STATE OF MICHIGAN

COURT OF APPEALS

GOYETTE MECHANICAL COMPANY, INC., as assignee of GARY STEPHAN, d/b/a RAINBOW SHELL, Plaintiff/Counterdefendant-Appellant,	UNPUBLISHED November 9, 2001
v	No. 221244 Genesee Circuit Court
SUPERIOR ENVIRONMENTAL CORPORATION, INC., Defendant/Counterplaintiff-Appellee.	LC No. 97-055216-CZ

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

We review de novo a trial court's decision regarding a summary disposition motion. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id*. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. *Id*.; MCR 2.116(G)(5). The party faced with a motion for summary disposition under MCR 2.116(C)(10), when responding to the motion, is required to present evidentiary proofs showing that there is a genuine issue of material fact for trial. If such proofs are not presented, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999). The court may not assess credibility or determine facts when deciding the merits of the motion for summary disposition. *Downey v Charlevoix Co Bd of Co Road Comm'rs*, 227 Mich App 621, 626; 576 NW2d 712 (1998).

The complex facts of this case, in brief, are as follows. Plaintiff's assignor, Gary Stephan, hired Energy and Environmental Technology Company (EETCO) as a "qualified

consultant" to clean his property and remove underground storage tanks. Defendant replaced EETCO in this role after work had commenced. Wolverine Contractors, Inc., performed the actual work. Funding was to be provided under the Michigan Underground Storage Tank Financial Assurance (MUSTFA) section of the Natural Resource and Environmental Protection Act, MCL 324.21501 *et seq.* However, funding for Wolverine's work was rejected because Wolverine had not been selected through competitive bidding as required by MUSTFA. See MCL 324.21517. Plaintiff's theory is that defendant was negligent by failing to ensure that proper bidding procedures were followed. Plaintiff is assignee of both Wolverine and Stephan; as assignee of Wolverine it sued defendant but did not prevail. It now appeals, as assignee of Stephan, its second unsuccessful suit against defendant.

The trial court granted summary disposition in favor of defendant based on its conclusion that plaintiff could not establish any damages because Stephan was not personally obligated to pay Wolverine Contractors, Inc., for any of the work defendant supervised. We find this conclusion to be erroneous. Even if Wolverine and Stephan had an agreement that Wolverine would only look to the MUSTFA for reimbursement for its work, that agreement would not establish the absence of damages that can be attributable to defendant. Under MUSTFA, Wolverine could not submit its own claim; only the "owner or operator" could submit a claim. MCL 324.21502(h). Thus, with regard to the causes of action against defendant, Stephan is the real party in interest because he hired and contracted with defendant, and it does not appear that Wolverine would qualify as a third-party beneficiary under that contract. See *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 427-430; 543 NW2d 31 (1995); MCL 600.1405. Nonetheless, we believe that Wolverine obtained a beneficial interest in this lawsuit in terms of any proceeds recovered, by expending its resources and labor on behalf of Stephan to clean up his property. *Stephenson v Golden*, 279 Mich 710, 766; 276 NW 849 (1937); *Weston v Dowty*, 163 Mich App 238, 242-243; 414 NW2d 165 (1987). Therefore, a question of fact remained concerning Stephan's liability to Wolverine outside of the contract. Wolverine performed the work that Stephan was responsible for completing; Wolverine's beneficial interest in this case supports a finding that factual issues remain regarding damages sustained, even if Stephan has not yet paid any amounts out of his own pocket. *Allstate Ins Co v Snarski*, 174 Mich App 148, 154-155; 435 NW2d 408 (1988).

Further, although defendant produced evidence that there was an agreement between Wolverine and Stephan that Wolverine would look only to the MUSTFA for payment, plaintiff submitted contrary evidence concerning the substance of the agreement between Stephan and Wolverine. Because a genuine issue of fact exits with respect to this issue, summary disposition is not appropriate. Under the facts and circumstances of this case, we believe that the trial court erred in granting defendant's motion for summary disposition, inasmuch as a genuine issue of material fact exists regarding whether plaintiff suffered damages as a result of defendant's alleged failure to comply with the MUSTFA to assure funding under that act.

Defendant alternatively argues that it is entitled to summary disposition on grounds that plaintiff's claim for professional negligence or malpractice was not assignable. We disagree. The prohibition against assigning malpractice claims has been applied only to claims of legal malpractice. See *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 258; 571 NW2d 716 (1997); *Joos v Drillock*, 127 Mich App 99, 102-105; 338 NW2d 736 (1983). The public policy concerns

that favor the prohibition against assigning legal malpractice claims, see *Joos*, *supra*, do not apply to a malpractice claim of the type involved in this case. As a general rule, all actions that survive death are freely assignable. *Weston*, *supra* at 241. Therefore, we conclude that the professional negligence claim alleged in the complaint could be assigned.

Defendant also argues that summary disposition was warranted because plaintiff did not produce expert testimony in support of its claims. We disagree. Expert testimony is required only in those cases where the jury cannot determine the applicable standard of care or determine whether the defendant's conduct amounted to a breach of that standard of care, because such knowledge is beyond the common knowledge and experience of laymen. *Jones v Porretta*, 428 Mich 132, 154-155; 405 NW2d 863 (1987). Here, as the trial court observed, the standard of care is established by MCL 324.21517(1)(a). The trial court further determined that the evidence supported a finding that there was "such an obvious goof up." Under these circumstances, the absence of expert testimony is not fatal to plaintiff's action.

Finally, we agree with the trial court that, because defendant failed to raise the statute of limitations defense as an affirmative defense in its answer, and never sought to amend its answer, that defense is waived. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997); see also MCR 2.111(F)(2) and MCR 2.116(D)(2).

Reversed.

/s/ Michael R. Smolenski
/s/ Kathleen Jansen

McDonald, J. did not participate.