STATE OF MICHIGAN

COURT OF APPEALS

JUST US FOUR, L.L.C., Plaintiff-Appellant,	UNPUBLISHED December 20, 2011
v	No. 300215 Berrien Circuit Court
VILLA ENVIRONMENTAL CONSULTANTS, INC., Defendant-Appellee.	LC No. 2008-000396-CZ

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's summary disposition of its complaint in this action arising out defendant's performance of a pre-purchase environmental assessment and wetland review of property now owned by plaintiff. For the reasons set forth in this opinion, we affirm.

At issue in this case is defendant's performance of a "wetland review" in conjunction with its pre-purchase Phase I Environmental Site Assessment (ESA) of a parcel of property, approximately 29 acres in size, located at 11060 Wilson Road in New Buffalo ("the property"). Plaintiff company was formed on April 1, 2005, for the purpose of purchasing the property as an investment in anticipation of the approval and construction of a casino in the vicinity. Previous to this, in 2004, Debra and James Weck began looking for property for their to-be-formed company to purchase in area of the proposed casino site. On the advice of others, including legal counsel, Debra Weck (hereafter, "Weck") determined that an environmental assessment should be conducted of any property before it was purchased. The real estate agent consulted by Weck referred her to defendant for this purpose, and Weck contacted defendant to conduct phase I ESA of the property. Weck also requested that defendant perform a "Wetland Review Please." While the scope of the phase I ESA was described in writing, the scope of a "wetland review" was not defined, either in writing or verbally, to Weck.

On February 25, 2005, defendant issued its completed phase I ESA report.[1] The report advised that there was no evidence of recognized environmental conditions at the property with the exception of a sewage lagoon immediately adjacent to the south of the property and a large mound located on the property, the origins and contents of which were unknown. The report recommended that a phase II investigation be conducted to determine whether the mound was contaminated.[2] As to the potential for wetlands on the property, the report advised, in part, that Blood Run Creek "intercepts" the property, and that

> [t]he wetland inventory map was reviewed on the [Michigan Department of Environmental Quality's] website and [it] indicated potential wetlands near Blood Run Creek that flows through the site. A wetland by definition only has to be wet at the surface 5-7 days during the growing season. A wetland delineation should be completed if any filling of a water feature or depression occurs.

With the exception of including a picture of the creek in an appendix, the report provided no further information or conclusions regarding the potential for wetlands on the property.

On May 2, 2005, relying on alleged verbal statements made by defendant's representative, Eric Larcinese, to Weck that "you're good to go," and "I think you'll be fine," plaintiff purchased the property. After the casino was approved, on October 26, 2006, plaintiff listed the property for sale. In December 2007, plaintiff entered into a letter of intent to sell the property for $2,163,000 to an entity that develops property for hotel franchises. The offer to purchase was contingent on a number of factors including satisfaction of any environmental concerns, market/feasibility studies, the availability of an acceptable hotel franchise to purchase the property after it was developed and approval/rezoning for the intended use of the property as a hotel and water park. As part of its due diligence, the prospective purchaser requested that plaintiff obtain a wetland delineation to determine the extent of any wetlands present on the property; the subsequent wetland delineation revealed that the property contains 15.2 acres of regulated wetlands. Following this determination, the prospective purchaser terminated the letter of intent and withdrew its offer to purchase the property.

Plaintiff then filed the instant action alleging that defendant breached its contract by failing to properly conduct the contracted-for wetland review, and further alleging that defendant was negligent in failing to properly utilize the available information to determine whether wetlands were present on the property, in failing to effectively inform plaintiff of the potential existence of wetlands on the property and in assuring plaintiff's representatives that there were no environmental conditions adversely affecting the property. Upon defendant's motion, the trial court granted defendant summary disposition of these claims, finding that plaintiff contracted for and received a "wetland review" and that plaintiff failed to allege any duty, separate and distinct

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[1] This report was revised on April 5, 2005; however, there was nothing in the record to suggest that any substantive changes were made to the report after its initial issuance.

[2] A Phase II investigation, involving the testing of soil samples from the mound, was conducted and it was determined that no contamination was present at the property.

from its obligation under the contract that defendant allegedly breached so as to support a separate claim for negligence. Following its ruling, the trial court afforded plaintiff two attempts to amend its complaint to assert a cognizable claim against defendant, but finding both attempts deficient, the trial court ultimately entered judgment in defendant's favor.

On appeal, plaintiff first argues that the trial court erred by construing the parties' agreement using the technical meaning, used within the environmental consulting industry, of the phrase "wetland review." Instead, plaintiff asserts, the trial court should have considered Weck's subjective understanding of the scope of the contract as requiring that defendant determine whether there were wetlands present on the property. Had the trial court done so, plaintiff asserts, it necessarily would have concluded that there was at least a question of fact as to the scope of defendant's obligations under the contract and whether defendant breached those obligations.

This Court reviews a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a decision on a motion brought under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court must consider all of the substantively admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. at 119-120; MCR 2.116(G)(6). Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120. 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 could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). This Court also reviews de novo a trial court's construction and interpretation of a contract. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008); *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

When ordering the phase I ESA for the property, Weck asked for, a "Wetland Review Please." Larcinese testified that a "wetland review" is the review of government documentation to determine whether such records indicate the potential for wetlands on the site; it is not an investigation to determine whether wetlands are actually present on the property, which investigation is referred to a "wetland delineation." Plaintiff's environmental expert, Marc Groenleer, likewise described a "wetland review" as an examination of historical records to determine if there are issues that require further examination. Groenleer agreed with Larcinese that a "wetland review" is substantially different from a "wetland delineation," which he defined as the determination of the actual presence and size, if any, of wetlands on the property. As acknowledged by Groenleer, defendant's report indicates that Larcinese reviewed the MDEQ wetland inventory maps, and it advises that there are potential wetlands on the property, and that if development were contemplated, a wetland delineation should be performed. Considering the deposition testimony offered by Larcinese and Groenleer, then, there is no question of fact that plaintiff contracted for, and received, a "wetland review."

Plaintiff asserts that Weck's subjective understanding of the scope of a "wetland review," as meaning essentially a "wetland delineation," created a least a question of fact as to the scope of the parties' agreement; however, parties are presumed to understand the plain language of the

contracts they sign and "the unilateral subjective intent of one party cannot control the terms of a contract." *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). Instead, "'[i]t is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms. Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms.'" *Id*., quoting *Zurcher v Herveat*, 238 Mich App 267, 299, 605 NW2d 329 (1999), quoting *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997) (O'Connell, J). The terms of the parties' agreement manifested the intent that defendant perform a "Wetland Review Please," and not a "wetland delineation." There is nothing in the contract to suggest that the parties' agreement was anything other than for a "wetland review" as defined by Larcinese and Groenleer. And, there is no dispute that defendant performed such a "wetland review." Accordingly, the trial court's summary disposition of plaintiff's breach of contract claim was proper.

Plaintiff next argues that the trial court erred by summarily disposing of its negligence claim, concluding that defendant did not breach any duty to plaintiff, separate and distinct from its contractual duties, by Larcinese's conduct in informing Weck during conversations with her that "you're good to go," and that "I think you'll be fine."

To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty; (2) the defendant breached the legal duty; (3) the plaintiff suffered damages; and (4) the defendant's breach was a proximate cause of the plaintiff's damages. *Roulo v Auto Club of Mich*, 386 Mich 324, 328; 192 NW2d 237 (1971). Accordingly, "[i]t is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). As our Supreme Court explained in *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967), Michigan courts recognize, generally, that "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and [] a negligent performance constitutes a tort as well as a breach." And, where a party voluntarily undertakes to perform an act, having no obligation to do so, a duty may arise to perform that act in a nonnegligent manner. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 529; 538 NW2d 424 (1996). Still, as our Supreme Court explained, in *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997), the assertion of a tort action between parties to a contract requires the Court to engage in the threshold inquiry of whether "the plaintiff alleges a violation of a legal duty separate and distinct from the contractual obligation."

At issue in *Rinaldo's*, 454 Mich at 83, was whether the plaintiff's allegation that "the defendant committed misfeasance in negligently failing to properly and fully perform its contract" gave rise to an action sounding in tort. Our Supreme Court explained:

> The question whether an action in tort may arise out of a contractual promise has not been without difficulty. *Hart v Ludwig*, 347 Mich 559, 560; 79 NW2d 895 (1956). However, in *Hart*, the Court discussed the issue at length in determining whether the plaintiff could maintain an action in tort against a defendant who failed to adequately care for the plaintiff's orchard under the parties' oral contract. In refusing to allow the plaintiff's action to proceed in tort, the Court explained, quoting *Tuttle v Gilbert Mfg Co*, 145 Mass 169, 175, 13 NE 465 (1887):

> "As a general rule, there must be some active negligence or misfeasance to support a tort. There must be some breach of duty distinct from breach of contract." [*Hart* at 563.]

Acknowledging that the distinction between misfeasance and nonfeasance is often difficult to discern, the Court explained that the fundamental principle separating the causes of action is the concept of duty. The Court noted those cases where misfeasance on a contract was found to support an action in tort as follows:

> [I]n each a situation of peril [was] created, with respect to which a tort action would lie without having recourse to the contract itself. Machinery [was] set in motion and *life or property [was] endangered* . . . In such cases . . . we have a "breach of duty distinct from . . . contract." Or, as Prosser puts it . . . "if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not." [*Id.* at 565 (emphasis added).]

In other words, the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation. The plaintiff's action in *Hart* failed to state a cause of action in tort because "[t]he only duty, other than that voluntarily assumed in the contract to which the defendant was subject, was his duty to perform his promise in a careful and skillful manner without risk of harm to others, the violation of which [was] not alleged." *Id.* at 565. The only other duty – to perform the promise – arose from the contract and could not support an action in tort. *Id.* at 565-5665.

Prosser and Keeton discuss the distinction further:

> *Misfeasance or negligent affirmative conduct in the performance of a promise generally subjects an actor to tort liability as well as contract liability for physical harm to persons and tangible things.* Generally speaking, there is a duty to exercise reasonable care in how one acts to avoid physical harm to persons and tangible things. Entering into a contract with another pursuant to which one party promises to do something does not alter the fact that there was a preexisting obligation or duty to avoid harm when one acts. [Torts, § 92, pp 656-657.]

This duty, however, does not extend to "intangible economic losses." *Id.* at 657. For this type of loss, "the manifested intent of the parties should ordinarily control the nature and extent of the obligations of the parties. . . ." *Id.* In addition to acknowledging this distinction at least as far back as *Hart*, the distinction has more recently been applied to sales contracts under the UCC under the rubric of the "economic loss doctrine." *Neibarger v Universal Cooperatives*, 439 Mich 512, 527; 486 NW2d 612 (1992). The concept has been approved in other contexts. See *Corl v Huron Castings, Inc*, 450 Mich 620, 626-628; 544

NW2d 278 (1996) (refusing to apply the collateral source rule for tort damages to an employment contract); *Ferrett v General Motors Corp*, 438 Mich 235, 243; 475 NW2d 243 (1991) (refusing to recognize a cause of action in tort for negligent evaluation of an employee).

> In this case, as in *Hart*, the defendant agreed to provide the plaintiff with services under a contract. Like the defendant in *Hart*, [the defendant here] allegedly failed to fully perform according to the terms of its promise. While [the] plaintiff's allegations arguably make out a claim for "negligent performance" of the contract, there is no allegation that this conduct by the defendant constitutes tortious activity in that it caused physical harm to persons or tangible property; and [the] plaintiff does not allege violation of an independent legal duty distinct from the duties arising out of the contractual relationship. Like the plaintiff in *Valentine* [*v Michigan Bell Tel Co*, 388 Mich 19; 199 NW2d 182 (1972)], "regardless of the variety of names [plaintiff gives the] claim, [plaintiff is] basically complaining of inadequate service and equipment. . . ." *Id.* at 22. Thus, under the principles outlined above, there is no cognizable cause of action in tort. [*Id.* at 83-85.]

Here, plaintiff alleges that Larcinese was negligent in communicating the results of the wetland review to Weck and in answering her inquiries about the property by assuring her that she was "good to go" and that he thought she would "be fine." Defendant contracted to advise plaintiff whether there was the potential for wetlands on the property. Plainly, all of plaintiff's claims arise from this contractual obligation; defendant had no duty to assess the property or to communicate with plaintiff or with Weck about its condition other than as imposed by the contract. Therefore, while plaintiff's allegations "arguably make out a claim for 'negligent performance of the contract' . . . plaintiff does not allege a violation of an independent legal duty distinct from the duties arising out of the contractual relationship," nor does plaintiff allege any tortious conduct by defendant causing "physical harm to persons or tangible property." *Rinaldo's*, 454 Mich at 85. Rather, "regardless of the variety of names [plaintiff gives the] claim, [plaintiff is] basically complaining of inadequate service," that is, of inadequate performance, under the contract. *Id.* Accordingly, plaintiff has no cognizable cause of action for negligence. *Id.*[3]

[3] We observe that *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004), which is discussed at length by the parties and was cited by the trial court, is inapposite. *Fultz* addressed the availability of a tort action for negligent performance of a contract "brought by a plaintiff *who is not a party to the contract*," in which case, it instructs that "the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Id*. at 467. As our Supreme Court has since observed, it is error to apply the decision in *Fultz* to the adjudication of a negligence claim brought by a plaintiff that was "in contractual privity" with the defendant. See, *Garrett v Goodman Building Company, Inc*, 474 Mich 948; 706 NW2d 202 (2005). Likewise, *Loweke v Ann Arbor Ceiling & Partition Co*, ___ Mich ___; ___ NW2d ___ (Docket No. 141168, June 6, 2011), clarifying

Plaintiff further asserts on appeal that, because defendant argued below that it had no duty under the contract to determine whether wetlands were *actually* present at the property, but instead only to determine whether they were *potentially* present, Larcinese's statements to Weck that she was "good to go" and that he thought she would "be fine" – which plaintiff characterizes as statements that there were no wetlands on the property – constituted a voluntary undertaking beyond the scope of the contract, for which a duty to respond in a nonnegligent manner arose. Contrary to this assertion, however, any statements made by Larcinese in communicating with Weck about the results of the environmental assessment and wetland review, and about the content of the phase I ESA report, necessarily arise from, and fall within, the scope of the contracted-for performance. Again, defendant was contracted to advise Weck regarding the environmental condition of the property, including whether there were potential wetlands present. Performance of this obligation necessarily required that Larcinese communicate the results of defendant's assessment of the property to Weck, which included opining as to whether there were potential wetlands on the property. Consequently, any statements opining as to the condition of the property and the possibility of wetlands thereon are, plainly, within the scope of defendants' contractual obligations. Accordingly, we conclude that the trial court properly granted summary disposition of plaintiff's negligence claim.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello

Fultz's "'separate and distinct' mode of analysis," by explaining that "a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to *noncontracting third parties* in the performance of the contract," slip op at 2 (emphasis added), is inapposite as well.