

STATE OF MICHIGAN  
COURT OF APPEALS

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LEE CHURCHILL and NANCY CHURCHILL,

Plaintiffs-Appellees,

v

J.P. KING AUCTION COMPANY, INC.,

Defendant-Appellant,

and

STEVEN L. REESER,

Defendant.

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UNPUBLISHED

April 10, 2008

No. 274461

Genesee Circuit Court

LC No. 04-079579-NM

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant J.P. King Auction Company, Inc. (defendant), appeals by leave granted from an order granting partial summary disposition to plaintiffs Lee Churchill and Nancy Churchill under MCR 2.116(C)(10).<sup>1</sup> We reverse.

Plaintiffs filed this negligence action against defendant, their real estate broker and auctioneer, alleging that it negligently drafted two purchase agreements that failed to contain an adequate legal description of the property to be sold, thereby allowing the prospective purchaser, Bryan Swarthout, to void the agreements. Plaintiffs' separate lawsuit against Swarthout was dismissed after the court in that case concluded that the purchase agreements were void because they contained inadequate descriptions of the property to be sold.<sup>2</sup> The trial court in this case determined that defendant's voluntary undertaking to prepare purchase agreements for the sale of

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<sup>1</sup> Another defendant, Steven L. Reeser, is not a party to this appeal.

<sup>2</sup> This Court affirmed the dismissal of plaintiffs' lawsuit against Swarthout in *Churchill v Swarthout*, unpublished opinion per curiam of the Court of Appeals, decided April 11, 2006 (Docket Nos. 257151, 260843, 262093).

plaintiffs' land gave rise to a duty of care, enforceable in tort, thereby allowing plaintiffs to proceed with their negligence action.

Defendant argues that the trial court erred in finding that it owed plaintiffs a duty of care, enforceable in tort. We agree.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994).

In negligence actions, the existence of a duty is a question of law for the court, to be reviewed de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). There can be no tort liability unless a duty is found to exist. *Id.*

The trial court found that defendant owed plaintiffs a duty of care, enforceable in tort, arising from a voluntary undertaking. As the trial court properly observed, a duty to act in a nonnegligent manner may arise from a voluntary undertaking to perform an act, where there is no obligation to do so. *Id.* at 465. In this case, however, defendant's preparation of the purchase agreements did not involve a voluntary undertaking. Rather, plaintiffs and defendant are parties to an auction marketing agreement and plaintiffs rely on this agreement as the source for defendant's alleged duty. Indeed, in their brief on appeal, plaintiffs assert that "[i]t is clear [that defendant] agreed by contract to draft purchase agreements for the Plaintiffs, and this Court need only address if this would trigger a tort duty in this case." Plaintiffs also assert that defendant charged them "very large sums of money for special services," and that "[t]he services Plaintiffs paid for was [sic] to include drafting of conveyance instruments." Thus, the material issue in this case is whether plaintiffs may bring an independent action for negligence based on defendant's contractual obligations.

In *Fultz*, the Supreme Court noted that in determining whether a tort action will lie "based on a defendant's contractual obligations," courts historically have drawn a distinction between acts of misfeasance (action) and nonfeasance (inaction), according to the principle that "a tort action will not lie when based solely on the nonperformance of a contractual duty." *Id.* at 465-466. The Court rejected this misfeasance/nonfeasance distinction, however, finding that it "obscures the proper initial inquiry: Whether a particular defendant owes any duty at all to a particular plaintiff." *Id.* at 466. Instead, the Court adopted the "separate and distinct" test, often used in misfeasance cases, which asks whether the tort claim alleges the malfeasance "as the 'violation of a legal duty separate and distinct from the contractual obligation.'" *Id.* at 467, quoting *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997).

As noted by plaintiffs, *Fultz* involved a negligence claim brought by a nonparty to the contract. However, nothing in the Court's analysis suggests that the "separate and distinct" test would not also apply where a negligence claim is asserted by a party to the contract. On the contrary, in *Rinaldo's Constr, supra* at 66-68, 78, on which the *Fultz* Court relied, a commercial client sued the telephone company, in tort, for alleged negligence in performing its contractual obligation to transfer the plaintiff's telephone service to its new address, resulting in economic damages to the plaintiff. In the context of determining whether the plaintiff could maintain an action in tort, our Supreme Court stated that "the threshold inquiry is whether the plaintiff alleges

violation of a legal duty separate and distinct from the contractual obligation.” *Id.* at 84. The Court explained, relying on *Hart v Ludwig*, 347 Mich 559, 565; 79 NW2d 895 (1956), which itself quoted Prosser, *Handbook of Torts*, 1<sup>st</sup> ed, § 33, p 205, that “if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not.”

In *Hart*, the Supreme Court held that a tort action could not be maintained against a defendant who failed to adequately care for the plaintiff’s orchard under the parties’ oral contract. The *Hart* Court explained that a tort action cannot be maintained where “[t]he only duty, other than that voluntarily assumed in the contract to which the defendant is subject, was his duty to perform his promise in a careful and skillful manner without risk of harm to others, the violation of which [was] not alleged.” *Hart, supra* at 565.

Thus, relying on *Hart*, the Court in *Rinaldo’s Constr, supra* at 85, concluded that “[w]hile the plaintiff’s allegations arguably make out a claim for ‘negligent performance’ of the contract, there is no allegation that this conduct by the defendant constitutes tortious activity in that it caused physical harm to persons or tangible property; and plaintiff does not allege a violation of an independent legal duty distinct from the duties arising out of the contractual relationship.” The Court explained that “regardless of the variety of names [plaintiff gives the] claim, [plaintiff is] basically complaining of inadequate service and equipment,” *Valentine v Michigan Bell Tel Co*, 388 Mich 19, 22; 199 NW2d 182 (1972), i.e., a contract violation, and no tort action can be maintained. *Id.*

In this case, plaintiffs concede that defendant’s alleged obligation to use reasonable care in preparing the purchase agreements arises from the parties’ agreement. Plaintiffs’ negligence action does not seek to enforce a duty separate and distinct from the parties’ agreement. Therefore, the trial court erred in finding that defendant owed plaintiffs a duty of care, enforceable in tort.

Although plaintiffs argue that other factors, including principals of agency, defendant’s status as a fiduciary, laws prohibiting the unauthorized practice of law, provisions of the occupational code,<sup>3</sup> and public policy, also support the existence of a duty of care, plaintiffs’

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<sup>3</sup> As argued by plaintiffs, 1999 AC, R 339.22307(4) provides that a licensed real estate broker or salesperson “shall make certain that all terms and conditions of the real estate transaction are included in the offer to purchase.” MCL 339.2508(2) requires that real estate brokers and salespersons be licensed. Under MCL 339.2512a, an unlicensed broker or salesperson may not maintain an action in Michigan to collect a commission. MCL 339.2512(h) provides that “a licensed real estate broker may pay a commission to a licensed real estate broker of another state if the nonresident real estate broker does not conduct in this state a negotiation for which a commission is paid.”

Although “a violation of a statute creates a rebuttable presumption of negligence, [whereas] a violation of an ordinance or administrative rules and regulations is only evidence of negligence,” *Johnson v Bobbie’s Party Store*, 189 Mich App 652, 661; 473 NW2d 796 (1991), a duty of care must first exist. In this case, any duty of care owed by defendant to plaintiffs arises out of the parties’ agreement and, therefore, is not enforceable in tort.

failure to identify a duty separate and distinct from defendant's obligations under the parties' agreement preclude them from maintaining a separate action for negligence.

Reversed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Mark J. Cavanagh