STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA, AUTO CLUB GROUP INSURANCE ASSOCIATION, WESTFIELD INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, HARTFORD FIRE INSURANCE COMPANY, and ALLSTATE INSURANCE COMPANY, Plaintiffs-Appellees, v PROFESSIONAL TEMPERATURE HEATING AND AIR CONDITIONING, INC., Defendant-Appellant.	UNPUBLISHED October 25, 2012 No. 300524 Oakland Circuit Court LC Nos. 2008-096006-NZ 2009-098423-CK 2009-100362-CZ

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying its motions for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). We affirm in part, reverse in part, and remand.

I. FACTS AND PROCEEDINGS

These consolidated actions arise from a fire at an apartment complex. Defendant, a heating and cooling contractor, was retained by the building's owner, JFA Non-Profit Housing Corporation ("JFA"), and its manager, Jewish Apartments and Services, Inc. ("JAS") (collectively "JFA/JAS"), to perform preventative maintenance to the building's heating system pursuant to a maintenance agreement. In 2008, the building was damaged by a fire that was apparently caused by a leaking boiler.

The boiler had been leaking intermittently since at least 2001. JFA/JAS decided to purchase a drip pan from defendant, and defendant ordered the pan. When JFA/JAS's employees installed the drip pan, they placed the pan directly on the wood floor. The parties generally agree that during the seven-year period the drip pan was in place, radiant heat and leaking water from the boiler caused the pan to oxidize, leaving the decaying wooden floor beneath susceptible to heat damage. The 2008 fire occurred directly underneath the boiler.

Plaintiff Hartford Fire Insurance Company ("Hartford") reimbursed its insured, JFA/JAS, for the losses it sustained in the fire. Plaintiffs Citizens Insurance Company of America ("Citizens"), Auto Club Group Insurance Association ("Auto Club"), Westfield Insurance Company ("Westfield"), State Farm Fire and Casualty Company ("State Farm"), and Allstate Insurance Company ("Allstate") reimbursed their insured tenants for fire losses. In LC No. 2008-096006-NZ, Citizens, Auto Club, Westfield, and State Farm Fire, as subrogees for several of the building's tenants, asserted claims for negligence, breach of contract, and product liability. In LC No. 2009-098423-CK, Hartford, as subrogee of JFA/JAS, also asserted claims for negligence, breach of contract, and product liability. In LC No. 2009-100362-CZ, Allstate, as subrogee for other tenants, brought claims for negligence and product liability. The actions were consolidated in the trial court.

Plaintiffs contend that defendant was negligent in failing to inspect the pan, failing to warn JFA/JAS of the fire hazard, and failing to correct the hazardous condition. In support of their product liability claims, plaintiffs alleged that defendant ordered a drip pan that could not be used safely for its intended purpose. Defendant filed several summary disposition motions under MCR 2.116(C)(7), (8), and (10). Defendant argued that the tenants' subrogees failed to plead and prove that defendant owed a duty in support of their negligence claims. Defendant also asserted that a limitation of liability provision in the maintenance agreement precluded its liability for damages arising from a fire. Defendant argued that JFA/JAS's misuse and alteration of the pan defeated the product liability claims. Defendant also contended that the plaintiffs in LC No. 2008-096006-NZ could not assert a valid claim for breach of contract because the tenants were not parties to or third-party beneficiaries of the maintenance agreement. The trial court determined that the tenants were not third-party beneficiaries and dismissed their claims for breach of contract. The court denied summary disposition for defendant with respect to plaintiff Hartford's breach of contract claim and with respect to all of the plaintiffs' negligence and product liability claims.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision regarding a motion for summary disposition de novo. *Patterson v CitiFinancial Mtg Corp*, 288 Mich App 526, 528; 794 NW2d 634 (2010). Summary disposition may be granted under MCR 2.116(C)(8) when a party fails to state a claim on which relief can be granted. *Teel v Meredith*, 284 Mich App 660, 663; 774 NW2d 527 (2009). The motion "tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Id.* at 662 (citation and internal quotations omitted). The reviewing Court accepts all well-pleaded allegations as true, and construes them favorably to the nonmoving party. *Id.*

Summary disposition may be granted under MCR 2.116(C)(10) when the nonmoving party fails to establish a genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93, 96; 815 NW2d 811 (2012). The reviewing court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties. *Id.*

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by a release. When reviewing a motion under MCR 2.116(C)(7), this Court reviews the pleadings

and any documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Id.*

III. TENANTS' SUBROGEES' NEGLIGENCE CLAIMS

To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). A subrogee stands in the shoes of its subrogor and attains the same rights to recover against the third party as held by the subrogor. *Citizens Ins Co of America v American Community Mut Ins Co*, 197 Mich App 707, 709; 495 NW2d 798 (1992). Accordingly, to establish defendant's liability for negligence, it is necessary that the tenants' insurers, as subrogees, establish that defendant breached a duty of care owed to the tenant subrogors.

Defendant argues that it did not owe a duty of care to the building's tenants that was separate and distinct from its contractual duties under the maintenance agreement and, therefore, it cannot be liable to the tenants for negligence. At the time the trial court decided this matter, the principal authority concerning a contracting party's liability in tort to third parties was *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465-467; 683 NW2d 587 (2004), in which our Supreme Court held that a third person seeking recovery for injuries caused by a contractor's performance of contractual duties must demonstrate that the defendant contractor owed the third-party plaintiff a duty of care that was separate and distinct from its contractual duties. After the trial court issued its decision, our Supreme Court decided *Loweke*, 489 Mich at 157, in which it clarified its decision in *Fultz*. In *Loweke*, 489 Mich at 168, the Supreme Court commented that its "separate and distinct" analysis in *Fultz* "has been misconstrued to, in essence, establish a form of tort immunity that bars negligence claims raised by a noncontracting third party." The Court remarked that courts had "misconstrued *Fultz's* test requiring a 'separate and distinct duty' by erroneously focusing on whether a defendant's conduct was separate and distinct from the obligations required by the contract or whether the hazard was a subject of or contemplated by the contract." *Loweke*, 489 Mich at 168. The Court explained:

> This interpretation is incorrect because, in analyzing tort actions based on a contract and brought by a noncontracting third party, *Fultz* directed the courts to focus on "[w]hether a particular defendant owes *any duty at all* to a particular plaintiff," *Fultz*, 470 Mich at 467 (emphasis added), and, thus, generally required an inquiry into whether, aside from the contract, "a defendant is under *any* legal obligation to act for the benefit of the plaintiff . . . .
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> * * *
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> Determining whether a duty arises separately and distinctly from the contractual agreement, therefore, generally does not necessarily involve reading the contract, noting the obligations required by it, and determining whether the

> plaintiff's injury was contemplated by the contract. *Id.* Instead, *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. *Fultz*, 470 Mich at 461-462. As this Court has historically recognized, 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 . . . . [*Loweke*, 489 Mich at 168-169.]

The Court stated:

> Thus, under *Fultz*, while the mere existence of a contractual promise does not ordinarily provide a basis for a duty of care to a third party in tort, "the existence of a contract [also] does not extinguish duties of care otherwise existing . . . ." 1 Torts: Michigan Law and Practice, § 10.18, p 12-25; see, also, *Fultz*, 470 Mich at 468-469. [*Loweke*, 489 Mich at 170 (ellipses in the original).]

The Court concluded that the plaintiff's cause of action "was not brought solely on the basis of defendant's failure to perform its contractual obligations to the general contractor." *Id*. at 171. Rather, the plaintiff claimed "that defendant breached the common-law duty to exercise reasonable care and avoid harm when one acts." *Id.* at 171-172. *Loweke* is consistent with the principle that where a party voluntarily undertakes to perform an act, having no obligation to do so, a duty may arise to perform that act in a non-negligent manner. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 529; 538 NW2d 424 (1995).

Regarding the tenants' subrogees' claims, in performing its responsibilities under the maintenance agreement, defendant had a common-law duty to avoid endangering other persons lawfully present in the building. The evidence established a question of fact whether defendant breached that duty by failing to report an apparent fire hazard related to the heating system that defendant undertook to inspect, and defendant's contractual duties regarding the boiler system cannot be reasonably segregated from the problems with the drip pan. Indeed, the drip pan by itself did not cause the problem. The problem was caused by the placement of the boiler in the pan in direct contact with the combustible floor. Additionally, defendant was in a special relationship giving rise to a duty of care to the tenants. A safe and reliable heating system is not an amenity for apartment dwellers, but an essential service. Defendant knew that JFA/JAS had engaged its services to help ensure that the tenants' units would be safely and reliably heated, and that hot water would be readily available. Thus, plaintiffs properly pleaded the duty element of a negligence claim and factually supported that element with evidence of defendant's contractual relationship with JFA/JAS and its obligations to prevent or warn of the risk of a fire hazard.

We disagree with defendant's argument that our Supreme Court's recent decision in *Hill v Sears Roebuck & Co*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 143329, 143348, & 143633, decided August 16, 2012), compels a different conclusion. In *Hill*, the Supreme Court held that the deliverers/installers of electrical appliances, including an electric-powered dryer, had no duty with respect to a hazard caused by an uncapped gas line that previously served a natural gas-

powered dryer. *Id.*, slip op at 13-15. The Court analyzed the relationship between the installers and the plaintiffs and concluded that the limited relationship did not create a duty extending to the gas line. The Court concluded that the installers did not create a new hazard warranting further duties beyond delivering the appliances. The Court noted that the uncapped gas line was an obvious potential hazard in the plaintiff's home before the new appliances were delivered. Four years after the appliance installation, the plaintiffs inadvertently turned on the gas valve connected to the gas. *Id.*, slip op at 5-6. The immediate hazard created by this incident was obvious to the plaintiffs, who could smell the leaking natural gas, but they did nothing to correct the leak. *Id.*

The relationship between the parties in *Hill* is significantly distinguishable from the tenants' relationship with defendant in this case. Unlike the defendants in *Hill*, who had only a limited duty to deliver and install the appliances, defendant here had an ongoing duty to inspect the boiler system for problems and hazards. Defendant accepted responsibilities to perform preventative maintenance and inspections that the tenants could not have performed on their own behalf because they did not have access to the maintenance room where the boiler was located. Thus, defendant's reliance on *Hill* is misplaced.

For these reasons, we affirm the trial court's order denying defendant's motion for summary disposition with respect to the tenants' subrogees' negligence claims.

IV. HARTFORD'S NEGLIGENCE CLAIM

Although defendant and Hartford analyze this issue in relation to *Fultz*, 470 Mich 460, Hartford's claims against defendant are significantly distinguishable from the issue in *Fultz*, which addressed a contractor's liability toward non-parties to the contract. As subrogee to the owner and operator of the building, Hartford stands in the subrogors' shoes and must therefore demonstrate that defendant is subject to tort liability to the subrogor parties to the maintenance agreement. *Citizens Ins Co*, 197 Mich App at 709.

In *Neibarger v Universal Coops, Inc*, 439 Mich 512, 527-528; 486 NW2d 612 (1992), our Supreme Court adopted the "economic loss doctrine," which holds that where a plaintiff seeks recovery for economic loss caused by a defective product purchased for commercial purposes, Article 2 of the Uniform Commercial Code (UCC) provides the exclusive remedy. The Court acknowledged that the economic loss doctrine would not preclude an action in tort arising from a transaction in services, because these transactions are not governed by Article 2 of the UCC. *Id.* at 533. When a contract involves a combination of goods and services, the economic loss doctrine will preclude a tort action if the transaction predominantly involves goods, but will not apply if the transaction predominantly involves services. *Id.* at 534.

In *Higgins v Lauritzen*, 209 Mich App 266, 269-270; 530 NW2d 171 (1995), this Court stated that "the question of whether goods or services predominate in a hybrid contract is one of fact," but if "there is no genuine issue of material fact in dispute regarding the provisions of the contract, a court may decide the issue as a matter of law." In *Frommert v Bobson Constr Co*, 219 Mich App 735, 738-739; 558 NW2d 239 (1996), this Court held that a contract for roof replacement is primarily a contract for services, not goods, where the contract required the defendant contractor to supply roofing materials and remove and replace the roof.

Here, defendant's primary duties involved servicing the heating and cooling system, and the provision of the pan was incidental to these services. The maintenance agreement did not generally provide for the sale of goods, and defendant separately invoiced the sale of the drip pan. Although Hartford maintains that defendant was negligent both in selling an unsuitable drip pan and in failing to monitor/warn of/repair its condition, the sale of the drip pan was incidental to defendant's usual contractual duties. Accordingly, the economic loss doctrine does not apply here.

"The question of whether an action in tort may arise out of a contractual promise has not been without difficulty." *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 83; 559 NW2d 647 (1997). In *Rinaldo's Constr Corp*, the Court discussed *Hart v Ludwig*, 347 Mich 559; 79 NW2d 895 (1956), noting that the Court in *Hart* concluded that in a negligence action in which the parties are also parties to a contract and the alleged injury is related to the contract, "there must be some active negligence or misfeasance to support a tort," i.e., "[t]here must be some breach of duty distinct from breach of contract." *Rinaldo's Constr Corp*, 454 Mich at 83, quoting *Hart*, 347 Mich at 563. The Court explained:

> Acknowledging that the distinction between misfeasance and nonfeasance is often difficult to discern, the Court explained that the fundamental principle separating the causes of action is the concept of duty. The Court noted those cases where misfeasance on a contract was found to support an action in tort as follows:
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> "[I]n each a situation of peril [was] created, with respect to which a tort action would lie without having recourse to the contract itself. Machinery [was] set in motion and *life or property [was] endangered* . . . In such cases . . . we have a "breach of duty distinct from . . . contract." Or, as Prosser puts it . . . "if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not." [*Id.* at 565 (emphasis added).]"
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> In other words, the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation. The plaintiff's action in *Hart* failed to state a cause of action in tort because "[t]he only duty, other than that voluntarily assumed in the contract to which the defendant was subject, was his duty to perform his promise in a careful and skillful manner without risk of harm to others, the violation of which [was] not alleged." *Id.* at 565. The only other duty—to perform the promise—arose from the contract and could not support an action in tort. *Id.* at 565-566. [*Rinaldo's Constr Corp*, 454 Mich at 83-84.]

Here, defendant had no duty to JFA/JAS that did not arise from the maintenance agreement. We are not persuaded by Hartford's contention that defendant voluntarily undertook a duty of monitoring, repairing, or warning with respect to the drip pan, separate from its contractual duty to inspect the boiler system. Any duty defendant owed with respect to the drip pan was inseparable from its duties with respect to the system as a whole.

We therefore conclude that the trial court erred in denying defendant's motion for summary disposition with respect to Hartford's negligence claim. Hartford failed to establish a genuine issue of material fact regarding defendant's breach of a duty that existed separate and distinct from defendant's contractual duties under the maintenance agreement.

V. HARTFORD'S BREACH OF CONTRACT CLAIM

Defendant moved for summary disposition of Hartford's breach of contract claim on the ground that the maintenance agreement released defendant from liability for fire damage. A trial court's interpretation of a written contract is reviewed de novo. *Butler v Wayne Co*, 289 Mich App 664, 672; 798 NW2d 37 (2010).

Defendant relies on the limitation of liability provision in the maintenance agreement with JFA/JAS:

> It is agreed that we shall not be liable for injuries to persons or damages to property, except those directly due to the negligent acts or omissions of our employees. We shall not be liable for any loss or damage or delay caused by acts of government, difficulties with workmen, fire, or for any reason beyond our control.

The trial court determined that this provision was ambiguous because the second sentence conflicted with the first. We disagree.

Courts must enforce unambiguous contracts as written, so that parties comply with the obligations they assented to. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 512 n 7; 741 NW2d 539 (2007). "The initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact." *Butler*, 289 Mich App at 671-672 (citation and internal quotations omitted). Courts must avoid interpretations that would render any part of a contract surplusage or nugatory, and must also, if possible, seek an interpretation that harmonizes potentially conflicting terms. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468-469; 663 NW2d 447 (2003).

We find no ambiguity in the limitation of liability provision.[1] The first sentence limits defendant's liability to damages directly caused by defendant's own negligence. The second sentence does not contradict the first, but further limits defendant's liability by exempting

[1] At oral argument, the parties acknowledged that the provision was unambiguous. Not surprisingly, the parties differed in their interpretations of the provision. Their differing interpretations do not render the provision ambiguous. "A contract is not ambiguous simply because the parties urge varying interpretations. A mere disagreement between the parties as to the meaning of a disputed contractual provision is not enough to support a claim that the contract is ambiguous . . . ." 17A Am Jur 2d Contracts, § 331, p 318.

liability arising from acts of government, difficulties with workmen, fire, or other reasons beyond defendant's control. These two sentences can be harmonized to mean that defendant will not be liable for damages not directly arising from its own negligence, and it also will not be liable for damages that are caused by its own negligence if the damages also arise from "acts of government, difficulties with workmen, fire, or any reason beyond [defendant's] control." The trial court erred in finding a conflict between two sentences that can be harmonized. The court failed to give meaning to the second sentence and treated it as redundant surplusage that merely repeated the meaning of the first sentence. Thus, the trial court erred in denying defendant's motion for summary disposition with respect to Hartford's breach of contract claim.[2]

VI. THE PRODUCT LIABILITY CLAIMS

Defendant lastly argues that it was entitled to summary disposition of the plaintiffs' product liability claims because there is no genuine issue of material fact that JFA/JAS misused and altered the drip pan. We agree.

Product liability actions, formerly governed by common-law principles, are now governed by statute. *Greene v AP Prods, Ltd*, 475 Mich 502, 507-508; 717 NW2d 855 (2006). A "product liability action" is defined as "an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." MCL 600.2945(h). Plaintiffs contend that the drip pan was defective because it was susceptible to rust and decay from continuous exposure to heat and water.

MCL 600.2947(1) and (2) provide:

> (1) A manufacturer or seller is not liable in a product liability action for harm caused by an alteration of the product unless the alteration was reasonably foreseeable. Whether there was an alteration of a product and whether an alteration was reasonably foreseeable are legal issues to be resolved by the court.
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> (2) A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.

MCL 600.2945 provides these definitions:

> (a) "Alteration" means a material change in a product after the product leaves the control of the manufacturer or seller. Alteration includes a change in the product's design, packaging, or labeling; a change to or removal of a safety

[2] The tenants were not parties to the maintenance agreement, and the trial court granted defendant summary disposition on the issue of the tenants' status as third-party beneficiaries of the maintenance agreement, which decision has not been challenged on appeal.

> feature, warning, or instruction; deterioration or damage caused by failure to observe routine care and maintenance or failure to observe an installation, preparation, or storage procedure; or a change resulting from repair, renovation, reconditioning, recycling, or reclamation of the product.
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> (e) "Misuse" means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

Here, there is no question of material fact that JFA/JAS misused the product, i.e., the drip pan. The boiler instruction manual specifically stated that if a boiler is installed on a combustible floor, the boiler must be raised on a "base of hollow clay tile or concrete blocks from 8" to 12" thick and extending 24" beyond the sides." The record indicates that defendant advised JFA/JAS to raise the boiler on concrete blocks in the drip pan and offered to complete the work. JFA/JAS failed to comply with the instruction manual and with the advice of defendant.

JFA/JAS argue that their alleged misuse was foreseeable because defendant's president and employee knew that JFA/JAS had already rejected defendant's proposal to raise the boiler and drip pan onto concrete blocks, and because defendant's service engineer saw the pan placed on the floor on the day it was installed and in subsequent inspections. We disagree. Plaintiffs do not explain how defendant should have predicted that JFA/JAS would ignore the manufacturer recommendations and ordinary understandings of heat transfer. Plaintiffs do not allege that anyone informed defendant that JFA/JAS planned to use the drip pan directly on the floor, contrary to all recommendations. Although defendant's service engineer subsequently learned about the placement of the drip pan (possibly because he was present during its installation), the pan had already passed to JFA/JAS's ownership and control. We disagree with plaintiffs' suggestion that defendant had a duty to foresee their misuse of the product.

Accordingly, the trial court erred in denying defendant's motion for summary disposition with respect to plaintiffs' product liability claims. MCL 600.2947(2). Because defendant was entitled to summary disposition on the basis of misuse, it is unnecessary to address its arguments regarding alteration.

The order denying summary disposition on the tenants' subrogees' negligence claims is affirmed. The order denying summary disposition on the product liability claims is reversed, as is the order denying summary disposition on Hartford's negligence claim and on Hartford's contract claim. The case is remanded for further proceedings. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio

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Plaintiffs-Appellees,

v

PROFESSIONAL TEMPERATURE HEATING AND AIR CONDITIONING, INC.,

Defendant-Appellant.

UNPUBLISHED
October 25, 2012

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2009-100362-CZ

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

BECKERING, J. (*concurring*).

I agree with the conclusions of my colleagues in the majority opinion, although in part for slightly different reasons. As such, I concur in result only.

/s/ Jane M. Beckering