Order

Michigan Supreme Court
Lansing, Michigan

April 28, 2021

161929

J.L. LEWIS & ASSOCIATES, INC.,
Plaintiff-Appellee,

v

SC: 161929
COA: 347057
Oakland CC: 2017-161227-CB

MAGNA MIRRORS OF AMERICA, INC. and
MAGNA MIRROR SYSTEMS MONTERREY
S.A. DE C.V.,
Defendants-Appellants.

____/

On order of the Court, the application for leave to appeal the April 23, 2020 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Section II.A. of the judgment of the Court of Appeals addressing "Ownership of the '946 Patent," together with all conclusions and holdings derived from this section, and we REMAND this case to the Court of Appeals, which shall hold this case in abeyance pending the United States Court of Appeals for the Federal Circuit's decision in *Omni MedSci, Inc v Apple Inc* (Case No. 20-1715). After *Omni MedSci* is decided, the Court of Appeals shall reconsider this case in light of *Omni MedSci*.

We do not retain jurisdiction.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 28, 2021

Clerk

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STATE OF MICHIGAN

COURT OF APPEALS

J.L. LEWIS & ASSOCIATES, INC.,

Plaintiff-Appellant,

v

MAGNA MIRRORS OF AMERICA, INC., and MAGNA MIRROR SYSTEMS MONTERREY S.A. DE C.V.,

Defendants-Appellees.

UNPUBLISHED
April 23, 2020

No. 347057
Oakland Circuit Court
LC No. 2017-161227-CB

Before: RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

Plaintiff, J.L. Lewis & Associates, Inc., appeals as of right the trial court's order granting summary disposition in favor of defendants, Magna Mirrors of America, Inc., and Magna Mirror Systems Monterrey S.A. de C.V. (collectively, Magna). Plaintiff contends on appeal that the trial court erred in dismissing a breach-of-contract claim based on an erroneous interpretation of a license agreement between the parties. Plaintiff also contends that the trial court erred in dismissing a separate breach-of-contract claim based on the statute of limitations and plaintiff's failure to establish fraudulent concealment of the claim. Finally, plaintiff contends that the trial court erred in dismissing plaintiff's statutory conversion claim based on the trial court's conclusion that plaintiff failed to allege a duty on the part of Magna arising in tort. We reverse the trial court's dismissal of plaintiff's breach-of-contract claims, but affirm the dismissal of plaintiff's statutory conversion claim.

I. FACTUAL BACKGROUND

Jimmie Lewis is the founder and owner of plaintiff, and alleged below that he is the inventor of what he referred to as the "Extendable Rearview Mirror," for which Lewis owned a number of patents. Lewis engaged in a license agreement whereby Magna was given the exclusive right to develop, manufacture, and sell the Extendable Rearview Mirror, and in exchange, Lewis would receive quarterly royalties on the sales. Under the terms of the license agreement, Magna was required to inform Lewis of any improvements made to the Extendable Rearview Mirror during the life of the license agreement so that Lewis could pursue patent protection of the improvements. Lewis eventually assigned his patents and his rights under the license agreement to plaintiff.

In 2017, the original patents expired and thereafter, in May 2017, Magna stopped making installment payments under the license agreement. Plaintiff does not contest that, subsequent to the expiration of the patents, plaintiff was no longer owed royalties on sales pertaining to them. Plaintiff alleges however, that around that time, plaintiff discovered that Magna obtained a patent in 2009—U.S. Patent No. 7,490,946 (the '946 Patent)—"which built upon the concepts of the [Extendable Rearview] Mirror." Thereafter, in October 2017, plaintiff filed a complaint for breach of contract, common-law conversion, and statutory conversion.

Plaintiff contended that, under the terms of the license agreement, the '946 Patent automatically belonged to plaintiff when the patent issued in 2009 and became subject to the terms of the license agreement. Therefore, although plaintiff's underlying patents had expired, plaintiff was still owed quarterly royalties on sales pertaining to the '946 Patent and the failure of Magna to pay those royalties constituted a breach of contract. Plaintiff also alleged that Magna breached the license agreement by failing to inform plaintiff of the '946 Patent and related improvements to the Extendable Rearview Mirror sooner. Lastly, plaintiff claimed common-law conversion and statutory conversion for Magna's development of the improvements and filing of the '946 Patent without plaintiff's knowledge or consent, and for Magna's subsequent failure to pay royalties on the patent.

Magna filed for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). First, Magna claimed that the breach-of-contract claims were barred by the statute of limitations under MCR 2.116(C)(7). Magna argued that, with respect to the breach-of-contract claim for failing to inform plaintiff of improvements to the Extendable Rearview Mirror, to the extent that the breach occurred at all, it occurred at the latest when Magna filed for the '946 Patent in 2009. Because breach-of-contract claims are subject to a six-year statutory limitation period, that breach-of-contract claim was barred. With respect to the breach-of-contract claim for failure to pay royalties on the '946 Patent, Magna argued that plaintiff also failed to bring a suit to establish ownership of the '946 Patent within the statutory limitation period. Magna contended that plaintiff was time-barred from claiming ownership of the patent, and therefore could not claim that it was owed royalties for sales related to it. Next, Magna contended that plaintiff failed to allege actionable claims of common-law conversion and statutory conversion under MCR 2.116(C)(8). Specifically, Magna contended that, under Michigan law, actions in tort must be supported by legal duties independent from those arising out of contract. Magna contended that plaintiff's conversion claims were essentially breach-of-contract claims by another name.

Plaintiff responded that, with respect to the breach-of-contract claim for Magna's failure to pay royalties on the '946 Patent, plaintiff was not required to bring any action to establish ownership over the patent. Plaintiff contended that, under the terms of the license agreement, the patent was automatically assigned to plaintiff when it was issued. With respect to the breach-of-contract claim for Magna's failure to inform plaintiff of the alleged improvements to the Extendable Rearview Mirror, plaintiff contended that the statute of limitations period had been tolled by Magna's fraudulent concealment of the claim. Plaintiff noted that, although fraudulent concealment ordinarily must be supported by affirmative acts or misrepresentations, in this case, Magna owed a fiduciary duty to plaintiff to inform plaintiff of the improvements and the failure of Magna to do so constituted fraud. With respect to the conversion claims, plaintiff conceded that the common-law conversion claim was not supported by a duty distinctive from the obligations arising out of the license agreement, and agreed to dismissal of the claim. However, plaintiff argued that the same did not apply to the statutory conversion claim because statutory conversion is intended to provide cumulative remedies to other remedies available at law.

The trial court sided with Magna. The court held that the license agreement was insufficient to create an automatic transfer of the '946 Patent to plaintiff. Therefore, because the original breach of contract for failure to inform plaintiff of the alleged improvements occurred in 2009, and because plaintiff failed to bring a suit to claim ownership of the patent within the statutory limitation period following that alleged breach, both of plaintiff's breach-of-contract claims were barred by the statute of limitations. The trial court disagreed with plaintiff that the statutory limitation period was tolled by fraudulent concealment because plaintiff failed to establish that Magna had a fiduciary duty to inform plaintiff of the alleged improvements to the Extendable Rearview Mirror or the resulting patent. With respect to the conversion claims, the trial court agreed with Magna that plaintiff failed to establish any duty arising in tort separate and distinct from the duties that arose out of the license agreement. The trial court dismissed plaintiff's breach-of-contract claims under MCR 2.116(C)(7), and dismissed plaintiff's conversion claims under MCR 2.116(C)(8).

Plaintiff now appeals the dismissal of the breach-of-contract claims and the statutory conversion claim. We reverse the dismissal of the breach-of-contract claims but affirm the dismissal of the statutory conversion claim.

II. BREACH OF CONTRACT

A. STANDARD OF REVIEW

" 'This Court reviews motions for summary disposition under MCR 2.116(C)(7) de novo.' " *Russell v Detroit*, 321 Mich App 628, 631; 909 NW2d 507 (2017), quoting *Trentadue v Buckler Automatic Law Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). "In reviewing the record to determine if defendant was entitled to judgment as a matter of law, we consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings in plaintiff's favor." *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004), citing *Rheaume v Vandenberg*, 232 Mich App 417, 420-421; 591 NW2d 331 (1998). We accept all of a plaintiff's well-pleaded allegations as true. *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015) (quotation marks and citation omitted). "Absent a disputed question of fact, the determination of whether a cause of action is barred by a statute of limitation is a question of law that this Court reviews de novo." *Doe*, 264 Mich App at 638, citing *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000). "However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate." *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211, 224 (2010). We also review questions of statutory interpretation de novo. *Stanton v City of Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002), citing *In re MCI Telecommunications*, 460 Mich 396, 413; 596 NW2d 164 (1999).

A. OWNERSHIP OF THE ‘946 PATENT

We first address the breach-of-contract claim for Magna’s failure to pay royalties on the ‘946 Patent in 2017. The central issue with respect to this breach is whether, under the terms of the license agreement, the ‘946 Patent and the related improvements Magna allegedly made to plaintiff’s underlying patented work automatically belonged to plaintiff after the improvements were invented and a patent was issued. Plaintiff concedes that its initial patents had expired and that Magna was no longer liable to pay royalties with respect to those patents, but argues that under the plain language of the license agreement, the ‘946 Patent automatically belonged to plaintiff after it was issued, and was subject to the terms of the license agreement. Thus, plaintiff contends that, until the ‘946 Patent expires in 2026, Magna is required to pay royalties to plaintiff on sales related to that patent.

Magna argued—and the trial court agreed—that the ‘946 Patent did not automatically belong to plaintiff under the terms of the license agreement because the license agreement did not create an automatic assignment of an expectant property interest, but instead created a future duty to assign the property interest to plaintiff after the property at issue was created. That is, without conceding that the ‘946 Patent actually involves any improvements to plaintiff’s underlying patents, Magna contends that even if the ‘946 Patent constituted such an improvement, Magna was required to assign the patent to plaintiff after it was created; the patent was not automatically plaintiff’s property. After the patent was issued in 2009 and Magna failed to assign the patent, plaintiff was required to bring an action to establish its ownership interest within the six-year statutory limitation period for breach of contract. Because plaintiff did not do so, plaintiff could claim no ownership of the ‘946 Patent and therefore could not claim royalties on sales related to that patent.

Plaintiff relies upon *Filmtec Corp v Allied-Signal, Inc*, 939 F2d 1568, 1570, 1572 (CA Fed, 1991), wherein the United States Circuit Court for the Federal Circuit interpreted the language “agrees to grant and does hereby grant . . . the full and entire domestic right, title and interest in any invention, discovery, improvement or development (whether or not patentable) made in the course of or under this contract or any subcontract (of any tier) thereunder” as constituting a present assignment of an expectant property interest rather than a future agreement to assign. *Id.* at 1570, 1572. The court explained:

> The statutes establish as a matter of law that patents today have the attributes of personal property. And 35 USC § 261 makes clear that an application for patent as well as the patent itself may be assigned. Further, it is settled law that between the time of an invention and the issuance of a patent, rights in an invention may be assigned and legal title to the ensuing patent will pass to the assignee upon grant of the patent.
>
> If an assignment of rights in an invention is made prior to the existence of the invention, this may be viewed as an assignment of an expectant interest. An assignment of an expectant interest can be a valid assignment. In such a situation, the assignee holds at most an equitable title.

> Once the invention is made and an application for patent is filed, however, legal title to the rights accruing thereunder would be in the assignee (subject to the rights of a subsequent purchaser under § 261, and the assignor-inventor would have nothing remaining to assign. [*Filmtec*, 939 F2d at 1572 (footnotes and citations omitted).]

The court further noted that, pursuant to such a contract assigning an expectant interest, "no further act would be required once an invention came into being; the transfer of title would occur by operation of law." *Id*. at 1573.

Magna asserts that *Filmtec* is distinguishable because it contains such language as "agrees to grant and does hereby grant," which more clearly created an automatic assignment of an expectant property interest. Magna's claim rests on an assumption—for which Magna provides no support—that the difference between a contract that creates an automatic assignment of an expectant property interest and a contract that creates a future duty to assign is particularized language mandated by federal law. However, the cases relied upon by Magna do not stand for the contention that there is any specific language that *must* be included in a contract to create an automatic assignment of an expectant interest.[1] And without any federally required "magic" language, the principal issue when determining whether a contract creates an automatic assignment of an expectant interest versus a future agreement to assign is the specific language of *this* contract.

This Court reviews "the proper interpretation of contracts and the legal effect of contractual provisions a[s] questions of law subject to review de novo." *Meemic Ins Co v Bischer*, 323 Mich App 153, 157; 915 NW2d 1 (2018). The primary goal of contract interpretation is to ascertain and effectuate the intent of the contracting parties. *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 218; 702 NW2d 106, 124 (2005). We presume that the contracting parties' intent is embodied in the actual words used in the contract. *Id*. at 219. "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005), citing *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). This Court enforces unambiguous contracts as written. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999), citing *Morley v Auto Club of Mich*, 458 Mich 459, 465; 581 NW2d 237 (1998). "A contract is ambiguous only if its terms are unclear or are reasonably susceptible to more than one meaning." *Island Lake Arbors Condo Ass'n v Meisner & Assoc, PC*, 301 Mich App 384, 392; 837 NW2d 439 (2013) (citations omitted).

The license agreement in this case provided:

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[1] For example, Magna references *Arachnid, Inc v Merit Indust, Inc*, 939 F2d 1574, 1580 (CA Fed, 1991), for the conclusion that particularized language is generally required in order for a contract to constitute an automatic assignment of an expectant interest. In that case, however, the Federal Circuit concluded that a contract constituted an agreement to assign rather than an automatic assignment largely in part to contractual language that provided that future inventions "*will* be assigned." *Id*. at 1580. The Federal Circuit held that such a "provision [could not] amount to a present assignment of an expectant interest." *Id*. at 1580-1581.

> 5. Improvements. All patents and letters patent issued on improvements to Extendable Rearview Mirror conceived or reduced to practice during the term of this Agreement shall be the exclusive property of the Licensor, subject to the license granted herein. The Licensee shall promptly notify Licensor of any improvements; Licensor may then decide whether to file a patent application on the improvement. The Licensor shall have sole authority to prepare, file, and prosecute, at Licensee's expense, Patents and application for letters patent in the United States and any foreign countries for all improvements made by the Licensor during the term of this Agreement or hereafter made by the Licensee. The Licensee shall, without further consideration, at the request of the Licensor, do all acts necessary to assist Licensor in obtaining, sustaining, reissuing or extending patents or any letters patent based on such improvements and shall give testimony and otherwise provide evidence in case of interference.

We conclude that this language is unambiguous.

The license agreement clearly states that "[a]ll patents and letters patent issued on improvements to Extendable Rearview Mirror conceived or reduced to practice during the term of this Agreement *shall be* the exclusive property of the Licensor, subject to the license granted herein." (Emphasis added.) See *Speedplay, Inc v Bebop, Inc*, 211 F3d 1245, 1253 (CA Fed, 2000) (referencing that language in a contract stating that future inventions "shall belong" to an assignee evidenced an assignment of an expectant interest rather than an agreement to assign in the future). That is, as in *Filmtec*, the contract in this case clearly provided that any patents issued on improvements to the Extendable Rearview Mirror were the exclusive property of plaintiff.

Magna briefly asserts that subsequent language in paragraph 5 requiring Magna to notify plaintiff of improvements so that plaintiff could then "decide whether to file a patent application on the improvement" establishes that ownership was not automatic and that plaintiff was required to take some action to establish ownership within the relevant statutory limitation period. This argument is without merit. "Courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any party of the contract surplusage or nugatory." *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 111; 812 NW2d 799, 807 (2011) (quotation marks and citation omitted). It is abundantly clear from the language of the agreement that patents issued on improvements to the Extendable Rearview Mirror conceived during the term of the license agreement are the "exclusive property of plaintiff," and are further subject to the license agreement. Nothing in the contract suggests that Magna would assign the future rights to already-issued patents in the future. That Magna was separately required to inform plaintiff of improvements and assist plaintiff in obtaining not-already-issued patents is irrelevant to the fact that patents containing improvements to the Extendable Rearview Mirror and issued during the life of the agreement strictly belonged to plaintiff.

With all of that in mind, we conclude that the trial court erred in determining that plaintiff was required to take some sort of legal action to assert an ownership interest in the '946 Patent. The license agreement grants to plaintiff ownership of any patent acquired by defendant during the life of the license agreement constituting an improvement to plaintiff's underlying patents, and under those circumstances, transfer of title in the patent and the underlying property interests occurred by operation of law when the invention was made and the patent was filed. See *Filmtec*, 939 F2d at 1572. That, in addition to the contractual language subjecting such patents to the terms of the license agreement, meant that, to the extent the ‘946 Patent constituted an improvement to plaintiff's underlying patents and to the extent that Magna sold patents covered by the ‘946 Patent—both disputed factual issues for the jury to decide[2]—Magna was still required to pay quarterly royalties on sales related to the patented technology when it declined to do so in May 2017. Plaintiff had six years from that presumptive breach to file his complaint under MCL 600.5807(9), and filed his complaint within the statutory limitation period on October 3, 2017. Thus, the trial court erred in dismissing plaintiff's breach-of-contract claim for Magna's failure to pay royalties under MCR 2.116(C)(7).

B. FRAUDULENT CONCEALMENT OF THE ‘946 PATENT

Plaintiff's second breach-of-contract claim involves Magna's failure to inform plaintiff of the alleged improvements to the Extendable Rearview Mirror pursuant to its obligation under paragraph 5 of the license agreement. Indeed, as indicated by the contract language above, the license agreement required Magna to "promptly notify [plaintiff] of any improvement" Magna developed to the mirror during the life of the license agreement, and to the extent that we must accept as true that the ‘946 Patent constituted an improvement, Magna does not deny that it failed to notify plaintiff of the same. However, Magna argued, and the trial court agreed, that even assuming Magna breached the license agreement by failing to notify plaintiff, the breach occurred when Magna acquired the ‘946 Patent in 2009, and again, plaintiff failed to bring a claim based on the breach within the statutory limitation period. Plaintiff contended in response that the statutory limitation period was tolled due to Magna's fraudulent concealment. We conclude that there is a question of fact with respect to this issue and that further factual development could provide plaintiff a basis for relief.

MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

"This statutory section permits the tolling of a statutory limitations period for two years if the defendant has fraudulently concealed the existence of a claim." *Mays v Snyder*, 323 Mich App 1, 39; 916 NW2d 227, 250 (2018). This Court has described the elements of fraudulent concealment as:

[2] Recognizing that Magna does not admit that the ‘946 Patent involved any improvements to plaintiff's underlying patents, for the purposes of summary disposition under MCR 2.116(C)(7), we presume all of plaintiff's well-pleaded allegations to be true. *Clay*, 311 Mich App at 362.

> (1) a material representation which is false; (2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; (3) that defendant intended plaintiff to rely upon the representation; (4) that, in fact, plaintiff acted in reliance upon it; and (5) thereby suffered injury. The false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose. Such an action is one of fraudulent concealment. [*McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 28 (1988) (quotation marks and citations omitted).]

Thus, "[f]or the fraudulent-concealment exception to apply, a plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment and prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery." *Mays*, 323 Mich App at 39 (quotation marks and citation omitted).

In this case, plaintiff did not allege any affirmative act or misrepresentation on the part of Magna, but instead suggested that Magna fraudulently concealed the improvements to the Extendable Rearview Mirror by failing to notify plaintiff of them. Ordinarily, mere silence is insufficient to establish fraudulent concealment unless it can be shown that a fiduciary duty existed to disclose. See *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 48-49; 698 NW2d 900 (2005); *Lumber Village, Inc v Siegler*, 135 Mich App 685, 695; 355 NW2d 654 (1984). The trial court determined that plaintiff failed to establish the existence of such a relationship because the relationship between plaintiff and Magna arose entirely out of contract. The court indicated that, as a matter of law, fiduciary duties must arise independently from contractual duties.

"Whether a duty exists is a question of law for the court to decide." *Prentis*, 266 Mich App at 43. "A fiduciary relationship arises from reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another." *Id*. at 43 (quotation marks and citation omitted). "When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship." *Id*., citing *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999).

> Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer. [*Calhoun co v Blue Cross Blue Shield of Michigan*, 297 Mich App 1, 20; 824 NW2d 202, 213 (2012) (quotation marks and citation omitted).

"Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care." *Id*. at 20.

Plaintiff relies on a string of historical cases for the proposition that a fiduciary relationship could have existed in this case, and often can arise outside of the context of traditional fiduciary relationships. In *Tompkins v Hollister*, 60 Mich 470, 479; 27 NW 651, 656 (1886), our Supreme Court found a fiduciary relationship existed between the plaintiff and the coexecutor of her husband's estate when the coexecutor failed to inform the plaintiff that she was not personally liable on a debt. The Court noted that the plaintiff "had such implicit faith and confidence in [the coexecutor] as to trust nearly all the business to him, and to accept unhesitatingly his guidance and control in all the financial matters pertaining to her husband's business and her own." In determining that the coexecutor had fiduciary obligations to the plaintiff, the Court noted:

> It seems to me that the whole controversy here hangs upon the question whether the relation that the defendant [coexecutor] in this transaction bore to the complainant was of such a fiduciary, or quasi-fiduciary, character that he was bound by that relation to inform complainant of her rights in the premises. If it was his duty to inform her that she was not personally liable upon [a debt] and he neglected to do so, especially for his own benefit, or that of his bank, he committed a fraud upon her which entitles her to relief. And it makes no difference that she may have an adequate remedy at law. Equity has concurrent jurisdiction in cases of fraud, and she can enforce her rights in this suit. And especially does equity take cognizance of a case where one, holding confidential and fiduciary relations to another, and thereby morally and legally bound to communicate facts, conceals them for his own benefit and profit, and to the disadvantage of the other. [*Tompkins*, 60 Mich 470, 479.]

In *Barret v Breault*, 275 Mich 482, 484-485; 267 NW 544, 545 (1936), the Michigan Supreme Court found that a fiduciary relationship existed where the plaintiff reposed "perfect confidence and trust in the [defendants]." The Court noted that, "[w]here the basis of the action is a fraud perpetrated by the defendant, the original fraud is regarded as a continuing affirmative act, and mere silence of the defendant is treated as concealment." *Id*. at 491. Quite unlike this case, however, the defendant in *Barret* "acknowledged the existence of … a confidential and fiduciary relationship," and plaintiff seems to ignore the fact that *Barret* involved an agency relationship whereby the plaintiff hired the defendants for the purpose of selling real property. *Id*. at 484-485.

In *Groening v Opsata*, 323 Mich 73, 82, 84; 34 NW2d 560 (1948), the Court concluded that a fiduciary duty existed when the defendants, who held themselves out to be experienced builders, did not fully inform the plaintiffs of flaws in real property they sold to the plaintiffs. The Court noted that the plaintiffs explicitly relied on the defendants for their expertise, and the defendants were aware of that reliance. *Id*. The Court further noted "[t]hat concealment of material facts that one under the circumstances is bound to disclose may constitute actionable fraud is not open to question." *Id*. at 83 (citations omitted). " 'The concealment of a fact which one is bound to disclose is an indirect representation that such fact does not exist, and constitutes fraud.' " *Id*. at 84, 86, quoting 37 CJR, Fraud, § 108, p 245. That having been said, in *Groenig*, the plaintiffs provided evidence that they posed specific questions to the defendants and the defendants made express statements in response that excluded "true facts in accordance with the duty resting on [the defendants] in replying to plaintiffs' inquiries." *Id*. at 86-87. The Court suggested that, beyond mere silence, this was akin to "alleged misrepresentations" on defendants' part. *Id*.

Notably, each of the cases relied on by plaintiff involve characteristics similar to traditional fiduciary relationships. *Tompkins*, 60 Mich at 479, involved the executor of an estate and a beneficiary of that estate. *Barrett*, 275 Mich at 484-485, involved an agency relationship wherein the agents were responsible for selling and making collections on real property on behalf of the plaintiff. *Groenig*, 323 Mich at 82, involved experienced builders from whom the plaintiff purchased real property and the plaintiff's explicit reliance on the builders' expertise and advice concerning that property. Magna is not ignorant of this point, and argues that Michigan courts are generally reluctant to extend causes of action for breach of fiduciary relationship beyond the traditional context.

Magna relies on *Ulrich v Fed Land Bank of St. Paul*, 192 Mich App 194, 196-197; 480 NW2d 910 (1991), wherein this Court held that a fiduciary relationship did not exist between a financial lender and a borrower. The plaintiff alleged that the lender had assumed the position of a fiduciary because of the plaintiff's naivete coupled with the lender's advertisements to the public concerning its expertise. *Id*. at 196. The breadth of *Ulrich*'s holding, however, seems to be limited to the conclusion that "no fiduciary relationship was created between the parties through [the lender's] attempt to solicit business from the public at large through advertisements." *Id*.

Magna also relies on *Bero Motors v Gen Motors Corp*, unpublished per curiam opinion of the Court of Appeals, issued October 2, 2001 (Docket No. 224190).[3] In *Bero*, this Court held that a fiduciary duty did not arise out of an oral agreement whereby General Motors allegedly agreed to allow the plaintiff to "exercise . . . [an] option for first refusal to purchase another automobile dealership." *Id*. at 1. This Court noted that the parties were " 'experienced for-profit entities in a commercial setting' and [the] plaintiff's simple allegations of reliance on another was insufficient to establish a fiduciary relationship." *Id*.

> In addition, the existence of § 17.1 of the franchise agreement and its statement that "[n]o fiduciary obligations are created by this agreement," provided notice of the context of the parties' course of business and thus any reposing of faith, confidence, and trust, and reliance upon the judgment and advice of another by plaintiff would have been misplaced, self-defeating and unwise.
>
> Here, the parties' existing and continued relationship is driven by profits. Plaintiff's mere expression that it relied on GM to effect the oral promise is unconvincing against a commercial backdrop where sophisticated commercial entities, such as here present, regulate the minutiae of their relationship through written contracts. [*Id*. at 5 (citation omitted).]

Notably absent from the contract in this case is a provision that "no fiduciary obligations are created by th[e] agreement." That having been said, Magna does point out that the parties in this case could be considered sophisticated commercial entities capable of regulating their relationship through contract.[4]

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[3] Pursuant to MCR 7.215(C)(1), unpublished opinions are not binding on this Court.

[4] It should not be ignored, however, that in *Bero* this Court made the statement regarding the ability of the parties to regulate their relationship through written contract in the context of the plaintiff

Ultimately, we find plaintiff's argument more convincing. In *Tompkins*, our Supreme Court held:

> Where one relies upon another, and has a right to so rely, and the person relied upon omits to state a most material legal consideration, within his knowledge, of which the other is ignorant, affecting his rights, and the person thus ignorant acts under this misplaced confidence, and is misled by it, a court of equity will afford relief, especially if such action is to the advantage of the person whose advice is taken, even though no fraud was intended. If it appears, under such circumstances, that the knowledge was concealed, or any misrepresentation made, with an intent to keep the party in ignorance of his rights under the law, for the express purpose of the other's benefit, such action is fraudulent, and there can be no doubt of the right of equity to interfere and remedy the wrong. [*Tompkins*, 60 Mich at 480-481.]

The facts alleged by plaintiff in this case neatly fit that scenario. Plaintiff entrusted Magna with the exclusive right to develop and manufacture its intellectual property, with the caveat that any future improvements developed by Magna during the life of the license agreement would belong to plaintiff. Magna explicitly agreed to inform plaintiff of any improvements made to plaintiff's mirror, and according to plaintiff, failed to do so. See *Calhoun Co,* 297 Mich App at 20 (noting that a fiduciary relationship may exist "when one person has a duty to act for . . . another on matters falling within the scope of the relationship."). And, while in many instances a contractual duty may not give rise to a fiduciary duty, in this case, plaintiff alleges that Magna had unique control over his intellectual property, and plaintiff reasonably relied on Magna's promise to inform plaintiff of improvements to that property for plaintiff's benefit. See *id*. (noting that a fiduciary relationship arises "when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first"). Plaintiff gave Magna substantial control over the development and production of its invention with the understanding that Magna would include plaintiff in any development that occurred over the life of their contract so that both could share in the profits. And, in light of the unique trust plaintiff placed in Magna, this Court cannot ignore the fact that, assuming plaintiff's factual allegations regarding the improvements are true, Magna's failure to inform plaintiff of the alleged improvements may have resulted in substantial financial gain on the part of Magna at the expense of plaintiff and in direct violation of Magna's promise to plaintiff.

Under these circumstances, we conclude that further factual development could provide a basis for plaintiff to establish that fraudulent concealment occurred. Accordingly, it was erroneous for the trial court to grant Magna summary disposition on this issue under MCR 2.116(C)(7).

III. STATUTORY CONVERSION

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having relied on an oral agreement as the basis for its argument that the defendant owed a fiduciary duty. See *Bero*, unpub op at 5. The same is not true in this case.

Plaintiff lastly contends that the trial court erred by dismissing plaintiff's complaint for statutory conversion under MCR 2.116(C)(8) on the basis that plaintiff did not allege any duty arising separately from plaintiff and Magna's contractual relationship. We disagree.

Motions for summary disposition under MCR 2.116(C)(8) are also reviewed de novo. *Mendelson Orthopedics PC v Everest Nat'l Ins Co*, 328 Mich App 450, 457; 938 NW2d 739 (2019). "A motion under MCR 2.116(C)(8) tests whether the opposing party has failed to state a claim on which relief can be granted." *Id*. "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Liang v Liang*, 328 Mich App 302, 310; 936 NW2d 710 (2019) (quotation marks and citation omitted). We consider only the pleadings. *Id*. A motion "may be granted only where the claims are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Id*. at 310-311.

Traditionally, common-law conversion has been defined as "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Aroma Wines & Equip, Inc v Columbian Distribution Services, Inc*, 497 Mich 337, 346; 871 NW2d 136, 145 (2015) (quotation marks and citation omitted). "While the tort of conversion originally required a separate showing that the converter made some use of the property that amounted to a total deprivation of that property to its owner, by the twentieth century common-law conversion more broadly encompassed any conduct inconsistent with the owner's property rights. In this context, the Legislature enacted MCL 600.2919a." *Id*. at 353. MCL 600.2919a provides:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> * * *
>
> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise. [MCL 600.2919a(1)(a) and (2).]

Separate from common-law conversion, we define statutory conversion as "knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property." *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 592-593; 683 NW2d 233, 241 (2004). We generally describe the crime as consisting of the elements of common-law conversion with the additional requirement that "a plaintiff seeking treble damages pursuant to § 2919a(1)(a) must 'present[ ] evidence that the conversion was to defendant's "own use" as required by MCL 600.2919a(1)(a).' " *Aroma Wines*, 497 Mich at 356. In *Aroma Wines*, we referred to statutory conversion as a "subset of common-law conversion" in which the conversion must specifically be "to the other person's 'own use.' " *Id*. at 354-355.

At issue in this case is the general principle that, "in case of nonfeasance in performance of a contract . . . an action sounding in tort cannot be founded thereon." *Hart v Ludwig*, 347 Mich

559, 897; 79 NW2d 895 (1956). See also *Llewellyn-Jones v Metro Prop Group, LLC*, 22 F Supp 3d 760, 778 (ED Mich, 2014), citing *Hart*, 347 Mich at 567 (referencing *Hart* as having "held that a plaintiff may not prevail on any claim for tort liability where the relationship of the parties is entirely governed by a contract between them").[5] Michigan Courts have employed the rule that, if a relationship does not exist that would give rise to a legal duty separate from enforcement of a contractual promise itself, a cause of action arising in tort cannot be maintained. *Brewster v Martin Marietta Alum Sales, Inc*, 145 Mich App 641, 668; 378 NW2d 558 (1985). Thus, to determine whether plaintiff's statutory conversion claim is actionable, "the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647, 658 (1997).

In *Rinaldo*, our Supreme Court held that a plaintiff's claim for negligent performance was not founded on any independent legal duty distinct from the duties arising out the plaintiff's contractual relationship with the defendant, noting:

> In this case, as in *Hart*, the defendant agreed to provide the plaintiff with services under a contract. Like the defendant in *Hart*, [this defendant] allegedly failed to fully perform according to the terms of its promise. While 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 plaintiff does not allege violation of an independent legal duty distinct from the duties arising out of the contractual relationship. [*Rinaldo*, 454 Mich at 85.]

The Court noted, "regardless of the variety of names [the] plaintiff [gave] the claim, [the] plaintiff [was] basically complaining of inadequate service and equipment." *Id*. Under those circumstances, there was "no cognizable cause of action in tort." *Id*.

The same is true in this case. Fundamentally, plaintiff's statutory conversion claim stems from the same failure by Magna that is the basis of his breach-of-contract claim: Magna's failure to abide paragraph 5 of the license agreement by informing plaintiff of improvements made to plaintiff's mirror and assist plaintiff in obtaining patent protection related to those improvements. And, while plaintiff suggests in his complaint that Magna "wrongfully converted the improvements to [Magna's] own use," in that same sentence, plaintiff premises the "wrongful conversion" on the fact that Magna "refused to pay royalties to Plaintiff." That is, plaintiff alleged that conversion occurred after Magna failed to pay royalties *under the contract*.

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[5] We note that Magna's brief relies heavily on *Llewellyn*, which, while giving a helpful explanation of the principle in Michigan caselaw that a cause of action for tort must arise from a duty distinctive from contractual obligations, also incorrectly refers to that policy as the "economic-loss doctrine." *Llewellyn*, 22 F Supp 3d at 78. While the economic-loss doctrine stems from the former policy, the two are not one in the same. See *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 84-85; 559 NW2d 647, 658 (1997) (explaining that the "economic-loss doctrine" is a subset of the broader doctrine stemming from *Hart* that specifically applies to sales contracts governed by the UCC).

Moreover, plaintiff essentially confirmed below that his common-law conversion claim—and therefore his statutory conversion claim—was not supported by any legal duty distinct from the duties that arose out of the license agreement. In response to Magna's initial complaint for summary disposition, plaintiff wrote:

> Plaintiff does not dispute that its tort claim for common law conversion arises from Defendant's alleged exercise of dominion over property [i.e., Pivot Connection Improvement and the '946 Patent] which was created pursuant to the terms of the License Agreement and will agree to dismiss this claim.

Rather than suggest as it does on appeal that plaintiff's statutory conversion is supported by a legal duty independent from contract, plaintiff argued below that MCL 600.2919a dispensed of that requirement:

> [A]s to Plaintiff's statutory conversion claim under MCL 600.2919a, Plaintiff[']s remedy for conversion is independently created by statute which the Michigan legislature intended would afford a remedy for conversion in addition to and cumulative to other remedies available to plaintiffs, including but not limited to contractual remedies sought by Plaintiff in Count I of its Complaint.

Plaintiff briefly reasserts this argument on appeal.

Indeed, MCL 600.2919a(2) provides: "The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise." Our Supreme Court has held before that the plain language of MCL 600.2919a(2) "indicates the cumulative nature of statutory conversion claims." *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 9-10; 779 NW2d 237 (2010). That is, MCL 600.2919a(2) allows plaintiffs to obtain remedies cumulative to other remedies at law for the same breach of duty. *Id*. However, MCL 600.2919a(2) provides a remedy for proper claims brought pursuant to the rest of the statute: claims of statutory conversion.

On appeal, plaintiff at once argues that his statutory conversion claim is for breach of a legal duty *separate and distinct* from the duty created by the license agreement, and as evidence of that fact, notes that MCL 600.2919a(2) allows for cumulative remedies for the *same* breach of duty. The legal duty element of a conversion claim is not the same thing as the remedy for a conversion claim, and only the latter is addressed by MCL 600.2919a(2). Plaintiff cites caselaw for the proposition that MCL 600.2919a(2) allows a plaintiff cumulative remedies for the same breach, but in no way explains how that caselaw supports the assertion that statutory conversion claims may be maintained when the legal duty at issue stems entirely from the parties' contractual relationship.

We conclude that plaintiff's statutory conversion claim was plaintiff's breach-of-contract claim by another name. Both claims are premised on Magna's failure to pay royalties under the contract, and accordingly, the trial court was correct to dismiss the statutory conversion claim under MCR 2.116(C)(8). Moreover, plaintiff's argument that MCL 600.2919a(2) dispenses of the requirement that conversion claims—statutory or otherwise—be supported by independent duties arising in tort is without merit. MCL 600.2919a(2) applies to the remedy available for a valid claim of statutory conversion, and where no such claim is made, the provision does not apply.[6]

IV. CONCLUSION

The trial court erred when it determined that the license agreement did not automatically transfer the ‘946 Patent to plaintiff after the patent was issued, and as a result, erred in dismissing plaintiff’s breach of contract for Magna’s failure to pay royalties related to the ‘946 Patent under MCR 2.116(C)(7). The trial court also erred in determining that the facts could not support the existence of a fiduciary duty on the part of Magna to inform plaintiff of improvements to the Extendable Rearview Mirror. Factual development could lead to the conclusion that Magna fraudulently concealed the improvements, and therefore, the trial court also erred in dismissing plaintiff’s breach-of-contract claim for Magna’s failure to inform plaintiff of improvements made to the Extendable Rearview Mirror.

With respect to plaintiff’s statutory conversion claim, plaintiff failed to allege a legal duty arising in tort that was independent from the duty that arose from plaintiff’s contractual relationship with defendant. Accordingly, the trial court did not err in dismissing plaintiff’s claim pursuant to MCR 2.116(C)(8). Additionally, plaintiff’s suggestion that MCL 600.2919a(2)’s allowance of cumulative remedies for statutory conversion dispenses with a fundamental element of the tort—the existence of a duty—is without merit.

The dismissal of plaintiff’s statutory conversion claim is affirmed. Plaintiff’s breach-of-contract claims, however, are reinstated, and this matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle

[6] Because plaintiff failed to plead an actionable statutory conversion claim, this Court need not address whether that claim would also have been subject to tolling based on fraudulent concealment.