STATE OF MICHIGAN

COURT OF APPEALS

BAY COUNTY ROAD COMMISSION,

Plaintiff-Appellee,

v

JOHN E. GREEN COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 16, 2021

No. 347439; 347712
Bay Circuit Court
LC No. 18-003444-NZ

Before: GADOLA, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

In Docket No. 347439, defendant, John E. Green Company, appeals by delayed leave granted[1] the trial court's order denying defendant's motion for summary disposition under MCR 2.116(C)(8), and the court's order denying defendant reconsideration of the decision to dismiss. We reverse and remand.

In Docket No. 347712, defendant appeals as of right the trial court's order denying defendant's motion to compel arbitration, stay the proceeding and dismiss the claims under MCR 2.116(C)(7). We affirm.

I. BACKGROUND

This case arises from the multi-million-dollar construction of plaintiff Bay County Road Commission's Bay Area Water Treatment Plant in Bay County, Michigan. Plaintiff had contracted with Spence Brothers to oversee the project as general contractor. Spence Brothers in turn subcontracted with defendant to perform mechanical work. Sometime after construction had begun, plaintiff began to notice defects in some of the pumps on which the defendant performed

[1] *Bay County Road Commission v John E Green Company*, unpublished order of the Court of Appeals, entered August 12, 2019 (Docket No. 347439).

work. Subsequent to this discovery, plaintiff and defendant executed a remediation agreement with time specific deliverables.

While the work under that remediation agreement was in progress, plaintiff filed a one count negligence complaint against defendant. Plaintiff alleged that defendant owed plaintiff common-law duties that included "the duty to act in a manner that does not cause unreasonable danger to its property, to perform its designs and work in accordance with industry standards and to perform its designs and work in accordance with the Mechanical Subcontract, contract documents, plans and specifications." Defendant filed a motion for summary disposition under MCR 2.116(C)(8) and requested vexatious pleading sanctions. Defendant argued that it owed no duty to the plaintiff, who at best was a third-party beneficiary of defendant's contract with Spence, and that plaintiff failed to allege that defendant owed it a duty that was separate and distinct from the subcontract. In response, plaintiff filed its first amended complaint that added two breach of contract claims (one under the subcontract and one under the remediation agreement) and reiterated the negligence claim. Plaintiff's amended negligence claim alleged that defendant owed plaintiff both a common law duty to use ordinary care in its undertakings and a statutory duty under the Occupational Code, MCL 339.101, *et seq*., as a licensed mechanical contractor to protect the health, welfare and safety of the public. Defendant again moved for summary disposition of plaintiff's negligence claim, this time maintaining that no statutory duty existed under the Occupational Code, that defendant otherwise owed no common law duty to plaintiff, and that plaintiff was not an intended third-party beneficiary to the subcontract.

After a hearing, the trial court denied defendant summary disposition. The court found that plaintiff was an intended third-party beneficiary of the subcontract between Spence and defendant and that plaintiff had established at the least, a claim of professional negligence. Defendant was denied reconsideration of the decision. The denial of the negligence claim is the focus of the appeal in Docket No. 347439.

After its unsuccessful dispositive motion, the defendant moved the court to compel arbitration of plaintiff's claims under the subcontract, to stay proceedings in the trial court during the pendency of the arbitration , and for summary disposition under MCR 2.116(C)(7). Defendant asserted that as a third-party beneficiary to the subcontract, plaintiff was bound by the arbitration provision in the subcontract. Plaintiff responded that the alternative dispute resolution provision in the contract between plaintiff and Spence, which gave plaintiff the option to elect to litigate rather than mediate, was incorporated by reference into the subcontract. The court agreed with plaintiff's interpretation of the general contract and subcontract and denied defendant's motion to compel and dismiss. That dismissal is the focus of the appeal in Docket No. 347439.

II. SUMMARY DISPOSITION

Defendant argues that the trial court erred in denying him summary disposition of plaintiff's negligence claim. We agree.

A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 205-206; 920 NW2d 148 (2018).

> 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. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood*, 461 Mich 109, 119–120; 597 NW2d 817 (1999) (quotation marks and citations omitted)].[2]

We also review de novo the determination of whether a duty exists. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012).

B. ANALYSIS

To establish a prima facie case of negligence, a plaintiff must prove that "(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." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). At issue in this case is whether defendant, who subcontracted with Spence to perform mechanical work at plaintiff's water treatment plant, also owed a duty of care to plaintiff.

Plaintiff's first amended complaint alleged that as an engineer, mechanical contractor, and/or design professional, defendant "had a preexisting, separate, and distinct (from any contractual obligations) duty to perform the Mechanical Work in a manner that protected the safety, health, and welfare of the public, including [plaintiff]." In its motion opposing summary disposition, plaintiff argued that this duty arose from the Occupational Code, MCL 339.101, *et seq*., (the Code) under which the defendant, as a mechanical contractor, was required to be licensed.[3] Plaintiff analogized its case to *People v Babcock*, 343 Mich 671, 680; 73 NW2d 521 (1955) and *W W White Co v LeClaire*, 25 Mich App 562, 564; 181 NW2d 790 (1970), both of which examined MCL 338.551 *et seq*, now replaced by professional licensing statutes for architecture, professional engineering and land surveying. In *Babcock*, the Michigan Supreme Court held that "the legislative intent in enacting [MCL 338.552] was to safeguard life, health, and property, when it restricts to qualified persons, both as to education and experience, the designing and construction of a building." 343 Mich at 675. In *W W White Co*, a panel of this Court held

[2] Below, defendant moved for summary disposition under MCR 2.116(C)(8) and (10). However, defendant indicates on appeal that (C)(10) was only relevant "as to the issue of timing under the RWP Settlement Agreement in Count I" of the amended complaint. Therefore, we only consider summary disposition of plaintiff's negligence claim (Count III of the amended complaint) under (C)(8).

[3] The Occupational Code applies to and regulates skilled trades. MCL 339.5101 *et seq*.

that "[t]he express purpose of [MCL 338.551] is to safeguard public life, health and property." 25 Mich App at 564.

The Occupational Code does not include either the exact express purpose clause found in MCL 338.551 nor any similar words or phrases. In discussing the licensure requirements under the Occupational Code, MCL 339.601(3), this Court has stated that:

> Nowhere in article 6 is there any intimation by the Legislature that private persons may bring or intervene in civil actions to enforce any of the provisions of the Occupational Code. Michigan jurisprudence holds that where a statute creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred. . . .
>
> This makes clear that in enacting the Occupational Code the Legislature considered whether and to what extent private rights of action unknown to the common law ought to be created, and thus that the failure to provide for such private rights with respect to violations of other than the licensing requirements was advertent, an archetypal exemplar of the principle of *expressio unius est exclusio alterius*. [*Claire-Ann Co v Christenson & Christenson, Inc*, 223 Mich App 25, 30-31; 566 NW2d 4 (1997)].

Thus plaintiff, under the holding in *Claire-Ann Co*, is owed no duty under the licensing requirements of the Code, which did not create a duty owed to private parties, like plaintiff.

Plaintiff's common law duty claim is also devoid of legal support. Our Supreme Court has recognized that "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done[.]" *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). In *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), the Michigan Supreme Court instructed that:

> the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie.
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> * * *
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> [I]f defendant fails or refuses to perform a promise, the action is in contract. If defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made. [*Id*. at 467, 469-470.]

Later, in *Loweke*, the Court clarified that "*Fultz*'s directive is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to another." 489 Mich at 169. A court must determine, "whether, aside from the contract, a defendant is under any legal obligation to act for the benefit of the plaintiff[.]" *Id*. at 168 (quotation marks and citation omitted). The Court explained that "a separate and distinct duty to support a cause of action in tort can arise by statute, or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties, and the generally recognized common-law duty to use due care in undertakings." *Id*. at 169-170 (citations omitted).

Plaintiff argues that defendant had a common law duty to "protect[] the safety, health, and welfare of the public," however, the contract itself articulates the duty owed by the defendant to both Spence and the owner, plaintiff. The subcontract also provided that defendant would perform its work "in a prudent and safe manner; maintain a safe and secure workplace; insure the safety of all persons and property of yourself and others; comply with all safety requirements of the Owner." Plaintiff does not otherwise plead facts to support a duty of care for mechanical contractors to act so as to protect the safety, health, and welfare of the public.

Viewing the factual allegations in the first amended complaint in a light most favorable to plaintiff, plaintiff failed to show the existence of a duty owed to it under the Occupational Code or common law, and the trial court erred in denying dismissal of plaintiff's negligence claim.[4] Because the issue of duty is dispositive, we need not address the parties' arguments as to damages.

III. SUBJECT MATTER JURISDICTION

Defendant argues that the trial court erred in deciding whether plaintiff's claims were arbitrable. We disagree.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

Defendant raises the issue of the trial court's subject matter jurisdiction for the first time on appeal. The issue is not waived where "a challenge to subject-matter jurisdiction may be raised at any time, even if raised for the first time on appeal." *Smith v Smith*, 218 Mich App 727, 729–730; 555 NW2d 271 (1996).

"Existence of subject-matter jurisdiction is a question of law reviewed de novo." *Midwest Energy Co-op v Michigan Pub Serv Com'n*, 268 Mich App 521, 523; 708 NW2d 147 (2005). "Issues of statutory interpretation are [also] questions of law that this Court reviews de novo."

[4] We find defendant's contention, that the occupation of mechanical contractor is regulated under the Skilled Trade Regulations Act (STRA), MCL 339.5101, *et seq*., and the Single State Construction Code Act (SSCCA), MCL 125.1501, *et seq*., and not under the Occupational Code to be of no importance to our holding. While mechanical contractor is not an occupation specifically listed in the Occupational Code, the STRA is a subsection of the Occupational Code, and therefore, the same analysis — that no duty arises under the Occupational Code from mere licensure — applies.

Spectrum Health Hosps v Farm Bureau Mut Ins Co of Michigan, 492 Mich 503, 515; 821 NW2d 117 (2012).

B. ANALYSIS

"Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 528; 695 NW2d 508 (2004) (quotation marks and citation omitted). Our state constitution provides that the "circuit court shall have original jurisdiction in all matters not prohibited by law[.]" Const.1963, art. 6, § 13.

> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state. [MCL 600.605].

MCL 600.605 vests the circuit court with original jurisdiction to hear and decide all civil claims, unless: 1) exclusive jurisdiction is given in the constitution or by statute to some other court, or 2) where the circuit courts are denied jurisdiction by the constitution or statutes of this state. Defendant argues that the Michigan Uniform Arbitration Act (MUAA), MCL 691.1681 *et seq.*, divested the court of subject matter jurisdiction and allowed delegation of the determination of jurisdiction to the arbitrator. It does not.

> In examining [the provisions of the MUAA], we must apply our longstanding principles of statutory interpretation:
>
> > The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. [*Spectrum Health Hosps v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 515; 821 NW2d 117 (2012) citing *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011)].

The MUAA provides that "The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." MCL 691.1686(2). The MUAA further provides that "On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate under the agreement, the court shall . . . proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." MCL 691.1687(1)(b). Another provision, MCL 691.1684(1), provides that "the parties may vary the effect of the requirements of this act to the extent permitted by law."

Defendant argues that the parties varied the requirements of the MUAA in their subcontract by adding to the arbitration provision that disputes "*shall be decided by Arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . .*" (Emphasis added). Defendant further argues that Rule 9(a) of the Construction Industry

Arbitration Rules granted the arbitrator the power to determine his or her own jurisdiction, thereby divesting the circuit court of subject matter jurisdiction:

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.

We disagree.

Plaintiff's argument is that the legislature, by allowing a variance from the MUAA, allowed the parties to divest the circuit court of jurisdiction. "The divestiture of jurisdiction . . . is a serious matter and cannot be done except under clear mandate of law." *Leo v Atlas Industries, Inc*, 370 Mich 400, 402; 121 NW2d 926 (1963). As our Michigan Supreme Court stated long ago in *Crane v Reeder*, 28 Mich 527, 532–533; 15 Am Rep 223 (1874):

> In dealing with statutes intended to affect or claimed to affect the continuance of jurisdiction in courts of original and general authority the law has always recognized a principle of construction which served to favor the retention of jurisdiction. . . . Indeed the authorities are very numerous and striking, that before it can be claimed that an act is to have the effect to absolutely divest a jurisdiction which has regularly and fully vested, the law in favor of it must be clear and unambiguous. . . .
>
> Whatever presumptions are permitted are in favor of the retention of the authority, are in favor of the usual and ordinary course, as opposed to what is unusual and exceptional; and it is very natural and reasonable to suppose that the Legislature, in so far as they should think it needful to authorize interruptions and the shiftings of jurisdiction, would express themselves with clearness and leave nothing for the play of doubt and uncertainty.

In other words, "[t]he language must leave no doubt that the Legislature intended to deprive the circuit court of jurisdiction of a particular subject matter." *Detroit Auto Inter-Ins Exch (DAIIE) v Maurizio*, 129 Mich App 166, 175; 341 NW2d 262 (1983).

Defendant's subject matter jurisdiction challenge fails under MCL 600.605 (circuit court's original jurisdiction statute) and under MCL 691.1684 (the MUAA provision allowing the parties to vary the Act's requirements). Under MCL 600.605, the circuit court's original jurisdiction extends to all civil claims except where, as alleged in this case, the circuit court is denied jurisdiction by the statutes of this state. Case law then dictates that the language of the legislation "must leave no doubt" that the Legislature's intent was to deprive the court of jurisdiction. *DAIIE*, 129 Mich App at 175. The statutory language which defendant relies on is in MCL 691.1684(1), that "the parties may vary the effect of the requirements of this act to the extent permitted by law." Plainly read, this statutory language says nothing about depriving the circuit court of jurisdiction. To the contrary, subsections (2) and (3) of the same statutory section state that the parties to an agreement to arbitrate "may not vary the effect of" MCL 691.1686 or MCL 691.1687, which grant the court authority to decide the existence of an arbitration agreement or whether an issue is arbitrable, summarily decide the issue, and order the parties to arbitrate. MCL 691.1684(2)(a) and

(3). Neither do the Construction Industry Arbitration Rules deprive the court of subject matter jurisdiction because they are Rules, not statutes as required under MCL 600.605. Accordingly, the MUAA did not deprive the court of subject matter jurisdiction and allow delegation of the determination of jurisdiction to the arbitrator.

IV. MCR 2.116(C)(7)

Defendant argues that the trial court erred (1) in finding that the alternative dispute resolution provision in the general contract was incorporated into the subcontract, and (2) in denying defendant's motion to compel and dismiss. We agree with defendant's first contention, but not his second.

A. STANDARD OF REVIEW

"This Court reviews de novo a circuit court's decision on a motion for summary disposition brought under MCR 2.116(C)(7). Under MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of 'an agreement to arbitrate[.]' " *Altobelli v Hartmann*, 499 Mich 284, 294-295; 884 NW2d 537 (2016) (internal citations omitted). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010).

"Whether a dispute is arbitrable represents a question of law for the courts that we review de novo." *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001).

B. ANALYSIS

Defendant argues that if plaintiff was a third-party beneficiary of the subcontract, as the trial court found, plaintiff was also then subject to the arbitration provision of the subcontract. Defendant further argues that plaintiff's claims of breach of contract and negligence fall within the scope of the arbitration provision. Plaintiff disagrees and argues that the general contract was integrated into the subcontract and that the general contract's dispute resolution provision governs to resolve plaintiff's claims. The trial court agreed with plaintiff and found that under the general contract, plaintiff was not required to arbitrate its claims and was given the right to litigate in the circuit court. Because we determined above that plaintiff's negligence claim should have been dismissed for lack of duty, our analysis under MCR 2.116(C)(7) is confined to plaintiff's breach of contract claims.

"Arbitration is a matter of contract." *Kaleva–Norman–Dickson Sch Dist No 6 v Kaleva–Norman–Dickson Sch Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975). "Accordingly, we must apply the same legal principles that govern contract interpretation to the interpretation of an arbitration agreement." *Beck v Park W Galleries, Inc*, 499 Mich 40, 45; 878 NW2d 804 (2016). "Our primary task is to ascertain the intent of the parties at the time they entered into the agreement, which we determine by examining the language of the agreement according to its plain and ordinary meaning." *Altobelli*, 499 Mich at 295. Effect must be given "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 v United Ins Grp Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) (internal citations omitted). "The general policy of this State is favorable to arbitration."

Detroit v A W Kutsche, 309 Mich 700, 703; 16 NW2d 128 (1944). "Doubts should be resolved in favor of arbitration. The burden is on the party seeking to show nonarbitrability." *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 129; 596 NW2d 208 (1999) (citation omitted).

"The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." MCL 691.1686(2). In *Madison Dist Pub Sch*, 247 Mich App at 595, this Court stated:

> To ascertain the arbitrability of an issue, the court must consider [1] whether there is an arbitration provision in the parties' contract, [2] whether the disputed issue is arguably within the arbitration clause, and [3] whether the dispute is expressly exempt from arbitration by the terms of the contract. Any doubts regarding the arbitrability of an issue should be resolved in favor of arbitration. [Citations omitted.]

As to the first factor in *Madison Dist Pub Sch*, there is an arbitration provision in the subcontract. It reads:

> All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be decided by Arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then existing unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Should we enter into arbitration with the Owner or others regarding matters relating to your Subcontract, you shall be bound by the result of the arbitration to the same degree as Spence Brothers. The prevailing party in any dispute arising out of or relating to this Subcontract or its breach that is resolved by arbitration or litigation (if applicable) shall be entitled to recover from the other party reasonable attorneys' fees, costs and expenses incurred by the prevailing party in connection with such arbitration or litigation. [Subcontract, ¶ 22].

In consideration of the second factor, the subcontract's arbitration provision in pertinent part, states that "All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be decided by Arbitration[.]" In its first amended complaint, plaintiff alleged claims of breach of contract against defendant. The substance of the breach of contract claims was that defendant breached its promise under the subcontract "by failing to properly perform the Mechanical Work". Because plaintiff's claims arise out of or are related to the subcontract or the breach thereof, they are "arguably within the arbitration clause." *Madison Dist Pub Sch*, 247 Mich App at 595.

The third inquiry in *Madison Dist Pub Sch*, requires the Court to consider "whether the dispute is expressly exempt from arbitration by the terms of the contract." *Id*. Again, plaintiff argues that its claims are governed by the general contract's dispute resolution provision. Plaintiff relies on the following italicized subcontract language to argue that the "contract documents"

included the general contract, thereby integrating the general contract into the subcontract by reference:

> Except as otherwise provided herein, you shall furnish all labor, materials, tools, equipment, supervision and services necessary to properly execute the Work. The Work shall be performed by you in a good and workman like manner strictly in accordance with *the Contract Documents which are incorporated by reference*. You promise and warrant that until Spence Brothers' completion of its project neither you or your employees, or anyone working for or under you will engage in any work stoppage, slowdown, or strike. [Subcontract, ¶ 6; Emphasis added].

Plaintiff further relies on Article 9.1.4 of the general contract that defines the "contract documents" to include "this agreement" or the "general contract".[5]

Defendant relies on the following subcontract language to assert that the "contract documents" means only those documents prepared by architect CDM Smith, which collectively include the drawings, plans, and "Specification Sections":

> You and Spence Brothers agree that you will provide Mechanical work (the "Work") as described in this Subcontract (the "Subcontract") and in the contract *documents prepared by CDM Smith* (the "Architect") including Addendum No. 1 dated June 14, 2013, Addendum No. 2 dated June 21, 2013, Addendum No. 3 dated July 2, 2013, Addenda Nos. 4 and 5 dated July 3, 2013 and Addendum No. 6 dated July 5, 2013, *in accordance with the following terms and conditions as noted below (collectively referred to as the "Contract Documents")*:
>
> Provide labor and materials to complete all Work per the *Drawings, Plans and Specifications* contained in the Contract Documents and specifically as included in Specification Sections: . . . [Subcontract, ¶ 1].

We reject defendant's interpretation of the "contract documents" because to only include the drawings, plans and specifications as those documents consisting of the contract documents and prepared by CDM Smith, would render the addenda language nugatory and superfluous. The general contract clearly defines the "contract documents" to include the general contract itself.

Plaintiff posits further that if the "contract documents" include the general contract, then the dispute resolution provision in the general contract applies and governs the resolution of plaintiff's claims, not the arbitration provision in the subcontract. The general contract's dispute resolution provision reads:

> **ARTICLE 16- DISPUTE RESOLUTION**

[5] "The Contract Documents which comprise the Contract between OWNER and CONTRACTOR are attached hereto and made a part hereof and consist of the following: . . . This Agreement." Article 9.1.4.

16.01 *Methods and Procedures*

A. Either Owner or Contractor may request mediation of any Claim submitted to Engineer for a decision under Paragraph 10.05 before such decision becomes final and binding. The mediation will be governed by the Construction Industry Mediation Rules of the American Arbitration Association in effect as of the Effective Date of the Agreement. The request for mediation shall be submitted in writing to the American Arbitration Association and the other party to the Contract. Timely submission of the request shall stay the effect of Paragraph 1 0.05.E.

B. Owner and Contractor shall participate in the mediation process in good faith. The process shall be concluded within 60 days of filing of the request. The date of termination of the mediation shall be determined by application of the mediation rules referenced above.

C. If the Claim is not resolved by mediation, Engineer's action under Paragraph 1 0.05.C or a denial pursuant to Paragraphs 1 0.05.C.3 or 1 0.05.D shall become final and binding 30 days after termination of the mediation unless, within that time period, Owner or Contractor:

1. elects in writing to invoke any dispute resolution process provided for in the Supplementary Conditions; or

2. agrees with the other party to submit the Claim to another dispute resolution process; or

3. gives written notice to the other party of the intent to submit the Claim *to a court of competent jurisdiction*. [Emphasis added].

It is the last sentence in this article that plaintiff and the trial court found provided plaintiff with a right to litigate, thereby exempting plaintiff's claims from arbitration under the subcontract. The subcontract further provides that in the event "any provision of th[e] Subcontract irreconcilably conflicts with a provision of the other Contract Documents, the provision imposing the greater duty or obligation on you shall govern."[6] Plaintiff argues that this means that the general contract's dispute resolution provision trumps the subcontract's arbitration provision because the right to litigate in the general contract irreconcilably conflicts with the right to arbitrate in the subcontract; therefore, litigation—which would be more burdensome on defendant—would govern. While we agree that the contract documents were incorporated by reference and that the general contract is included as part of the contract documents, we disagree that the dispute resolution provision was incorporated into the subcontract.

In *Arrow Sheet Metal Works v Bryant & Detwiler Co*, 338 Mich 68, 75; 61 NW2d 125 (1953), the Michigan Supreme Court held that a "time is the essence" provision in the general contract between the owner and the general contractor had not applied to the subcontract between

[6] Subcontract, ¶ 7.

the defendant general contractor and the plaintiff subcontractor. The subcontract had provided "that the work was to be done in accordance with plans and specifications prepared by named architects and engineers." *Id*. at 70. Copies of the plans and specifications were incorporated from the general contract into the subcontract. The subcontractor sued the general contractor for declaratory judgment of payment owed and for breach of contract for having caused delay in the performance of the contract that cost the plaintiff money. Because the subcontract did not clearly set forth the duties owed the plaintiff, the plaintiff relied on the reference in the subcontract to the plans and specifications in the general contract. "It [was] urged in this regard that such reference incorporated into the subcontract, for the benefit of plaintiff, certain obligations that defendant had assumed in connection with the performance of its work under the general contract." *Id*. The Court found that the reference in the subcontract to the drawings and specifications was only for the "purpose of indicating what work was to be done, and in what manner done, by the subcontractor" because the subcontract "contain[ed] no clause incorporating into itself the provisions of the principal contract, or even in terms referring to that instrument." *Id*. at 77-78. The Court ruled that "in the case of subcontracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified." *Id*. at 78. Therefore, the Court held that the general contract was not admissible evidence against plaintiff and "the contract between the parties must be regarded as controlling." *Id*. at 79-80.

In *Omega Const Co, Inc v Altman*, 147 Mich App 649, 651; 382 NW2d 839 (1985), the plaintiff sought a declaratory judgment that the disputes that arose out of the construction contracts with the defendants were required to be arbitrated or in the alternative that the plaintiff be awarded damages for breach of contract and tort claims. The plaintiff and the defendants executed a contract that stated it was "being signed based on plans and drawings prepared by the architect" and that when the final drawings and specification arrived "they shall be considered part of the Contract Documents for purposes of this Agreement." *Id*. at 653. "On appeal, the defendants admit[ted] that these provisions incorporate the architect's specifications and plans into the parties' contracts." *Id*. The architect's specifications and plans were in a project manual the title page of which was signed by the parties. The project manual contained an arbitration provision that read: "All claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof . . . shall be decided by arbitration . . ." *Id*. at 654. The plaintiff argued that the arbitration provision was incorporated by reference into the parties' contract when they signed the project manual. The defendants moved for summary disposition and argued that clear and unambiguous language was required to show the parties' intent to incorporate the arbitration provision. Applying the holding of *Arrow*, *supra*, the Court held that the parties agreed to incorporate the architect's drawings and specifications for a limited purpose and did not agree on other matters in the project manual or to incorporate the dispute resolution procedures contained in the manual. *Id*. at 656.

So too does it appear in the instant case that the parties intended to incorporate the general contract for the limited "purpose of indicating what work was to be done, and in what manner done, by the subcontractor." *Arrow*, 338 Mich at 77-78. Throughout the subcontract, the mention of the "contract documents" is accompanied with some performance aspect of the mechanical work and the general contract is clearly referenced for the particular purpose of explaining the work that needed to be done. The following subcontract provisions are exemplary:

> 8) ***You shall coordinate and schedule work to insure it is accomplished as an integrated whole . . . such integration shall be undertaken by the subcontractor as part of the subcontractor's work*** and at no additional cost to the contractor, ***whether or not explicitly shown or described in drawing or other Contract Documents.***
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> * * *
>
> 30) You hereby guarantee that ***the Work shall be free from defects and*** shall conform to and ***meet the requirements of the Contract Documents*** and applicable code requirements and ***shall furnish any separate guarantee for the Work or portions thereof required under the Contract Documents. You hereby agree to make good, to the satisfaction of the Owner,*** any portion or portions of the Work which prove defective within ***one (1) year (or such longer period as may be specified in the Contract Documents)*** . . . [Emphasis added].

Further, there is no language in the subcontract evidencing an intent to agree to and incorporate the dispute resolution provision from the general contract. Thus, the substance of plaintiff's claims places them within the arbitration provision of the subcontract and the trial court erred in finding otherwise. However, as a third-party beneficiary of the subcontract, plaintiff was not subject to the subcontract's arbitration provision. Plaintiff was not a party to the subcontract between Spence and defendant, and therefore did not enter into or agree to be bound by the subcontract's arbitration clause. See *Altobelli*, 499 Mich at 295 ("a party cannot be required to arbitrate an issue which it has not agreed to submit to arbitration.") (citation omitted). Accordingly, the trial court did not err in denying defendant's motion to compel arbitration and dismiss plaintiff's complaint under MCR 2.116(C)(7).

We reject defendant's final contention, that the circuit erred in not applying the holding from *Spence Brothers v Kirby Steel*, unpublished opinion per curiam of the Court of Appeals, issued March 14, 2017 (Docket Nos. 329228 and 332083). While the same arbitration provision was at issue in *Spence Brothers*, the trial court was not required to apply its holding here. "Trial courts are not bound by decisions having no precedential value." *Stine v Contl Cas Co*, 419 Mich 89, 95 n 2; 349 NW2d 127 (1984); MCR 7.215(C)(1). "[U]npublished decisions have no precedential value." *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 282-283; 769 NW2d 234 (2009).

In Docket No. 347439, we reverse the trial court's orders related to plaintiff's negligence claim denying defendant's motion for summary disposition under MCR 2.116(C)(8), and defendant's motion for reconsideration. We remand for entry of an order granting summary disposition to defendant on plaintiff's negligence claim. We do not retain jurisdiction.

In Docket No. 347439, we affirm the trial court's denial of defendant's motion to compel arbitration and defendant's motion to dismiss of plaintiff's breach of contract claims.

/s/ Michael F. Gadola
/s/ Cynthia Diane Stephens

STATE OF MICHIGAN

COURT OF APPEALS

BAY COUNTY ROAD COMMISSION,

Plaintiff-Appellee,

v

JOHN E. GREEN COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 16, 2021

No. 347439; 347712
Bay Circuit Court
LC No. 18-003444-NZ

Before: GADOLA, P.J., and GLEICHER and STEPHENS, JJ.

GLEICHER J. (*concurring in part and dissenting in part*).

Bay County invested $42 million in a construction project intended to upgrade the county's water treatment plant. The county alleges that a subcontractor's negligently performed mechanical work caused a cascade of problems including leaks, premature wear on pump tubes, and pumps that generate excessive noise and vibration.

The county assigns responsibility for these results to defendant John E. Green Company (JEG). JEG performed the mechanical work for the project, including the fabrication and installation of plumbing, HVAC, process piping, and fire protection systems. Bay County's first amended complaint avers that after JEG completed its work, the county discovered a number of "errors, omissions, and defects." It seeks damages in contract and tort for remediating the problems that JEG allegedly caused.

JEG sought summary disposition under MCR 2.116(C)(8), contending that it owed Bay County no duty apart from the contractual obligations it owed to the general contractor.[1] The trial court denied summary disposition of Bay County's negligence claim and subsequently denied JEG's motion to compel arbitration.

[1] JEG's lone challenge to Bay County's negligence claim—and the sole basis for the majority's rejection of that claim—is the concept of duty. JEG has offered no other ground supporting the dismissal of Bay County's negligence theory.

The majority reverses the trial court's summary disposition ruling and affirms the arbitration ruling. I concur with the majority's conclusion that because the county was not a party to the arbitration agreement, the county is not bound by it. I respectfully dissent from the majority's duty analysis, as it is incompatible with our Supreme Court's opinion in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011).

I. THE PLEADINGS SUPPORT A DUTY

The procedural posture of this case is vital to my analysis. The issue presented is whether the trial court erred by denying a motion for summary disposition brought under MCR 2.116(C)(8), on the pleadings. Our Supreme Court has stressed that "a motion for summary disposition under MCR 2.116(C)(8) must be decided on the pleadings alone and . . . all factual allegations must be taken as true." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 154-155; 934 NW2d 665 (2019). In evaluating a (C)(8) motion, a court may not contest, disbelieve, or ignore any factual allegations and must rely solely on the pleadings in resolving legal issues. *Id*. at 160. "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id*.

Bay County's first amended complaint avers in relevant part that the Bay Water Treatment Plant provides "the only source of potable water for the residents of Bay County and supplies water utilized in fire suppression systems for commercial buildings, as well as the water utilized by firefighters." The complaint highlights that the plant "is so critical that, in the event it becomes inoperable, there will be merely eight to twelve hours of water sufficient to meet the public health and safety needs of Bay County." These background allegations elucidate that the construction project was intended to benefit the public, and that various public interests would be placed at risk if the project went awry.

The general contractor for the water treatment plant upgrade, Spence Brothers, entered into a subcontract with JEG to perform the mechanical work for the project. The amended complaint asserts that "JEG purports to specialize in the fabrication and installation of plumbing, HVAC, process piping, and fire protection systems, including design build and emergency services." According to the first amended complaint, the county discovered a multitude of problems with JEG's mechanical work. Here is the relevant paragraph:

> 15. In or around August of 2015, the 14-Day Acceptance Test proceeded. Bay County, however, quickly began, and has since continued, to discover substantial errors, omissions, and defects with Mechanical Work. Among other things, Bay County discovered:
>
> a. defective raw water pumps that produce a significant amount of noise;
>
> b. defective clarified water pumps;
>
> c. defective sludge pumps;

d. defective finished water pumps that fail to conform to contractual specifications, which have caused damaging cavitation and vibration far above the allowable industry standard;

e. defective finished water pumps that can only be operated at 80%-82% of maximum output, despite Bay County's purchase of pumps that should be capable of being operated at 100% (even causing MDEQ to *order* Bay County *not to* exceed the 80%-82% range);

f. defective finished water tanks that must be kept at elevated levels to mitigate damaging cavitation to the finished water pumps, which limits the availability of potable water to the Bay County transmissions mains, and consequently jeopardizes capacity to the distribution system;

g. defective drain valves on the finished water piping that leak and have never been repaired;

h. defective drain lines on every skid that have broken because of faulty installation;

i. defective pressure gauges on the suction side of the finished water pumps that fail to conform to contractual specifications;

j. defective thermal protective devices that trip out the finished water pumps when activated, and were disconnected and never repaired, which left the finished water pump motors unprotected from overheating and damage;

k. defective flex couplings on the bulk chemical tanks that were improperly installed;

l. defective chemical feed lines that were never purged of plastic shavings causing premature wear on peristaltic pump tubes;

m. defective chemical feed lines that were kinked when installed, which forced Bay County to replace the lines, and caused a safety issue due to high pressure on chemical lines;

n. defective pipe supports and hangers that were improperly designed, manufactured, and installed, including (but not limited to) those immediately adjacent to the membrane skids, which are deflecting and causing such potentially imminent failure that MDEQ recently required Bay County to file an emergency action plan; and

o. the inability of the Plant to produce and deliver potable water at the design rate of 17.4 million gallons per day.

Voluntary efforts to remediate these issues failed, Bay County claims.

Count III of the first amended complaint sets forth a claim for "negligence," in relevant part stating as follows:

> 45. As an engineer, mechanical contractor, and/or design professional licensed by the State of Michigan, JEG had a preexisting, separate and distinct (from any contractual obligations) duty to perform the Mechanical Work in a manner that protected the safety, health, and welfare of the public, including Bay County.
>
> 46. JEG breached this duty by failing to properly perform the Mechanical Work, including but not limited to those items listed in ¶ 16 d.-o. above.[2]
>
> 47. JEG's breach of this duty has endangered the safety, health, and welfare of the public (including Bay County) and caused damage to Bay County's property.

These allegations, which must be taken as true, adequately set forth a negligence claim.

"Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law." *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). That duty may be created by a statute, "or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Id*. at 261. The Supreme Court highlighted, "This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another." *Id*. (citation omitted).

Whether Bay County's first amended complaint sets forth an actionable claim for negligence against JEG should not be a difficult question, as the allegations describe that JEG violated a duty owed to the people of Bay County to perform its work in a manner that did not endanger the security and functionality of the county's water system. As the Supreme Court explained in *Clark*, a common-law duty "may be a general one owed by the defendant to the public, of which the plaintiff is a part." *Id*. The allegations in the first amended complaint meet this standard.

The majority misses the obvious—that JEG owed a common-law duty to perform its work in a way that did not endanger the county's water system—because it becomes entangled in the effect of the subcontract between Spence and JEG. In *Clark*, the Supreme Court addressed this very issue, explaining that although a contract is "a relevant factor" in a duty determination, it "merely creates the state of things which furnishes the occasion of the tort." *Id*. There, the Court found that the defendant owed the plaintiff a legal duty of care despite the coexistence of

[2] Likely the reference to ¶ 16 is a typographical error, as the paragraph listing the "items" including "d.-o." is number 15 in the first amended complaint.

contractual duties on the defendant's part: "The general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors of inspectors, or anyone else lawfully on the site of the project, is well settled." *Id*. at 262. Here, the contract between JEG and Spence is the reason that JEG was present and performing work at the water treatment plant, but bears no relevance to JEG's obligation to avoid injury to the plant, the water, or Bay County.

Unfortunately, the clarity of *Clark*'s distinction between common law and contractual duties was blurred by our Supreme Court's decision in *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004). The Supreme Court cleaned up the confusion wrought by *Fultz* in *Loweke*, 489 Mich 157. Although the majority cites *Loweke* in support of its holding, I suggest that the majority opinion elides the meaning and import of that case. I fear that the majority's analysis of duty revives the confusion generated by *Fultz*. I turn to a discussion of *Loweke*, which in my view resolves the issue presented here.

II. *LOWEKE*, AND THE DISTINCTION BETWEEN CONTRACTUAL AND COMMON-LAW DUTIES

Citing *Fultz*, the majority opinion recites that when evaluating "tort actions based on a contract and brought by a plaintiff who is not a party to that contract," courts must employ a " 'separate and distinct' mode of analysis." *Fultz*, 470 Mich at 467. Although the majority acknowledges that in *Loweke* the Supreme Court instructed courts to focus on "whether, aside from the contract, a defendant is under any legal obligation to act for the benefit of the plaintiff," the majority fails to follow this rule. Remarkably, several sentences later the majority holds that "the contract itself articulates the duty owed by the defendant to both Spence and the owner, plaintiff."

If the majority is suggesting that the duties JEG might owe to Bay County are subsumed in its subcontract with Spence, the majority has resurrected the confusion created in the wake of *Fultz*. *Loweke* clarified that apart from any contract governing the defendant's relationship with a third party, there is an inherent common law duty to perform contractual undertakings non-negligently. As *Loweke* stressed, ascertaining whether such a common-law duty exists "generally does not necessarily involve reading the contract." *Loweke*, 489 Mich at 169. The majority either misapprehends *Loweke* or simply fails to apply it to these facts.

The *Loweke* Court reinforced *Clark*, highlighting that "a separate and distinct duty to support a cause of action in tort can arise by statute, or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties *and the generally recognized common-law duty to use due care in undertakings*." *Id*. at 169-170 (citations omitted, emphasis added). The salient question is "whether any legal duty independent of the contract" exists. *Id*. at 169. Alternatively stated, the test "is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to another." *Id*.

In no uncertain terms, *Loweke* dictates that the mere existence of a contract between Spence and JEG, or Bay County and Spence, does not preclude Bay County from maintaining a cause of action against JEG for negligence. Rather, the question is whether JEG owed Bay County a duty

to use due care when it undertook to perform extensive mechanical work on Bay County's water treatment plant.

Let's assume that a pedestrian passed by the water treatment plant construction site and was struck in the head by a wrench dropped by a worker employed by JEG. Is there any doubt but that the pedestrian could sue JEG? The duty involved in that hypothetical case is the duty to perform one's work safely so as not to injure others. That the worker's employer had a contract with Spence would be irrelevant to the pedestrian's case; the contract simply provided a reason for the worker's presence on the premises.

Loweke involved a similar duty to provide a safe workplace. The plaintiff there was a workman employed by a subcontractor who was injured by falling boards that had been negligently positioned by a different subcontractor. *Id*. at 159. Explaining that this Court had misinterpreted *Fultz* by holding that the defendant owed no duty to the plaintiff who had been struck by the falling boards, the Supreme Court pointed out that *Fultz* had not "extinguished preexisitng common-law duties[.]" *Id*. at 172. The Court summarized:

> [D]efendant—by performing an act under the contract—was not relieved of its preexisting common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings. That duty, which is imposed by law, is separate and distinct from defendant's contractual obligations with the general contractor. [*Id*.]

Here, Bay County's amended complaint asserts that JEG's negligence "endangered the safety, health, and welfare of the public . . . and caused damage to Bay County's property." The first amended complaint provides a long list of examples of such harms, including noise, leaks, and safety challenges. Regardless of its contract with Spence, JEG owed Bay County a duty to perform its work in a manner that protected the county's residents, their water, and the people's property from harm. *Loweke*'s straightforward lesson is that this common-law responsibility of due care existed separate and apart from JEG's specific contractual obligations. I have no idea of whether JEG actually violated any common-law duties, but Bay County's first amended complaint adequately sets forth an actionable claim that it did. I would affirm the circuit court's denial of summary disposition under MCR 2.116(C)(8).

/s/ Elizabeth L. Gleicher