STATE OF MICHIGAN

COURT OF APPEALS

DALTON TOWNSHIP,

Plaintiff,

and

FRUITLAND TOWNSHIP and LAKETON TOWNSHIP,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF MUSKEGON,

Defendant-Appellee.

UNPUBLISHED
January 23, 2018

No. 335743
Muskegon Circuit Court
LC No. 15-049995-CK

Before: METER, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

In this contract action, plaintiffs Dalton Township,[1] Fruitland Township, and Laketon Township, appeal as of right the trial court's order granting summary disposition in favor of defendant, Charter Township of Muskegon, pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm.

I. FACTS

This case arises out of a dispute over whether a contract involving the provision of water service to defendant and the other townships that are plaintiffs in this action required defendant

[1] Dalton Township is no longer a party to this appeal. After this appeal was filed, Dalton Township moved in this Court to withdraw as an appellant, and this Court dismissed Dalton Township as a party. *Dalton Twp v Charter Twp of Muskegon*, unpublished order of the Court of Appeals, entered March 28, 2017 (Docket No. 335743). When describing the underlying facts of this action, our use of the term plaintiffs refers to Dalton Township, Fruitland Township, and Laketon Township. However, when discussing the arguments raised on appeal, our use of the term plaintiffs only refers to Fruitland Township and Laketon Township.

to pay a certain fee. Throughout the lower court proceedings, this fee was referred to by various names, such as "hydrant fee," "hydrant district fee," "hydrant maintenance fee," "fire hydrant rent," "system maintenance fee," and other similar labels. Although defendant had an apparent history of paying such a fee, defendant eventually stopped paying the disputed fee and claimed that it was not required by the parties' contract to pay the fee. This litigation followed.

Plaintiffs, defendant, and the county of Muskegon (the county) are all parties to a contract executed in 2009 and titled "Amended and Restated Muskegon County Regional Water System Management Contract" (the 2009 contract), which is the subject of the instant litigation. However, the county is not a party to this action. The 2009 contract referred to the Muskegon County Regional Water System as the "System," and it also referred to the townships (i.e. the parties to this action) individually as a "Local Unit" and collectively as "Local Units." The 2009 contract involved the provision of water service "to the Local Units" by the System. Furthermore, the contract provided that "[t]he County shall be responsible for the operation and maintenance of the System and the System Policy Board shall be responsible for the management of the System, as hereinafter provided." More specifically, the contract provided as pertinent to the issues raised on appeal that

> [t]he County shall . . . bill and, if requested, collect *rates and charges established by the System Policy Board for Operation and Maintenance Expenses, account for all such collections and deposits into the Pooled Account, and from the Pooled Account pay all Operation and Maintenance Expenses* and Debt Service Requirements, as provided in Section 5. [Emphasis added.]

The parties also "agree[d] that the System shall be operated, administered and maintained for the sole use and benefit of the Local Units and their respective water customers, and the Local Units shall fix rates at the appropriate levels or use other legally available funds to pay all costs in connection therewith." "Operation and Maintenance Expenses," which are the only type of expenses at issue in this case, were defined as follows:

> for any Fiscal Year, the costs of operation, maintenance, administration and management of the System (including reasonable reserves therefor) necessary to keep all facilities of the System in proper repair and working order and, to the extent deemed necessary by the System Policy Board, reasonable reserves for replacement of the facilities of the System, including any equipment necessary therefor. Operation and Maintenance Expenses shall include but not be limited to cost of water purchased, wages and salaries for labor and administration related to the System, materials expense, supplies, utility charges, insurance and the annual reports and engineering studies required in Section 6.

Additionally, there has been a historical practice of plaintiffs and defendant paying an annual "hydrant maintenance fee" or other similarly labeled fee to the county. This fee has been paid both under the current 2009 contract and previous contracts involving these same parties. The annual fee, regardless of the label attached to it, has been calculated based on the number of fire hydrants within each township. Most recently, the fee has been $200 per hydrant per year. Defendant, believing that the fee was not required by the 2009 contract, determined that it would stop paying the fee beginning with the 2014 invoice for the 2013 fee.

Defendant subsequently submitted a proposal to the System Policy Board for replacing the disputed fee, and the proposal was discussed by the System Policy Board at its January 13, 2015 meeting. At its March 17, 2015 meeting, the System Policy Board voted to reject defendant's proposal. Kim Arter, who was Laketon Township's representative on the System Policy Board, averred that the System Policy Board considered and rejected defendant's position that the 2009 contract did not authorize the disputed fee.

On April 29, 2015, plaintiffs filed the instant action, alleging that the plain terms of the contract required defendant to pay the fire hydrant fees and that defendant violated the terms of the 2009 contract by refusing to pay the disputed fees. Plaintiffs further alleged that the System Policy Board had the authority under the 2009 contract to resolve concerns regarding requirements and obligations under the contract, that the System Policy Board had rejected defendant's position regarding its obligations regarding the disputed fee under the 2009.

The trial court subsequently granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in a written opinion, concluding that the 2009 contract did not authorize charging users a fee for operation and maintenance expenses that was based on the number of fire hydrants within a Local Unit.

Plaintiffs moved for reconsideration, arguing in pertinent part that the trial court failed to address the issue regarding the System Policy Board's previous determination that defendant was obligated to pay the fee and that it was unclear whether the trial court determined that the contract was unambiguous or resolved an ambiguity in the language.

The trial court denied plaintiffs' motion for reconsideration and clarified the reasoning underlying its original opinion granting summary disposition. The trial court explained that the contract was unambiguous, that the 2009 contract did not authorize charging the fee to defendant, that defendant was arguing that the System Policy Board had no authority to impose the fee pursuant to the 2009 contract, and that the 2009 contract was silent with respect to whether the System Policy Board's decisions were final and binding.

Plaintiff appealed, raising arguments that involve issues of contract interpretation.

II. STANDARD OF REVIEW

A trial court's grant of summary disposition is reviewed de novo. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). "A motion for summary disposition under MCR 2.116(C)(10) requires the reviewing court to consider the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Rambin v Allstate Ins Co*, 495 Mich 316, 325; 852 NW2d 34 (2014). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

Additionally, both contract interpretation and determining whether contract language is ambiguous present questions of law that we review de novo. *Klapp v United Ins Group Agency,*

Inc, 468 Mich 459, 463; 663 NW2d 447 (2003). "Whether extrinsic evidence should be used in contract interpretation is a question of law that this Court reviews de novo." *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005).

Finally, we review for abuse of discretion a trial court's decision on a motion for reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

III. ANALYSIS

"Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Innovation Ventures*, 499 Mich at 507 (quotation marks and citation omitted). "In interpreting a contract, our obligation is to determine the intent of the contracting parties." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). An appellate court "determine[s] the parties' intent by examining the language of the contract according to its plain and ordinary meaning." *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014). "[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468 Mich at 468. "If the contractual language is unambiguous, courts must interpret and enforce the contract as written . . . ." *Innovation Ventures*, 499 Mich at 507 (quotation marks and citation omitted; ellipsis in original).

First, plaintiffs argue that the parties included what essentially amounts to a dispute resolution provision in the 2009 contract, vesting the System Policy Board with the final authority to resolve disputes regarding the parties' requirements and obligations under the contract. Plaintiffs claim that the trial court erred by considering the merits of the dispute because the System Policy Board had already determined that the 2009 contract required defendant to pay the fee.

Section 8(d) of the 2009 contract provides in pertinent part as follows:

> The System Policy Board shall be responsible for the management of the System, which shall include the following:
>
> * * *
>
> (3) resolving any concerns which any Local Unit may have with respect to its requirements and obligations under this Contract and the operation and maintenance of the System;
>
> * * *
>
> (6) in consultation with the County, investigating and making recommendations with respect to violations of this Contract that affect the operational integrity of the System and/or the ability of the System to be operated in accordance with Applicable Laws; and

(7) dealing with any other matter which the parties may agree to direct to the System Policy Board.

This Court has previously explained that "the law favors contractual terms providing for alternate dispute resolution mechanisms." *Whispering Pines AFC, Home, Inc v Dep't of Treasury*, 212 Mich App 545, 550; 538 NW2d 452 (1995). The *Whispering Pines* Court concluded that the petitioner, who operated an adult foster-care home under contract with the Department of Mental Health (DMH), contractually waived any right he may have had to a formal evidentiary hearing for resolving his dispute over repaying excess funds he had been paid under his contract. *Id*. at 547, 550. The pertinent part of the contract provision at issue stated:

> The CONTRACTOR agrees to repay within 30 days any amounts due as the result of *final* (meaning following the disposition of any appeals that may be made by the CONTRACTOR) cost settlement or audit. [*Id*. at 548 (emphasis added).]

The litigation in *Whispering Pines* arose after the DMH determined that the petitioner was overpaid and the petitioner had followed the administrative appeal process outlined in the contract up through the final step of receiving a decision from the director of the Bureau of Hospitals and Centers of the DMH; the director concluded that the petitioner had been overpaid and needed to repay the money. *Id*. at 547-548. This Court rejected petitioner's argument on appeal that he was denied his constitutional right to due process, concluding that any such rights were waived by contractual agreement. *Id*. at 550.

However, unlike the contractual provision at issue in the instant case, the contractual provision discussed in *Whispering Pines*, 212 Mich App at 548, included language providing that the alternative mechanism for resolving the dispute would result in a "final" decision. Indeed, the *Whispering Pines* Court explained that the parties had contractually agreed to a "defined review process leading to final decision" and that a contractual provision could validly provide for such a decision to be "*final and conclusive*, both on the parties and a court before which the parties have brought their dispute." *Id*. at 550-551. In the instant case, however, § 8(d) of the 2009 contract includes no such language regarding finality. While the parties may have generally agreed that the System Policy Board would resolve disputes, the parties did not agree that the System Policy Board's decisions were final or binding, and the parties did not agree to give up their rights to seek remedies in the courts. Thus, pursuant to the plain meaning of the contractual language in § 8(d), when plaintiffs filed this action against defendant to try to enforce a right to payment under the contract, defendant was not prohibited from arguing that the contract did not require the payment to be made. *Miller-Davis*, 495 Mich at 174. Therefore, it was not erroneous for the trial court to conclude that the parties did not contractually agree to make the System Policy Board's decisions final, and the trial court was not bound by the System Policy Board's determination that defendant owed the disputed fee. *Klapp*, 468 Mich at 463. Consequently, the trial court also did not abuse its discretion by rejecting this argument in denying plaintiffs' motion for reconsideration. *Churchman*, 240 Mich App at 233.

Accordingly, there is no need to address defendant's arguments that amount to alternative grounds for upholding the trial court's decision because § 8(d) of the contract is unambiguous and does not demonstrate an agreement to prohibit judicial review and make the System Policy

Board's decisions final and binding; this provision must be enforced according to its terms. *Innovation Ventures*, 499 Mich at 507. Moreover, these arguments were not addressed by the trial court, and "[a]ppellate review is generally limited to issues decided by the trial court." *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999).

Next, plaintiffs argue essentially that the disputed fee can be charged under the 2009 contract because doing so is not prohibited by the contract. Notably, plaintiffs do not rely on any caselaw to support such a proposition.

As previously stated, unambiguous contractual language must be enforced as written. *Innovation Ventures*, 499 Mich at 507. " '[P]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.' " *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998) (citation omitted). "[A] contract is ambiguous when two provisions 'irreconcilably conflict with each other,' or 'when [a term] is equally susceptible to more than a single meaning.' " *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010) (citation omitted; second alteration in original). It is worth emphasizing that "[o]nly when contractual language is ambiguous does its meaning become a question of fact." *Id*. Moreover, "courts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare an ambiguity." *Klapp*, 468 Mich at 467. When contractual language is not ambiguous, "consideration of extrinsic evidence as a construction aid is not appropriate." *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 190; 702 NW2d 106 (2005) (opinion of CAVANAGH, J.); see also *id*. at 217 (opinion of YOUNG, J.) ("[I]t is well-settled law that when a contract is clear and unambiguous on its face, a court will not consult extrinsic evidence and will enforce the contract as written.").

In this case, § 4(b) of the 2009 contract provides:

> (b) The County shall bill *users in* each Local Unit for Operation and Maintenance Expenses on a regular basis and deposit revenues received from such billings in the Pooled Account. If the revenues in the Pooled Account are not sufficient to pay Operation and Maintenance Expenses when due, each Local Unit agrees to pay its share of the shortfall within 30 days of receipt of an invoice therefor from the County as provided in Section 5. [Emphasis added.]

Section 5 of the 2009 contract describes how rates and charges were to be collected, as well as the "Pooled Account." Section 5 provides in pertinent part as follows:

> (a) The County shall be responsible for billing all rates and charges for water service furnished by the System to users within the Local Units. Each Local Unit shall be responsible for collecting all such rates and charges and may contract with the County to collect such rates and charges on its behalf . . . . Each of the Local Units hereby consents to the billing by the County of rates and charges for water service provided by the System to individual users within its boundaries *in accordance with applicable ordinances adopted by the Local Units*. . . .

(b) There is hereby established for the System a separate pooled account (the "Pooled Account"), to be held by the Board separate from all other County and Board funds. All amounts collected by the County and the Local Units from rates and charges for water service furnished by the System shall be paid to and held by the Board in the Pooled Account and used only for the payment of System costs as herein provided.

(c) Moneys shall be disbursed from the Pooled Account for the following purposes and in the following order of priority:

(1) First, there shall be paid all Operation and Maintenance Expenses. *If the moneys in the Pooled Account are not sufficient to pay Operation and Maintenance Expenses when due, then the County shall bill each Local Unit for its share of the shortfall, which shall be a fraction, the numerator of which is the number of current users in the Local Unit (expressed in terms of residential equivalent units) and the denominator of which is the number of current users in all of the Local Units (expressed in terms of residential equivalent units)*, and each Local Unit shall pay its share of the shortfall within 30 days of receipt of an invoice therefor from the County.

* * *

(e) The Board will report the status of the Pooled Account to the Local Units at least quarterly and in such detail so that the Local Units will be fully informed as to the use of the moneys on deposit in the Pooled Account, the need to revise rates for use of the System, and any requirements to provide additional funds to the County to pay Operation and Maintenance Expenses and Debt Service Requirements.

(f) Each Local Unit covenants and agrees that, *should it appear*, upon sixty (60) days written notice from the County, *that additional funds will be needed to pay the Operation and Maintenance Expenses* and/or the Debt Service Requirements when due as provided in this Section 5, *each Local Unit will, if necessary, promptly increase rates and charges to all of its water customers so that sufficient revenues, including other legally available funds of the Local Unit, will be available for such purposes. In the event that such rates and charges shall not be sufficient* to pay Operation and Maintenance Expenses and/or Debt Service Requirements, as the case may be, when due, *then each Local Unit shall pay its share of such deficiency from any legally available funds of the Local Unit*. [Emphasis added.]

Section 4(c) provides in pertinent part:

(c) Each Local Unit *shall adopt a water use, connection and rate ordinance*, which shall set forth the rates and charges to be charged *to its users* for water

service, such rates and charges at a minimum to be in amounts, together with other legally available funds of the Local Unit, necessary to pay the Operation and Maintenance Expenses required hereunder and its share of Capital Costs[2] required hereunder or under any Financing Contract. [Emphasis added.]

Section 4(e) provides:

> (e) It is the intention of the parties hereto that *payments provided for in this Section 4* will be *sufficient to pay all* Capital Costs and *Operation and Maintenance Expenses*. [Emphasis added.]

Notably, while § 4 was intended to provide sufficient funds to cover all operation and maintenance expenses, there is no mention in this section of any "hydrant maintenance fee" or "system maintenance fee," much less a fee of that kind that can be directly charged to the Local Units. However, this is not surprising because § 4(c) explicitly provides that the rates and charges designed to cover the operation and maintenance expenses were to be set forth in a separate ordinance to be adopted by the Local Units. It is also clear from the above contractual language that the county was to bill the *users* "in" or "within" the Local Units (not the Local Units directly) according to the terms of the ordinances. §§ 4(b), 5(a). The term "users" is not defined in the contract, but "[d]ictionary definitions may be used to ascertain the plain and ordinary meaning of terms undefined in an agreement." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 504; 741 NW2d 539 (2007). "User" means "one that uses." *Merriam-Webster's Collegiate Dictionary* (11th ed). The verb "use" has been defined to mean "to put into action or service: avail oneself of" and "to expend or consume by putting to use . . . ." *Id*. The word "in" is "used as a function word to indicate inclusion, location, or position within limits." *Id*. The word "within" is "used as a function word to indicate enclosure or containment." *Id*. According to the plain meaning of the contract, *Miller-Davis*, 495 Mich at 174, it is therefore clear that the people and entities who consume water and avail themselves of the water system (which could include departments of the Local Units) are to be billed by the county *according to the terms of the ordinances*.

Nonetheless, despite the trial court's focus on the term "users" early in the case and the parties' focus on this term in their arguments throughout the proceedings, the meaning of the term users does not conclusively resolve the issue on appeal. The specific issue to be addressed is whether a *Local Unit* can be charged a fee that is calculated based on the number of fire hydrants within its borders, regardless of the label assigned to that fee.

Examining the contract further, there is no mention in the 2009 contract of a hydrant maintenance fee, system maintenance fee, or any other fee based on the number of fire hydrants within a Local Unit. Furthermore, the contract gives specific directions about when Local Units are to be directly charged by the county and how to calculate the amount each Local Unit would pay. The contract explicitly provides that the rates and charges collected from billing the "users

[2] Capital Costs are not at issue in this case. Section 4(a) provides that "[e]ach Local Unit shall pay its share of the Capital Costs . . . ."

in each Local Unit" are to be deposited into the Pooled Account, and that the Local Units would pay any shortfall "[i]f the revenues in the Pooled Account are not sufficient to pay Operation and Maintenance Expenses when due" upon receiving an invoice for such a shortfall in revenue. §§ 4(b), 5(b), 5(c)(1), 5(f). Moreover, § 5(c)(1) provides an exact formula for determining each Local Unit's share of the shortfall: this formula has nothing to do with fire hydrants and is instead based on each Local Unit's proportion of the total number of current users in all of the Local Units combined. Finally, it is also necessary to consider the Uniform Water Rate Ordinance adopted by defendant and plaintiffs that was incorporated into the contract in order to determine the contract's plain meaning because this ordinance sets forth the applicable rates and charges that are to be charged to the users pursuant to the contract itself. §§ 4(c), 5(a). We may look to a document incorporated by the contract at issue to determine whether the contract is ambiguous in the first instance. See *Klapp*, 468 Mich at 467.

Section 4 of the Uniform Water Rate Ordinance adopted by defendant provides:

> Rates and charges to be charged for service furnished by the System shall be as provided in Appendices attached to and made a part of this ordinance. Rates and charges may be changed from time to time by resolution of the various municipalities based on the needs of the system and recommendation of the Policy Board.

Appendix C, § 8.5 of the ordinance provides:

> The Township shall pay, out of the appropriate general funds of the Township, the reasonable cost and value of water furnished to the township by the system, based on the amount of water used by the several departments of the Township, including their respective fire departments unless fire hydrant assessment districts have been established which cover these costs.

However, there is no mention in the ordinance of a "hydrant fee," "system maintenance fee," or other similarly designated fee. There also is no indication in the ordinance that "fire hydrant assessment districts" were established. This language plainly does not require the Local Units, or defendant as one of those Local Units, to pay the disputed fee. *Miller-Davis*, 495 Mich at 174.

In sum, there is no mention of the fee in the contract or the ordinance that is incorporated into the contract, and the contractual language describing how revenue to pay operation and maintenance expenses is to be generated—through charges in accordance with the ordinance and through a specific procedure in the case of a shortfall that is based on a Local Unit's *proportion of the total users*—do not include the disputed fee as one of the revenue generating mechanisms. Therefore, the plain language of the contract clearly does not require defendant to pay an annual fee to the county based on the number of fire hydrants within its boundaries. *Id*. The pertinent language is not susceptible to more than one meaning and there is no ambiguity. *Holland*, 287 Mich App at 527. Because the contract is not ambiguous, it must be enforced as written and extrinsic evidence may not be considered to interpret it. *Grosse Pointe Park*, 473 Mich at 190 (opinion of CAVANAGH, J.); *id*. at 217 (opinion of YOUNG, J.); *Innovation Ventures*, 499 Mich at 507.

Therefore, the trial court did not err by granting summary disposition in favor of defendant and denying plaintiffs' motion for reconsideration. *West*, 469 Mich at 183; *Churchman*, 240 Mich App at 233. To the extent that it appears that the trial court may have relied on extrinsic evidence to bolster its conclusion that the contract was not ambiguous, the trial court erred. *Grosse Pointe Park*, 473 Mich at 190 (opinion of CAVANAGH, J.); *id*. at 217 (opinion of YOUNG, J.); *Innovation Ventures*, 499 Mich at 507. However, we may still affirm a trial court's summary disposition ruling if it reaches the right result but for the wrong reason. *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 449; 886 NW2d 445 (2015).[3]

Affirmed. Defendant, having prevailed, may tax costs. MCR 7.219(A).

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra

[3] Plaintiffs' appellate argument essentially amounts to an attempt to rely on parol evidence despite the contract's provision in § 13 indicating that the 2009 contract represented the parties' entire agreement. Parol evidence may not be used to vary the terms of a clear and unambiguous contract. *UAW-GM*, 228 Mich App at 492. Furthermore, "[i]f clear and free from ambiguity, the intention shown upon its face, if written, must be followed, though contrary to the practical interpretation of the parties, and even if such practical construction has been acquiesced in for a long period of time." *Mich Chandelier Co v Morse*, 297 Mich 41, 48; 297 NW 64 (1941) (quotation marks and citation omitted). "Parol evidence under the guise of a claimed latent ambiguity is not permissible to vary, add to, or contradict the plainly expressed terms of this writing, or to substitute a different contract for it, to show an intention or purpose not therein expressed." *Id*. Moreover, plaintiffs' argument that the fee is permitted merely because it is not prohibited is nonsensical. One of the essential elements of a contract is "mutuality of agreement." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). "Where mutual assent does not exist, a contract does not exist." *Quality Products*, 469 Mich at 372. It would be illogical for a party to enforce an alleged contractual obligation that was not actually contained in the contract against another party merely because the term was not "prohibited" or because the parties *could have* included such a term. See *id*.; *Hess*, 265 Mich App at 592. For the reasons stated above, the unambiguous language of the 2009 contract does not require defendant to pay the disputed fee.