S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEPPERCO-USA, INC., Plaintiff-Appellant,	UNPUBLISHED February 21, 2017
v FLEIS & VANDENBRINK ENGINEERING, INC., Defendant-Appellee.	No. 331709 Branch Circuit Court LC No. 15-100509-CZ

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ.

PER CURIAM.

Plaintiff, Pepperco-USA, Inc. (Pepperco), appeals as of right the trial court's order granting summary disposition in favor of defendant, Fleis & Vandenbrink Engineering, Inc. (F&V), in this action involving claims of breach of contract, engineering malpractice, negligence, and breach of warranty arising out of a site plan prepared by F&V with respect to the construction of a hydroponic greenhouse. Pepperco alleged that it repeatedly instructed F&V that the subject property had to be "balanced," meaning that the property had to be graded solely using existing dirt, fill, and soil readily located and available on the property. Accordingly, there was a direct correlation between having the property balanced and the determination of the grade. Pepperco asserted that F&V ultimately set the grade at 1013 feet for purposes of the final engineering site plan drawings; however, after excavation and earthwork began based on F&V's plan, Pepperco learned that the property could not be balanced at the 1013 foot grade, given that there was not enough readily-available, suitable material to do so. According to Pepperco, it became necessary to secure, through extraordinary means, additional suitable material that was not readily available. Pepperco claimed that as a result of F&V's failure to develop a site plan that properly balanced the property, Pepperco incurred additional costs exceeding $1 million. On F&V's motion for summary disposition, the trial court found that Pepperco lacked standing to pursue the lawsuit because it was not a party in interest and that a binding arbitration agreement dictated that a court action was not maintainable even had Pepperco been a party in interest. We reverse and remand for further proceedings.

I. BACKGROUND

Per a proposal letter dated March 1, 2010, F&V offered engineering services to Mastronardi Produce (MP). The letter was addressed to MP's executive vice-president Kevin Safrance. The proposal letter noted that MP "currently operates a sizable enterprise in Canada and the United States based on a core business of consistently producing high quality produce hydroponically with a sophisticated greenhouse process" and that MP "is interested in securing property in Michigan on which to build new greenhouses to generate produce in the months of October through July in order to complement the Canadian production schedule of March through December." The proposal letter set forth the scope of offered services and an associated budget, and the services encompassed the following:

> As requested, F&V will provide engineering services to prepare a specific site evaluation report which would include evaluation of infrastructure capacity, transportation capacity, utility costs, connection fees site assessment, preliminary site development costs, preliminary site planning, meeting with local municipality for zoning and construction requirements, storm drainage retention requirements, permit approval process and approval schedule, note other permit approval requirements and associated permitting fees.

Later in March 2010, F&V and MP entered into a professional services agreement (PSA). The PSA stated that "[t]he description of the Project . . . and the scope of services . . . provided under this PSA is as follows: Professional Energy Engineering, Site Selection Evaluation and General Consultation, as described in proposal letter dated March 1, 2010 [referenced above], and additional services as may be specifically authorized by" MP. The PSA also indicated that "[a]ll obligations covered under this PSA are governed by the Contract Documents, which specifically include this PSA and all of the following documents, which are all incorporated herein by reference: Engineer's proposal / letter dated March 1, 2010." Further, the PSA provided that "[u]nless specifically included in the Scope of Services, there are no construction phase services as part of this PSA . . . ." The PSA included a dispute resolution paragraph, which stated as follows:

> Claims and disputes arising out of or relating to this PSA involving claims in the aggregate of less than twenty-five thousand dollars[] ($25,000.00)[,] without interest or attorney fees and without consideration of counterclaims, shall be decided by a court of competent jurisdiction exclusively in Kent County, Michigan. Claims and disputes arising out of or relating to this PSA involving claims in the aggregate of greater than twenty-five thousand dollars ($25,000.00) shall be decided by arbitration in accordance with the applicable rules of the American Arbitration Association. There shall be a single arbitrator. The award shall be final and binding and enforceable in a court of competent jurisdiction. In either arbitration or litigation, the prevailing party shall be entitled to recover its attorney's fees and costs through all levels of appeal. Jurisdiction, venue and the hearing locale for all arbitrations or litigation shall lie exclusively in Kent County, Michigan.

Finally, the PSA indicated that "[t]here are no third party beneficiaries to this PSA and the Services provided herein are exclusively for the direct benefit of . . . [MP]." And MP "ensure[d] that all other agreements relating to this project [would] reflect that there are no third party beneficiaries to this PSA."

In an affidavit, MP's Safrance averred that he was an authorized representative for MP, a Canadian corporation, for Mastronardi Produce – USA, Inc. (MP-USA), a Michigan corporation, and for Maroa Farms, Inc. (Maroa), an Illinois corporation. Safrance indicated that MP and F&V had entered into the 2010 PSA "in connection with the construction of certain greenhouses in Coldwater, Michigan to be owned and used by a separate legal subsidiary entity – Maroa – to produce tomatoes." Christopher J. Gill, an authorized representative of Pepperco, averred in his affidavit that Pepperco was a separate legal entity, maintaining corporate formalities, keeping its own corporate books and records, and employing separate bank accounts and minutes. Gill indicated that Pepperco was related to MP, MP-USA, and Maroa.[1]

Safrance averred that MP paid F&V "in full" for the design work F&V performed under the 2010 PSA and that said "work [was] not at issue in this lawsuit." The work performed by F&V in 2010 under the PSA was characterized as pertaining to Phase 1 of an overall project. In an affidavit by Aaron Catlin, who was a development group manager for F&V, he averred that "[d]uring 2011," MP "contracted F&V to provide site engineering design services to the existing PSA for Phase 2 of [MP's] Coldwater Township Project."

As reflected in Safrance's affidavit and a scope-of-services letter from F&V to MP-USA that Safrance signed, thereby authorizing the work, on March 28, 2014, F&V offered to provide MP-USA with land-survey and environmental-due-diligence services in connection with the prospective purchase of real property in Coldwater. Under the agreement, F&V was to conduct a boundary survey, one and potentially two environmental tests on the property, and, if necessary, a baseline environmental assessment. According to Safrance, F&V prepared the survey and conducted one environmental test, with the second environmental test and the baseline environmental assessment not being necessary, as no environmental problems were identified in the initial environmental test. The agreement under the scope-of-services letter indicated that the work "would be completed under the terms and conditions of our existing [PSA]." Safrance's signature at the end of the document authorizing the work also specifically acknowledged that the work was "authorized under [the] existing [PSA] with F&V." Safrance averred that MP-USA paid F&V in full for the work performed by F&V under the scope-of-services letter and that said "work is not at issue in this lawsuit." In the affidavit executed by F&V's Catlin, he acknowledged the March 28, 2014 agreement as described above, especially the part indicating that the work implicated the existing PSA. Catlin referred to the agreement as encompassing

[1] Although there is no documentary evidence on the matter, Pepperco contends that it is a Michigan corporation that was formed in 2014, which assertion does not appear to be disputed by F&V.

Phase 3 of the project, which, according to Catlin, concerned the "construction of a hydroponic commercial greenhouse on a 105 acre parcel of property in Coldwater Township."

Pepperco's Gill averred that in 2014 Pepperco purchased 105 acres of real property in Coldwater Township.[2] Gill indicated that Pepperco eventually built and operated on the property "a large scale, three section hydroponic commercial greenhouse which produces peppers." Gill stated that he had the responsibility for managing and coordinating the construction of the Pepperco greenhouse. Gill averred that in April-May 2014, he, on behalf of Pepperco, hired F&V to prepare the site plan with respect to the construction of the Pepperco greenhouse. It is this 2014 site plan that forms the basis of Pepperco's lawsuit. Gill claimed that the agreement between Pepperco and F&V for F&V to prepare the site plan "was principally oral with follow-up emails further explaining the various requested tasks." Gill additionally asserted that F&V "never asked Pepperco to sign an agreement or any acknowledgment whatsoever that Pepperco was subject to the terms of any other written agreements like [the] 2010 [PSA] between [MP] and [F&V] . . ., or to sign a written agreement incorporating the terms of another written agreement like the 2010 PSA, in connection with the work [F&V] performed for Pepperco." Gill averred that Pepperco never agreed to arbitrate disputes with F&V regarding the specific work that F&V performed relative to the Pepperco greenhouse and the associated site plan. Gill proceeded to discuss the nature of F&V's alleged negligence in regard to making sure that the property was balanced.

Contrary to Gill's affidavit, F&V's Catlin averred in his affidavit that pursuant to the existing PSA between MP and F&V, "F&V provided site engineering services for Phase 3 from April 2014 through June 2015." Catlin noted that "[t]he professional site design engineering services F&V performed for Phases 1, 2[,] and 3 all bore the same project number, Project 805550." The record contains six invoices from F&V addressed to Safrance as executive vice-president of MP, each one of which reflected that it was for "Project 805550 Mastronardi – 2014 PepperCo. Greenhouse Site Design."[3] In his affidavit, Catlin asserted that there was "no contract or agreement between an entity named Pepperco[] and F&V."

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[2] There is no documentary evidence revealing exactly when in 2014 that Pepperco purchased the property. The March 28, 2014 scope-of-services letter indicated that "[a] purchase agreement [was] currently being negotiated." Given that there is evidence, discussed below, reflecting actions by Pepperco in April 2014 that suggested ownership of the property, it would appear that the purchase was finalized in late March or early April 2014.

[3] For professional services rendered through June 27, 2014, the bill was $31,371.44, for professional services rendered thereafter through August 1, 2014, the bill was $18,760.41, for professional services rendered thereafter through August 28, 2014, the bill was 9,542.62, for professional services rendered thereafter through October 31, 2014, the bill was $22,689.61, for professional services rendered thereafter through November 28, 2014, the bill was $1,068.33, and for professional services rendered thereafter through December 26, 2014, the bill was $1,058.50.

On April 2, 2014, Pepperco's Gill sent an email to F&V's Catlin, noting that MP had changed its online presence from mastronardiproduce.com to sunsetgrown.com. In a letter dated April 4, 2014, Catlin wrote Gill, referring to Gill as MP's Director of Greenhouse Operations, setting forth the various agency approvals needed for the new project and offering F&V's services to assist MP in obtaining approvals. In emails exchanged in April 2014 between Gill, Catlin, a person who appeared to be a township official, and others, a timeline and schedule were discussed relative to proceedings before local commissions and boards, rezoning issues, and site plan review. On April 29, 2014, Gill sent Catlin a blueprint of the planned greenhouse, and the blueprint noted that it pertained to MP. On May 2, 2014, Catlin emailed Gill, asking him, "What is the formal title of the project and the owner's name?" Catlin was informed by email later on May 2, 2014, that Pepperco could be listed as the owner and that Coldwater Phase III was the name of the project. A preliminary site plan submitted by F&V on May 15, 2014, contained the following caption:

PEPPERCO-USA, INC.

COLDWATER PHASE III GREENHOUSE FACILITY

CITY OF COLDWATER, BRANCH COUNTY, MICHIGAN

A site plan review application for the Coldwater Planning Commission dated May 22, 2014, was submitted by Pepperco, noting that the property was located at 250 Stickney, that Pepperco owned the property and planned to occupy the site, that F&V was the project designer, and that the total acreage was 105.22. A brief description regarding the character of the proposed development read, "Continuation of construction of greenhouses built and under construction on the adjoining properties immediately north of this proposed site plan."

The record contains a notice of commencement, filed for purposes of the Construction Lien Act, MCL 570.1101 *et seq.*, drafted by Pepperco as owner of the real property, indicating that it had contracted for an improvement to the property and that the general contractor was Pepperco. The notice of commencement was dated May 23, 2014, and it was recorded on July 25, 2014. On May 23, 2014, Pepperco's Gill received an email by an individual who apparently was involved in doing earthwork and construction at the site, informing Gill that based on "the grades shown on the plans . . ., the site would need upwards of 200,000 cy [cubic yards] of imported material to achieve those grades[,]" that "[b]y lowering the entire site by approximately 2 feet . . ., we can balance the site and have a surplus of topsoil left over[,]" and that "importing . . . material to achieve the plan grades will be very expensive." On May 26, 2014, Gill emailed F&V's Catlin, forwarding him the email referenced in the preceding sentence and asking Catlin, "[Is] this valid?" Catlin responded to Gill by email later that day, stating:

> I don't know. But, assuming he's correct, lowering the site 2' would require us to move everything to the west – I don't know how much yet but likely requiring wetland mitigation. That's why we shifted forward. Dropping the site 2' where it sits would make the drive access very steep. I'll look tomorrow.

On October 1, 2015, Pepperco filed its complaint against F&V, alleging that Pepperco had hired F&V in 2014 as the engineer on the project and that F&V was contracted to prepare the site plan relative to the construction of Pepperco's greenhouse. Pepperco alleged that it repeatedly instructed F&V that the subject property had to be "balanced," meaning, as indicated earlier, that the property had to be graded solely using existing dirt, fill, and soil readily located and available on the property. Pepperco maintained that F&V ultimately set the grade at 1013 feet for purposes of the final engineering site plan drawings; however, after excavation work began based on F&V's plan, Pepperco learned that the property could not be balanced at the 1013 foot grade, considering that there was not enough readily-available, suitable material to do so. Pepperco alleged that it thus became necessary to secure, through extraordinary means, additional suitable material that was not readily available. Pepperco claimed that as a result of F&V's failure to develop a site plan that properly balanced the property, Pepperco incurred additional costs exceeding $1 million. Pepperco alleged causes of action for breach of contract, professional malpractice, negligence, and breach of warranty.

F&V filed a motion for summary disposition, arguing under MCR 2.116(C)(5) and (8) that Pepperco lacked standing to pursue its lawsuit, given that Pepperco was not a real party in interest, where there was no contract or agreement between Pepperco and F&V, and where the only agreement for F&V's services associated with the subject 105-acre parcel was the PSA between MP and F&V.[4] F&V further contended under MCR 2.116(C)(7) that Pepperco's court action was barred by the arbitration provision in the PSA, which mandated arbitration for any claims or disputes arising out of or related to the PSA when in excess of $25,000. Pepperco responded to F&V's motion, maintaining that it had standing to file suit, where Pepperco owned the property, where it hired F&V in 2014 to prepare the site plan for the greenhouse, where Pepperco used and relied on F&V's site plan to Pepperco's detriment, where it had paid for the construction of the greenhouse, and where it was Pepperco that actually suffered an injury, incurring an additional $1 million in costs as a result of the alleged defective site plan. With respect to the arbitration issue, Pepperco contended that it was a separate legal entity and was merely related to MP and MP-USA; therefore, Pepperco, which was not a party to the 2010 PSA that contained the arbitration provision, could not possibly be bound by the PSA's arbitration clause. After entertaining the parties' arguments at the hearing on F&V's motion for summary disposition, the trial court took the matter under advisement. On February 10, 2016, the trial court entered a cursory order granting F&V's motion for summary disposition, adopting the law, logic, and rationale presented by F&V in its motion and accompanying brief, as supplemented by the documentary evidence. Pepperco now appeals as of right.

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[4] Although F&V did not specifically state that its standing argument was based on MCR 2.116(C)(8) (failure to state a claim), as well as MCR 2.116(C)(5) (party asserting claim lacks legal capacity to sue), it is clear that F&V relied on both subsections with respect to standing, which, as reflected below, is an approach recognized by this Court. At no point in its summary disposition motion and brief did F&V argue that Pepperco failed to state claims for breach of contract, breach of warranty, negligence, or professional malpractice.

II. ANALYSIS

A. GOVERNING STANDARDS

F&V moved for summary disposition on the basis of MCR 2.116(C)(7) relative to the assertion that the suit was barred by the arbitration provision, as well as MCR 2.116(C)(5) and (8) on the matter of standing. Pursuant to MCR 2.116(C)(7), summary disposition is proper when a claim is barred because of "an agreement to arbitrate[.]" We review de novo a trial court's decision on a motion for summary disposition. *Altobelli v Hartmann*, 499 Mich 284, 294-295; 884 NW2d 537 (2016).[5] The question whether a claim is subject to arbitration is also reviewed de novo, as is the construction of contractual language. *Id.* at 295.

Whether a party has standing is likewise subject to de novo review. *Barclae v Zarb*, 300 Mich App 455, 467; 834 NW2d 100 (2013). In *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000), this Court discussed "standing" in the context of MCR 2.116(C)(5) and (8), observing:

> In this case, the trial court granted summary disposition under MCR 2.116(C)(5) and (C)(8) on the basis that plaintiff neither pleaded nor provided evidentiary support for facts that, if true, would provide him with standing . . . . Review of a determination regarding a motion under MCR 2.116(C)(5), which asserts a party's lack of capacity to sue, requires consideration of the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. By comparison, a motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim as pleaded. All factual allegations and reasonable inferences supporting the claim are taken as true. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. Consequently, this Court's review de novo of the instant question requires drawing all inferences in the light

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[5] In *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), this Court noted the general principles applicable to motions brought under MCR 2.116(C)(7):

> Under MCR 2.116(C)(7) . . ., this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

most favorable to plaintiff, and then determining if plaintiff either pleaded or established facts that would give him standing to sue. [Citations and quotation marks omitted.]

B. PRINCIPLES CONCERNING STANDING

In order to have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected. *Barclae*, 300 Mich App at 483. A plaintiff must have a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large. *Id.* A party must assert his or her own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties. *Id.* MCR 2.201(B) mandates that, in general, an action must be prosecuted in the name of the real party in interest, and a real party in interest is the one who is vested with the right of action on a given claim, even though the beneficial interest may be in another. *Barclae*, 300 Mich App at 483. The standing doctrine recognizes that litigation can only be commenced by a party having an interest, thereby assuring sincere and vigorous advocacy. *Id.* In cases involving corporations, the standing doctrine provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation, whether arising from tort or contract, must ordinarily be brought in the name of the corporation, and not that of a stockholder, officer, or employee. *Id.* at 484.[6]

C. ARBITRATION PRINCIPLES

The Michigan arbitration act (MAA), MCL 600.5001 *et seq.*, was repealed by our Legislature pursuant to 2012 PA 370 and replaced by the uniform arbitration act (UAA), MCL 691.1681 *et seq.*, which was enacted pursuant to 2012 PA 371. The repeal of the MAA and the enactment of the UAA became effective July 1, 2013. See 2012 PA 370 and 371. The UAA provides that "[o]n or after July 1, 2013, this act governs an agreement to arbitrate whenever made." MCL 691.1683(1). Given the timing of the instant litigation, which was commenced in October 2015, the UAA applies in this case. MCL 691.1686 provides, in pertinent part:

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[6] In *Lansing Schs Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010), our Supreme Court ruled:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. . . . Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising *between the parties to the agreement* is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. [Emphasis added.]

In *Altobelli*, 499 Mich at 295-296, the Michigan Supreme Court explained as follows regarding the applicability of arbitration:

> Arbitration is a matter of contract. Accordingly, when interpreting an arbitration agreement, we apply the same legal principles that govern contract interpretation. Our primary task is to ascertain the intent of the parties at the time they entered into the agreement, which we determine by examining the language of the agreement according to its plain and ordinary meaning. In considering the scope of an arbitration agreement, *we note that a party cannot be required to arbitrate an issue which it has not agreed to submit to arbitration*. The general policy of this State is favorable to arbitration. The burden is on the party seeking to avoid the agreement, not the party seeking to enforce the agreement. In deciding the threshold question of whether a dispute is arbitrable, a reviewing court must avoid analyzing the substantive merits of the dispute. If the dispute is arbitrable, the merits of the dispute are for the arbitrator. [Citations, quotation marks, and alteration brackets omitted; emphasis added.]

D. DISCUSSION

We begin with the issue of arbitration, considering that the issue is easily resolved. Assuming for the sake of argument that the 2010 PSA encompassed, either in whole or in part, F&V's preparation of the 2014 site plan for the Pepperco greenhouse, which is the plan that was alleged to have been defective as to "balancing" the property, the parties to the PSA were F&V and MP, not Pepperco, which was not even formed until 2014. The PSA expressly indicated that there were no intended third-party beneficiaries to the contract and that F&V's services were exclusively for the direct benefit of MP. Further, there is no evidence that a novation ever occurred, with Pepperco substituting as a party under the PSA in place of MP, see *In the Matter of the Dissolution of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986),[7] or that Pepperco was subsequently added as a party to the contract, joining MP. Pepperco was not a party to the PSA and was thus not a party to the arbitration clause in the PSA. Accordingly, MCL 691.1686(1), which references the need to arbitrate controversies

[7] "A novation requires: (1) parties capable of contracting; (2) a valid obligation to be displaced; (3) consent of all parties to the substitution based upon sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one." *Dissolution of F Yeager Bridge*, 150 Mich App at 410.

"arising between the parties to the agreement," dictates that the arbitration clause at issue here is not "valid, enforceable, and irrevocable" *with respect to Pepperco*. As indicated by our Supreme Court in *Altobelli*, 499 Mich at 295, "a party cannot be required to arbitrate an issue which it has not agreed to submit to arbitration." (Citation, quotation marks, and alteration brackets omitted.) And there is no evidence whatsoever that Pepperco agreed to submit any issue to arbitration.

Pepperco was a corporate entity separate and distinct from MP, and there is no argument to the contrary. It is a well-accepted principle that separate corporate entities will be respected, and under Michigan law, absent an abuse of the corporate form, we presume that parent and subsidiary corporations are distinct and separate entities. *Spartan Stores, Inc v Grand Rapids*, 307 Mich App 565, 577-578 n 13; 861 NW2d 347 (2014). There has been no accusation of an abuse of the corporate form; therefore, Pepperco, not being a party to the 2010 PSA and its arbitration clause, is not subject to arbitration with respect to its claims, even though the related corporate entity, MP, would be subject to the clause. In sum, the trial court erred in ruling that Pepperco's lawsuit was barred by an agreement to arbitrate.

Turning to the standing issue, the case becomes only slightly more difficult. There is no factual dispute that Pepperco purchased the property in 2014 upon which it eventually constructed and operated a greenhouse and that F&V developed the site plan for construction of the greenhouse, which site plan Pepperco claimed was defective and caused it in excess of $1 million in extra costs. Pepperco was not a party to the 2010 PSA, so it necessarily has no viable cause of action arising out of and predicated on the PSA. Again, Pepperco is proffering theories sounding in contract, warranty, negligence, and malpractice, which by their nature raise issues concerning the existence of a professional relationship, a duty, and a contract. See *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995) (malpractice actions require proof of a professional relationship); *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013) (recognizing duty as an element in a negligence action); *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991) (setting forth elements of a contract).

Pepperco's position is that it entered into a direct contractual relationship with F&V in 2014, pursuant to which F&V prepared the site plan that serves as the basis of Pepperco's action. Christopher Gill, Pepperco's authorized representative, averred that he contracted with F&V in April-May 2014 for site-plan services. However, Aaron Catlin, a development manager with F&V, averred that there was "no contract or agreement between an entity named Pepperco[] and F&V." F&V also adamantly contended that the PSA governed all three phases of the overall project, including the preparation of the 2014 site plan. Accordingly, F&V's position is that MP or perhaps MP-USA is the real party in interest for purposes of standing, but not Pepperco.

It appears, given the conflicting affidavits, the emails, and the other documents, that there exists an issue of material fact with respect to whether the 2010 PSA encompassed F&V's 2014 preparation of the site plan for the greenhouse, or whether a contract for the work arose between Pepperco and F&V in 2014 on the basis of actions and communications between the parties' authorized representatives. We hold that these presumed issues of fact go to the viability and merit of the causes of action, not Pepperco's standing to bring suit. Again, Pepperco owned the property, built and operated the greenhouse, utilized and relied on F&V's site plan, took steps to address the grade and balancing problems that allegedly were caused by following the site plan,

and Pepperco asserted a monetary injury flowing from the alleged defects in F&V's site plan. Pepperco's rights and interests are certainly at stake in the litigation, assuring sincere and vigorous advocacy. *Barclae*, 300 Mich App at 483. Even assuming that the 2010 PSA entirely governed F&V's preparation of the 2014 site plan for the Pepperco greenhouse, absent any other contract, as claimed by F&V, it might perhaps undermine one, some, or all of Pepperco's theories of recovery, but it does not deprive Pepperco of standing to bring suit in the first instance. The existence of a contract for purposes of the breach of contract and warranty claims, as well as the existence of a duty or a professional relationship for purposes of the negligence and malpractice claims, pertain to the elements of the causes of action that need to be established, not standing to litigate the matters. See, e.g., M Civ JI 142.01 (first element to be proven in breach of contract action is the existence of a contract); *Simko*, 448 Mich at 655; *Sanders*, 303 Mich App at 4. Pepperco is a proper party to request adjudication. In sum, the trial court erred in ruling that Pepperco lacked standing to file suit.[8]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, we award taxable costs to Pepperco under MCR 7.219.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Brock A. Swartzle

[8] Pepperco also argues that the trial court erred in ruling that, under MCR 2.116(C)(8), Pepperco failed to sufficiently state its causes of action. However, the trial court never made this ruling in adopting F&V's summary disposition arguments, considering that, as noted earlier, F&V never argued that Pepperco failed to state causes of action; F&V's arguments only concerned standing and arbitration.