STATE OF MICHIGAN

COURT OF APPEALS

HERITAGE IN THE HILLS HOMEOWNERS ASSOCIATION,

Plaintiff-Appellant,

and

ROBERT J. LUTTERMOSER,

Plaintiff,

v

HERITAGE OF AUBURN HILLS, L.L.C., d/b/a, HERITAGE HILLS OF AUBURN HILLS, L.L.C., SILVERMAN BUILDING COMPANIES, INC., d/b/a SILVERMAN COMPANIES, INC., and d/b/a SILVERMAN and d/b/a SILVERMAN HOMES, TOLL DEVELOPMENT CO., INC., d/b/a TOLL BROTHER, INC., and U.S. HOMES CORPORATION,

Defendant-Appellees,

and

GOJCAJ CONSTRUCTION CORPORATION,

Defendant.

UNPUBLISHED
February 2, 2010

No. 286074
Oakland Circuit Court
LC No. 06-075239-CZ

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff, Heritage in the Hills Homeowners Association (the Association), appeals as of right from the trial court's grant of summary disposition in favor of defendants Heritage of Auburn Hills, LLC (Heritage LLC), Silverman Companies, Inc, Toll Development Company, Inc., and U.S. Homes Corporation. We reverse in part and remand for further proceedings.

I. Underlying Facts:

The relevant facts on appeal are largely undisputed. Heritage LLC was the developer of Heritage in the Hills, which is a residential complex in Auburn Hills that is largely composed of residential units. The other defendants each played a role in developing Heritage in the Hills. Plaintiff is the Association to which each of the homeowners in Heritage in the Hills belongs and Robert Luttermoser is an individual who owns one of the condominiums in the development.

Luttermoser, like the other homeowners in the development, entered into a purchase agreement with Heritage LLC when he purchased his unit. The purchase agreement contained several provisions that have become central to this litigation. Paragraph four of the purchase agreement, which is entitled "Purchaser's Acknowledgements," provides in part that:

> Purchaser acknowledges that Developer has made no representations or warranties concerning the property (other than the *2-10 Home Buyer's Warranty* to be provided pursuant to paragraph 6 of the General Provisions) . . . No action, regardless of form, arising under the transactions under this Agreement may be brought by Purchaser more than one year after the cause of action has accrued. Purchaser agrees that all of Purchaser's rights relating to this Agreement, the Property and the Heritage in the Hills development may be asserted only by Purchaser and not by any association or class representative.

Additionally, there were several "general provisions" attached to the purchase agreement. Paragraph seven of the general provisions provided that any dispute regarding the construction of the home or the condition of the site would be submitted to binding arbitration. In paragraph six, it stated that the only warranties made in relation to the property were contained in the 2-10 Home Buyer's Warranty and that any other warranties, express or implied, were disclaimed. The 2-10 Home Buyer's Warranty provided the following disclaimer: "THIS IS AN EXPRESS LIMITED WARRANTY OFFERED BY YOUR BUILDER. To the extent possible under the law of your state, all other warranties, express or implied, including but not limited to any implied warranty of habitability, are hereby disclaimed and waived." Furthermore, pursuant to the Michigan Condominium Act, the purchase agreement was accompanied by a disclosure statement.

II. Procedural History:

At a point that is not clear based on the record, Luttermoser and the Association allegedly discovered a number of defects in the development and subsequently sought relief. The complaint alleged that the various defendants, in their roles as developers, failed to use proper materials in constructing concrete drives, sidewalks and aprons and those portions of the development were consequently suffering from premature deterioration. The compliant further alleged that defendants damaged utility boxes during construction, failed to properly grade the site and remove dead trees and caused water to pond in an improperly constructed road. The complaint indicated that Luttermoser intended to be representative of a class of over 500 residents in the association and stated that joinder of all the residents would have been impractical.

In response to the complaint, defendants filed a motion to compel arbitration and/or for summary disposition pursuant to MCR 2.116(C)(5), (C)(7) and (C)(8). On September 11, 2006, plaintiffs filed a motion for class certification pursuant to MCR 3.501(A)(1). On April 7, 2007, the trial court issued an opinion that addressed plaintiffs' motion for class certification and defendants' motion to compel arbitration and/or for summary disposition. In the opinion, the trial court first addressed defendants' argument that any claims were subject to arbitration. The court held that Heritage LLC was the only defendant that was a party to the purchase agreement and that the Association was not a party to the agreement. The court further noted that the requirement for arbitration only applied to individually owned property and did not apply to common areas of the development. Therefore, the trial court stated that the motion for summary disposition was granted only in favor of Heritage LLC, and only in respect to the claims of Luttermoser that related to damages to his individually owned property. Regarding defendants' claims that they could not be sued on an individual basis because they were members of Heritage LLC, the trial court held that Heritage LLC's operating agreement demonstrated that U.S. Home Corporation and the Silverman defendants were members of the LLC, but the Toll defendants were not. Therefore, the court held that summary disposition was proper in favor of U.S. Home and the Silverman defendants to the extent that the claims arose out of those defendants' status as members of the LLC. The trial court next held that the purchase agreement's prohibition of the bringing an action on behalf of a separate individual was enforceable and therefore granted summary disposition in favor of defendants regarding any attempt by the Association to enforce the rights of anyone other than itself. For that same reason, the court denied the motion for class certification. Finally, the court held that the one-year period of limitation in the purchase agreement was enforceable against the parties to the agreement. Consequently, the court held that summary disposition was granted in favor of Heritage LLC regarding any action brought by an individual homeowner. The one-year limitation was held to be without effect regarding the other defendants and the Association.

As a consequence of the trial court's order, a stipulated order of dismissal was entered on February 11, 2008, in which Luttermoser was dismissed from the action as class representative. Additionally, a stipulation was entered on the same day in which "the allegations contained in Plaintiff's complaint, as amended, referencing or relating to a class, class action, or class certification" were stricken from the complaint. The stipulated orders did not specifically reserve a right to appeal the April 7, 2007 order.

After the trial court's opinion addressing the above-described motions, the Association and Luttermoser filed their first amended complaint. On February 27, 2008, defendants filed another motion for summary disposition. The motion was filed in response to plaintiff's first amended complaint and was brought pursuant to MCR 2.116(C)(7) and (C)(8). The trial court held a hearing on the motion for summary disposition on May 7, 2008. After hearing brief arguments from the parties, the trial court issued its ruling. Regarding counts IV and V of the amended complaint, the trial court held that summary disposition was appropriate pursuant to MCR 2.116(C)(7). The court stated that the express warranty claim was barred by the period of limitations included in the express warranty documents and the implied warranty claim was barred because each of the individual purchasers waived any such claims. The court further held that summary disposition was appropriate pursuant to MCR 2.116(C)(8) for all counts other than count V. In issuing the ruling, the court stated that the Association was not permitted to enforce

the rights of the individual owners. Following the hearing, the trial court entered an order granting defendants' motion for summary disposition for the reasons stated on the record.

Meanwhile, while the motion for summary disposition was pending, the Silverman defendants filed a motion for sanctions for spoliation of evidence. In the accompanying brief, the Silverman defendants explained that plaintiffs engaged the services of Wiss, Janney, Elstner Associates, Inc. (WJE) to analyze samples of the asphalt and concrete from the development. Upon collecting and analyzing the samples, WJE concluded that the concrete at the development prematurely deteriorated as a result of poor materials and improper installation. After being contacted by Silverman regarding the location of the concrete samples, the Association indicated that it had contacted WJE to ensure that the samples were preserved. The parties agree that the samples were not preserved and were consequently not available for the Silverman defendants to conduct their own tests.

On April 2, 2008, the trial court held a hearing on the motion for sanctions for spoliation of evidence. At the hearing, the parties reiterated the arguments from their briefs. The court issued its ruling at the close of the hearing. The court stated:

> Yeah, I – you know, nobody is finding fault with you, and perhaps not even with your client. I mean, they did everything right. But when evidence is lost, whether it's through inadvertence or intention, you know, it has to be dealt with. And it's not fair to the defendants that they can't see these samples.
>
> I do think dismissal is too extreme. I am going to strike the opinions as to the cement samples that were lost.

According to the Association, the trial court had the practice of allowing the parties to draft written orders to reflect its oral rulings. Defendants apparently drafted the written order in response to the ruling regarding spoliation. The written order, which was signed by the trial court, stated:

> Plaintiff, its attorneys and all witnesses called by them may not use pleadings or offer any tangible evidence, testimony, remarks, questions or arguments which relate either directly or indirectly to issues of the cause of damage or deterioration of the concrete including without limitations: scaling, mortar flaking, crazing or the presence of ASR.

The Association subsequently filed a motion for reconsideration of the ruling and that motion was denied.

On appeal, the Association challenges the trial court's grant of summary disposition and also challenges the scope of the order granting the motion for spoliation of evidence.

III. Summary Disposition Pursuant to MCR 2.116(C)(8):

The Association first asserts that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). We agree in part.

This Court reviews a trial court's grant or denial of a motion for summary disposition pursuant MCR 2.116(C)(8) de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), reh den 461 Mich 1205 (1999). Where summary disposition is sought pursuant to MCR 2.116(C)(8), "the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "[A]ll well-pleaded allegations are accepted as true, and construed most favorably to the nonmoving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

Pursuant to MCR 2.116(C)(8), the trial court dismissed Counts I, II, III, VI and VII of the amended complaint. We will address each count in turn and analyze whether dismissal of the count was proper.

Count I (Violations of the Michigan Condominium Act)

Count I of the amended complaint alleged that defendants violated the Michigan Condominium Act by providing an insufficient disclosure statement to the individual homeowners. The Michigan Condominium Act, at MCL 559.184a, provides:

> The developer shall provide copies of all of the following documents to a prospective purchaser of a condominium unit, other than a business condominium unit:
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> ***
>
> (d) A disclosure statement relating to the project containing all of the following:
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> ***
>
> (ii) The names, addresses, and previous experience with condominium projects of each developer and any management agency, real estate broker, residential builder, and residential maintenance and alteration contractor.
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> ***
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> (v) Any express warranties undertaken by the developer, together with a statement that express warranties are not provided unless specifically stated.
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> ***
>
> (x) Other material information about the condominium project and the developer that the administrator requires by rule.
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> ***

MCL 559.184a further provides that the disclosure statement may not make any untrue statements of material fact or omit any material facts in order to mislead, and that if there are any material changes or omissions, an amendment must be made. The provision concludes by stating that a violator of the section is subject to section 115 of the Act. Section 115, located at MCL

559.215(1), provides that "[a] person or association of co-owners adversely affected by a violation of or failure to comply with this act, rules promulgated under this act, or any provision of an agreement or a master deed may bring an action for relief in a court of competent jurisdiction . . ."

Among other allegations, the amended complaint specifically alleged that defendants violated MCL 559.184a when the disclosure statement failed to provide an adequate list of the identities of the developers involved in the development, made material representations and omissions and was not adequately amended to correct statutory deficiencies. In making its ruling, the trial court did not extensively expound on its reasoning. Rather, the court merely stated that summary disposition was proper because the Association could not bring claims on behalf of the individual homeowners.

The trial court improperly dismissed Count I of the amended complaint pursuant to MCR 2.116(C)(8). The Michigan Condominium Act, at MCL 559.215(1), clearly sets forth that the Association has its own right to bring suit for a deficient disclosure statement. Although the Association is not legally permitted to maintain a cause of action for a defect to the individual units of the development, Count I of the amended complaint dealt with deficient disclosure statements and did not relate to the homeowner's individual units. Consequently, defendants failed to establish below that Count I was precluded by any legal authority. Summary disposition was, therefore, improper pursuant to MCR 2.116(C)(8).

Count II (Violations of the Michigan Consumer Protection Act)

In Count II of the Amended Complaint, the Association alleged that defendants violated several provisions of the Michigan Consumer Protection Act. The Michigan Consumer Protection Act provides in part:

> (1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:
>
> ***
>
> (c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.
>
> ***
>
> (e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
>
> ***
>
> (n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.
>
> ***

> (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.
>
> ***
>
> (bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.
>
> ***

The Association asserted that defendants violated each of the above provisions. According to the Association, defendant falsely represented to the co-owners of the association that the individual units and the common areas would be free from defects and deficiencies. The Association further asserted that the purchase agreements, disclosure statements and homeowner warranty and maintenance guides contained false information that mislead and deceived actual and prospective purchasers. The Association also stated that defendants misled the Association and individual homeowners regarding the rights, obligations and remedies available to the Association and the homeowners. The amended complaint concluded that the violations of the Michigan Consumer Protection Act injured the Association and its co-owners and "[p]laintiffs, individually and as representatives of the class, requests [sic] Judgments against the Developer Defendants. . ."

On appeal, the Association asserts that the trial court improperly dismissed Count II of the complaint when it relied on the purchase agreement and concluded that the Association could not assert the rights of individual homeowners. In contrast, defendants argue that summary disposition was justified because the court's previous summary disposition ruling, which dismissed Luttermoser's claims, established that the Association could only bring claims relating to the common areas and could not bring claims reserved for the individual homeowners. Count II of the amended complaint contains references to the individual homeowners' expectations regarding their units and it contains references to the Association's expectations regarding the conditions of the common areas. Because the Association has not demonstrated that it had any right to enforce in relation to the individual units, it was proper for the trial court to dismiss Count II to the extent that it sought redress for the deficiencies in those units. However, nothing indicates that the Association does not have a right under the Michigan Consumer Protection Act to bring suit for violations of that act that relate to the common areas of the development. The amended complaint set forth, in part, a claim for which relief could be granted to the Association. Therefore, the trial court's ruling was in error because it had the effect of dismissing Count II completely rather than merely partially dismissing the count.

Count III (Negligence):

In Count III of the amended complaint, the Association alleged that defendants owed the Association and the individual residents a duty to construct the common areas in a workmanlike manner, that defendants breached that duty by deficiently constructing those areas and that the breach proximately caused the Association's and residents' injuries. The trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) was the result of the court concluding that it

was an improper attempt to assert the right of the individual homeowners. On appeal and in its original motion for summary disposition, defendants assert that summary disposition was appropriate regarding the negligence claim because defendants did not owe any duty to the Association and because the action was untimely.

The trial court erred in concluding that the negligence claim was an improper attempt to assert the rights of the individual homeowners. The parties agree that the Association has an interest in the common areas of the development. The amended complaint clearly set forth that the Association was alleging negligence in the construction of the driveways, driveway aprons, sidewalks and roads, along with the presence of dead trees, pooling water and damaged utility boxes. Although the driveways appear to belong to the individual homeowners, it appears that it is undisputed that other allegedly deficient components are part of the common areas. The Association was therefore not exclusively asserting the rights of the individual homeowners in the amended complaint and the trial court's grant of summary disposition should have only related to alleged damages to property of the individual homeowners.

Defendants' argument that summary disposition was proper because no duty was owed to the Association is without merit. "Whether a defendant owes a plaintiff a duty of care is a question of law for the court." *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). A duty can be created by a contractual relationship, a contract or an application of the common law. *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). We need not determine whether a duty has been created in this case by contract or statute because it is clear that an imposition of a duty is appropriate under the common law. When determining if the common law creates a duty in a particular situation, a number of factors are to be considered. As provided in *Rakowski v Sarb*, 269 Mich App. 619, 629; 713 NW2d 787 (2006), this Court must consider:

> (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the degree of certainty of injury, (4) the closeness of connection between the conduct and injury, (5) the moral blame attached to the conduct, (6) the policy of preventing future harm, and, (7) finally, the burdens and consequences of imposing a duty and the resulting liability for breach. The inquiry is ultimately a question of fairness involving a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.

An application of the above factors favors the finding that defendants owed the Association a duty. Defendants are the developers of the Association's condominium complex. It was foreseeable that the use of defective construction materials and techniques in the common areas of the development would cause injury to the Association. Most importantly, to hold that defendants did not owe a duty to the association would be bad policy as it would enable future developers to easily avoid liability for negligent construction of a development's common areas. Therefore, defendants did owe the Association a duty and summary disposition was improper pursuant to MCR 2.116(C)(8) under a theory of absence of duty.

Defendants also argue on appeal that summary disposition was proper because the negligence claim was not timely. While defendants presented that argument to the trial court, the trial court did not address the issue. Therefore, the issue is not properly preserved. *Fast Air, Inc v Knight*, 235 Mich App. 541, 549, 599; NW2d 489 (1999). "This Court may review an

unpreserved issue if it is an issue of law for which all the relevant facts are available." *Vushaj v Farm Bureau General Ins Co of Michigan*, 284 Mich App 513, 519; ___ NW2d ___ (2009). For the reasons stated below, this Court will not address this argument.

On appeal, defendants assert that this cause of action is time-barred by MCL 600.5839(1)[1], which provides that any cause of action for injury to real property may not be brought "more than six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or one year after the defect is discovered or should have been discovered."[2] Defendants argue that because the concrete in question was laid prior to 2000, the claim for negligence is untimely because it was not filed until 2006. It appears that defendant misreads MCL 600.5839(1). The statute does not establish that the cause of action had to be brought within six years of the injury to the property. Rather, the statute references the date of occupancy, use, acceptance and discovery. Neither party has adequately developed the record regarding those dates. It is unclear when the common areas were passed from the developers to the Association or were used or accepted. Likewise, it is not clear when it was discovered that the concrete was deteriorating prematurely. Therefore, because all of the relevant facts are not available to this Court, this unpreserved issue cannot be addressed.

Because the amended complaint adequately set forth a claim for negligence on the part of the Association with regard to the common areas of the development, the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(8).

Count VI (Negligence Per Se)

In Count VI of the amended complaint, the Association alleged that defendants' failure to comply with the Michigan Condominium Act proximately caused injury to the Association and the "members of the class" and constituted negligence per se. The trial court granted summary disposition pursuant to MCR 2.116(C)(8) after concluding that the Association was improperly asserting the rights of the individual homeowners.

The trial court's grant of summary disposition on the negligence per se claim was proper. As with each of the other counts discussed above, we conclude that it was proper to grant summary disposition to the extent that the Association sought to enforce the rights of the individual homeowners. Furthermore, regarding this count, it was proper to grant summary disposition where the count alleged injuries to the common areas of the development. It does not

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[1] Defendants actually cite MCL 500.5389(1), which does not exist. We presume that defendants intended to cite MCL 600.5389(1).

[2] In contrast, the Association asserts that MCL 559.276 controls. However, MCL 559.276(2) indicates that it only applies to condominium projects that were established "on or after the effective date of the amendatory act that added this subsection." MCL559.276 was added to the Michigan Condominium Act by PA 2000, No 379, which was effective on January 2, 1001. The record indicates that this condominium project was established prior to that date, as construction began on the project before 2000. Therefore, MCL 559.276 does not control.

appear that this Court has previously stated whether a violation of the Michigan Condominium Act constitutes negligence per se. Our Supreme Court has explained that negligence per se exists if (1) the statute that was violated was intended to protect against the injury that resulted from the violation, (2) the plaintiff is a member of the class that the statute was intending to protect and (3) the evidence demonstrates that the violation was a proximately contributing cause of the injury. *Klanseck v Anderson Sales and Service, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986). The amended complaint made no effort to set forth the aspects of this particular situation that established a claim for negligence per se. The Association never provided, nor have we located, a section of the Michigan Condominium Act that could be interpreted to demonstrate that the purpose of the act is to protect an Association from negligent construction by a developer. Even when viewing the pleadings in the light most favorable to the Association, the complaint does not adequately set forth a claim for negligence per se for which relief could be granted.

Count VII (Misrepresentation):

In Count VII of the amended complaint, the Association alleged that defendants made material misrepresentations to "the members of the class" and that those misrepresentations were detrimentally relied upon. The trial court properly granted summary disposition pursuant to MCR 2.116(C)(8) after concluding that the Association was improperly asserting the rights of the individual homeowners. Count VII makes no reference to the Association, nor does it refer to the common areas of the development. It cannot be construed as an assertion of the Association's rights. Because the Association was precluded from asserting the rights of the individual homeowners with respect to their property, summary disposition was properly granted.

Conclusion:

The trial court erred in part in granting summary disposition pursuant to MCR 2.116(C)(8). It was error to grant summary disposition in relation to Count I where the Michigan Condominium Act specifically grants the Association the right to bring suit for a deficient disclosure statement. The trial court erred in part with respect to Count II, as summary disposition should have only been granted to the extent that the Association sought to remedy the injuries to the individually owned property. Likewise, summary disposition was improper in part with respect to the negligence claim of Count III because only a portion of the claim related to the individually owned property. Summary disposition was proper with respect to Counts VI and VII because the Association failed to state a valid claim for negligence per se and only sought a misrepresentation claim on behalf of the individual owners.

IV. Summary Disposition Pursuant to MCR 2.116(C)(7):

The Association also asserts that the trial court erred in granting summary disposition on Counts IV and V pursuant to MCR 2.116(C)(7). While we agree that summary disposition was improper pursuant to MCR 2.116(C)(7), we affirm the trial court in part on alternative grounds.

This Court reviews a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo. *Maiden, supra*, 461 Mich 118. In so doing, this Court examines the whole of the record in order to determine whether defendant was entitled to summary disposition. *Id.* "A motion for summary disposition under this subrule does not test

the merits of a claim but rather certain defenses which may make a trial on the merits unnecessary." *DMI Design and Mfg, Inc v Adac Plastics, Inc*, 165 Mich App 205, 208; 418 NW2d 386 (1987). "When a motion is premised on subrule (C)(7) the court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties." *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). The trial court's grant of summary disposition related to Counts IV and V of the Amended Complaint. This opinion will address each count in turn.

Count IV:

The trial court granted summary disposition on Count IV of the complaint pursuant to MCR 2.116(C)(7) and (C)(8). Count IV alleged that Heritage LLC impliedly warranted to the individual purchasers that the dwellings and appurtenances were fit for the intended use and were habitable. The Association alleged that the defects in the concrete of the individual units and the common areas constituted a breach. The trial court granted summary disposition after concluding that the one-year period of limitations in the purchase agreement barred the claim and that the claim was precluded by the express waiver of implied warranties that appeared in the purchase agreements.

On appeal, defendants assert that the grant of summary disposition regarding Count IV was proper. Defendants reason that the only implied warranties that were created necessarily arose from the purchase agreements and, therefore, any claim regarding those warranties was subject to the period of limitations in those agreements. The trial court presumably utilized a similar reasoning in reaching its holding. We disagree with defendants' assertion that the implied warranties that were allegedly breached could have only arisen from the purchase agreements. There were two types of transfers of property that occurred in relation to the development. The first type of transfer was the transfer of the individual units. Many such transfers occurred and each transfer was completed pursuant to the purchase agreement. Consequently, each of those transfers is subject to the terms of the purchase agreements. Count IV does allege that the implied warranties of habitability and fitness for a particular purpose were breached in relation to the individual units. Any such claim would be subject to the one-year period of limitations found in the purchase agreements. Furthermore, any such claim was improper in the Amended Complaint because the Association does not have the authority to assert the rights of the individual homeowners in relation to their units. Therefore, summary disposition was appropriate in part pursuant to MCR 2.16(C)(8).

The second apparent type of transfer that occurred in relation to the development was the transfer of the control and possession of the common areas from the developer to the Association. This transfer was not completed pursuant to the purchase agreement. We conclude that implied warranties are created when a developer-vendor transfers common areas to an Association. In *Smith v Foerster-Bolser Construction, Inc*, 269 Mich App 424, 431; 711 NW2d 421 (2006), this Court held that an implied warranty of habitability is created when a developer-vendor transfers a new home to a purchaser. In *Plymouth Pointe Condominium Ass'n v Delcor Homes-Plymouth Pointe, Ltd*, unpublished opinion of the Court of Appeals, issued October 28, 2003 (Docket No 233847), this Court noted that other jurisdictions have held that the same warranty of habitability also applies to the development and purchase of new condominiums *and the accompanying common areas* (see *Berish v Bornstein*, 770 NE2d 961 (Mass, 2002). Such a rule is logical and necessary. If this Court were to accept defendants' logic, developers could

routinely avoid liability for defective common areas by inserting disclaimers into the purchase agreements of the individual homeowners. Associations would be left without a remedy, despite the fact that they were not parties to the purchase agreements. Therefore, we hold that because Heritage LLC was a developer-vendor, the transfers of property created implied warranties of habitability relating to the individual units and the common areas. Although the Association did not have the right in the amended complaint to pursue a remedy for the breach of the warranties relating to the individual units, the Association did possess a right to seek a remedy for the breach of warranties that related to the common areas. Because the implied warranties relating to the common areas did not arise from the purchase agreements, the trial court improperly applied the one-year period of limitations and summary disposition was improperly granted pursuant to MCR 2.116(C)(7).

Additionally, the trial court erred in ruling that the period of limitations barred the claims for breach of warranty where the trial court failed to address when the claims began to accrue. MCL 650.5827 provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Count IV alleged breaches of implied warranties of habitability and fitness for a particular purpose. In a claim for a breach of a warranty of fitness, "the claim accrues at the time the breach of the warranty is discovered or reasonably should be discovered." MCL 600.5833. No statutory section expressly states when a claim for breach of an implied warranty of habitability accrues. As a result, that claim in Count IV accrued "at the time the wrong upon which the claim is based was done regardless of the time when damage result[ed]." MCL 650.5827. Furthermore, the term "wrong" in the accrual statute has been interpreted to mean the time that the plaintiff was harmed. *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995).

In the process of granting the motion for summary disposition, the trial court never discussed when the claims accrued. "[T]he question of the governing date of accrual of a cause of action for statute of limitations purposes is a question of fact." *Flynn v McLouth Steel Corp*, 55 Mich App 669, 675; 223 NW2d 297 (1974). Based on the above-cited authorities, the Association's claims did not accrue at the time the concrete was installed. Rather, the claims accrued, at the earliest, when the concrete began to prematurely deteriorate. It is unclear from the record when that deterioration began. When viewing the WJE report on the condition of the concrete, it is evident that some concrete was deteriorating in 2004. However, it is also clear that the concrete did not uniformly deteriorate and that the amount of concrete affected dramatically increased between 2004 and 2005. It is not clear whether all of the elements of the development were affected at the same time. In other words, it is unclear whether the streets, driveways, driveway aprons and sidewalks all began to deteriorate at the same time and at the same pace.[3] It

[3] Similarly, the amended complaint also seeks a remedy for the presence of dead trees in the (continued…)

is also unclear when the deterioration became advanced to the point where it was noticeable or should have been discovered. Without that information, it was not possible for the trial court to determine when the breach of warranty claims accrued, which consequently prevented the trial court from determining whether the claims were barred by the period of limitations.

Count V:

In Count V of the amended complaint, the Association alleged that defendants issued express warranties "to every member of the class" through the purchase agreements, disclosure statements and warranty documents. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) after determining that that claims were barred by the period of limitations in the purchase agreement. We conclude that summary disposition was improper pursuant to MCR 2.116(C)(7) because the record is unclear regarding when the claims in question accrued. However, the grant of summary disposition regarding Count V is affirmed on alternative grounds.

As described in the analysis of Count IV of the amended complaint, the purchase agreement stated that there was a one-year period of limitations from the time a claim relating to a breach of warranty accrued. Just as with Count IV, the trial court did not engage in any analysis regarding the date of accrual of the express warranty claims. It was therefore impossible for the court to say whether the period of limitations had expired prior to the filing of the complaint. More importantly, the period of limitations in the purchase agreement was inapplicable to the Association because the Association was not a party to that purchase agreement. Therefore, the trial court's grant of summary disposition was in error.

Despite the fact that the trial court erred, its grant of summary disposition should not be reversed. This Court need not reverse where the right result was reached for the wrong reason. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). Although Defendants did not cite MCR 2.116(C)(5), they did argue that the Association did not have standing to bring an express warranty claim. Summary disposition was proper under MCR 2.116(C)(8) and MCR 2.116(C)(5). The express warranties cited by the Association only appear in the documents given to the individual purchasers and appear to only relate to the individual units. The count makes no reference to the common areas of the development. The Association's interest in the development is limited to the common areas. Any claims relating to the individual units are reserved for the owners of those units. Therefore, because Count V does not reference any property in which the Association had an interest, the trial court should have concluded that Count V failed to state a claim for which relief could be granted and that the Association did not have the capacity to present the claims. Summary disposition was proper with respect to Count V.

Conclusion:

(…continued)

development, along with improper grading, damaged utility boxes and pooling water in various streets. The record is not factually detailed regarding when those defects occurred and/or were discovered.

Regarding Count IV, the grant of summary disposition is affirmed in part pursuant to MCR 2.116(C)(8) but only to the extent that the count improperly asserted claims relating to the individual units. Summary disposition was improper pursuant to MCR 2.116(C)(7) because the period of limitations in the purchase agreement was inapplicable to the Association and because the record does not adequately demonstrate when the claims for breach of warranty accrued.

Regarding Count V, the grant of summary disposition is affirmed pursuant to MCR 2.116(C)(8). Although the trial court erred in concluding that the period of limitations in the purchase agreement controlled, summary disposition was appropriate because the claim was merely an attempt to assert the rights of the individual homeowners.

V. Spoliation of Evidence:

The Association next asserts that the trial court abused its discretion when it ordered that the Association could not introduce any evidence related to the cause of the premature deterioration of the development's concrete. We agree.

This Court has specifically addressed the standard of review that applies when a trial court sanctions a party for failing to preserve evidence. A "trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation has commenced." *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). It is irrelevant whether the evidence was intentionally destroyed or was merely destroyed through a negligent act. *Id*. An exercise of that power is reviewed for an abuse of discretion. *Id*. The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). When crafting a sanction to remedy a failure to preserve evidence, "a trial court properly exercises its discretion when it carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Brenner, supra*, 226 Mich App 161.

On appeal, the Association implies that the trial court's order was more expansive than the court intended it to be. As described above, at the close of the hearing on the motion for sanctions the court indicated that any opinions regarding the concrete that was destroyed would be inadmissible. Apparently, defendants were instructed to prepare an order that reflected the court's ruling. The written order appeared to be much more broad that the trial court originally indicated, as the order stated that no evidence would be admissible if it related to the cause of the deterioration of the concrete. Although the written order did not comport with the court's statements at the hearing, it would be improper to conclude that the written order did not reflect the views of the court. To begin, "[i]t is well settled that a court only speaks through written judgments and orders." *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009). Therefore, the statements at the close of the hearing had no binding effect. Furthermore, the Association brought a motion for reconsideration after the written order was issued. The trial court considered and rejected that motion. The trial court was clearly aware of the content of its order and when it was given with the opportunity to modify that order it chose not to.

The trial court would have certainly been in within its discretion had it ruled that the reports that were produced from the analysis of the lost samples could not be admitted at trial or

relied upon in any motions. However, as indicated in *Brenner, supra,* the court was required to *carefully* craft a remedy that did not allow any plaintiff to benefit from the destruction of the evidence but did not prevent any plaintiff from presenting other relevant evidence. The order at issue is not a carefully crafted remedy that accomplishes the objectives set forth in *Brenner*. As the Association argues, there remains an immense amount of concrete at the development. The Amended Complaint did not allege that only the concrete samples were deficient. Rather, it alleged that the concrete in the driveways, driveway aprons, sidewalks and roads was all deficient and deteriorating. The trial court could have prevented the admission of the already produced reports and could have allowed the Association to gather more concrete samples to test. There is no indication that a trial was quickly approaching or that the delay in gathering and testing more samples would prejudice defendants. Although a case evaluation was scheduled to occur shortly after the Association acknowledged the destruction of the samples, nothing indicates that the evaluation could not have occurred at a later time. The trial court's order was overly broad. On remand, the court is instructed to carefully craft a remedy so as to exclude any evidence relating to the destroyed samples only.

VI. Holdings Relating to the Individual Owners:

Finally, the Association asserts on appeal that the trial court erred denying the individual owners' motion for class certification and that the trial court erred in ordering that the individual claims were bound by the arbitration clause in the purchase agreements. It would be improper to address either of these issues on appeal. Luttermoser was contacted in January 2009 and told that further action was necessary in order to be listed as an appellant in this Court. He failed to take action. Therefore, the Association is the only party that has properly presented issues to this Court. The Association may not appeal the trial court's holdings relating to class certification and arbitration. Pursuant to MCR 7.203(A), this Court's jurisdiction only extends to appeals of "aggrieved" parties. In *Federated Ins Co v Oakland Co Rd Com'n*, 475 Mich 286, 291-292, 715 NW2d 846 (2006), our Supreme Court explained:

> An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case.

The trial court's rulings relating to the arbitration agreement and the motion for class certification only impacted the claims of the individual owners. Those rulings did not impact the Association's ability to pursue the claims relating to the common areas of the development.

VII. Conclusion:

The trial court erred in part in granting summary disposition pursuant to MCR 2.116(C)(8). It was error to grant summary disposition in relation to Count I where the Michigan Condominium Act specifically grants the Association the right to bring suit for a deficient disclosure statement. The trial court erred in part with respect to Count II, as summary disposition should have only been granted to the extent that the Association sought to remedy the injuries to the individually owned property. Likewise, summary disposition was improper in part

with respect to the negligence claim of Count III because only a portion of the claim related to the individually owned property. Summary disposition was proper with respect to Counts VI and VII because the Association failed to state a valid claim for negligence per se and only sought a misrepresentation claim on behalf of the individual owners.

Regarding Count IV, the grant of summary disposition is affirmed in part pursuant to MCR 2.116(C)(8) but only to the extent that the count improperly asserted claims relating to the individual units. Summary disposition was improper pursuant to MCR 2.116(C)(7) because the period of limitations in the purchase agreement was inapplicable to the Association and because the record does not adequately demonstrate when the claims for breach of warranty accrued. Regarding Count V, the grant of summary disposition is affirmed pursuant to MCR 2.116(C)(8). Although the trial court erred in concluding that the period of limitations in the purchase agreement controlled, summary disposition was appropriate because the claim was merely an attempt to assert the rights of the individual homeowners.

The trial court abused its discretion in prohibiting the introduction of any evidence relating to the cause of the concrete's deterioration. On remand, the court is instructed to craft a more careful remedy that is narrowly tailored to achieve its objective.

Because Luttermoser failed to take the necessary steps to be considered an appellant in this Court and because the Association is not an aggrieved party, we will not address the trial court's rulings relating to the motion for class certification and the arbitration agreement.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens