.

Because the Council had no authority to endorse the second sentence in the contractual provision, that sentence is void and only the first sentence remains in effect. The first sentence provides that the Council may cancel the contract if the Council no longer needed the service or commodity due to changes in law. This is exactly what occurred in this case. 1999 PA 262-264 stripped the Council of its authority to direct and supervise the work involved in the publication of the Code. Therefore, the Council had no need for the "service or commodity." Accordingly,

the Council properly cancelled the contract in this case. Because our conclusion is dispositive to this appeal, we need not address defendant's remaining claims.

Reversed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood