STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Avenue
Grand Haven, Michigan 49417
(616) 846-8320
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THE CITY OF HOLLAND, a municipality acting by and through its **HOLLAND BOARD OF PUBLIC WORKS**, a municipal utility,
Plaintiff,

v

WESTERN LAND SERVICES, INC., a Michigan corporation; and **KEVIN M. HACKERT**, an individual,
Defendants,

consolidated with

ROBERTS PIPELINE, INC., an Indiana corporation, duly licensed in Michigan as a foreign corporation,
Plaintiff,

v

THE CITY OF HOLLAND, a municipality, acting by and through its **HOLLAND BOARD OF PUBLIC WORKS**, a municipal utility,
Defendant.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION
File No. 17-005067-CB
Hon. Jon A. Van Allsburg

File No. 17-005218-CK

Scott R. Murphy (P68015)
BARNES & THORNBURG LLP
171 Monroe Avenue NW, Suite 1000
Grand Rapids, Michigan 49503
(616) 742-3930
smurphy@btlaw.com
Attorneys for the City of Holland Board of Public Works

Michael D. Carroll (P53815)
KERR, RUSSELL AND WEBER, PLC
500 Woodward Avenue, Suite 2500
Detroit, Michigan 48226
(313) 961-0200
mcarroll@kerr-russell.com
Attorneys for Roberts Pipeline, Inc.

Gary K. August (P48730)
Matthew G. McNaughton (P66097)
ZAUSMER, AUGUST & CALDWELL, P.C.
31700 Middlebelt Road, Suite 150
Farmington Hills, Michigan 48334
(248) 851-4111
gaugust@zacfirm.com
mmcnaughton@zacfirm.com
Attorneys for Western Land Services, Inc. and Kevin M. Hackert

Defendants Western Land Services (WLS) and Kevin M. Hackert (Hackert) (hereinafter, collectively, defendants) bring a motion for summary disposition pursuant to MCR 2.116(C)(10) to the complaint filed by the City of Holland Board of Public Works (HBPW). The foundation of HBPW's complaint is the "Master Land Services Contract" (MLS contract) entered into between HBPW and WLS pursuant to which WLS agreed to acquire the rights-of-way for HBPW for a gas pipeline to be built pursuant to a contract (pipeline contract) between HBPW and Roberts Pipeline, Inc. (Roberts). Hackert was WLS' project manager for the MLS contract.

A motion under subrule (C)(10) must "specifically identify" the issue as to which the moving party believes there is no genuine issue as to any material fact. MCR 2.116(G)(4); *Bullock* v *AAA*, 432 Mich 472, 475 n 3; 444 NW2d 114 (1989). The motion tests the factual basis underlying a plaintiff's claim. *Velmer* v *Baraga Area Schools*, 430 Mich 385, 389-390; 424 NW2d 770 (1988). A court must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion and grant the benefit of any reasonable doubt to the opposing party. *Stevens* v *McLouth Steel*, 433 Mich 365, 370; 446 NW2d 95 (1989). Summary disposition may only be granted if, except as to the amount of damages, there is no genuine issue as to any material fact. "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010).

HBPW's complaint is pled in six counts: count I, breach of contract; count II, breach of contract (indemnity); count III, declaratory judgment (indemnity); count IV, negligent misrepresentation; count V, professional negligence; and count VI, breach of fiduciary duty.

Beginning with count I, breach of contract, HBPW alleges that WLS breached the MLS contract by failing to acquire the rights of way by August 1, 2015 and, as a direct and proximate result, HBPW incurred damages. Judging from defendants' brief, it appears that the specific issue of fact as to which defendants contend that there is no genuine dispute is that defendants' alleged breach of the MLS contract did not cause the damages sustained by HBPW. In support of their motion, defendants have submitted Hackert's affidavit. In his affidavit, Hackert states that it was his understanding of "the work" that WLS agreed to perform was that WLS was to use its

"best efforts" to obtain the rights of way by August 1, 2015. Defendants argue that because WLS did, in fact, use its best efforts, defendants did not cause the damages sustained by HBPW.

Hackert's understanding of "the work" finds no support in the text of the MLS contract. Article I, Section B. of the contract states that "the work" that WLS agrees to perform is set forth in "Exhibit A." Exhibit A states that "the work" consists of the "acquisition" of the rights-of-way. Article I, Section E. states the work shall be completed "by August 1, 2015." WLS' obligation under the MLS contract could not be clearer: WLS was to acquire – that is, to actually obtain – the rights-of-way by August 1, 2015. This is made manifest by Article I, Section C. of the contract, which states that HBPW was "solely interested" in attainment of the desired *results*. The contract is not a "best efforts" contract. HBPW contracted for – and WLS promised to produce – results, not efforts.[1]

It is undisputed that WLS did not acquire the rights-of-way by August 1, 2015 and that, as a result, HBPW sustained damages for claims made by Roberts. As to count I, WLS' motion for summary disposition is denied. Pursuant to MCR 2.116(I)(2), except as to the amount of damages, summary disposition is granted in favor of HBPW as to count I.

Turning to count II, breach of contract (indemnity), defendants' brief indicates that the specific issue of fact as to which defendants contend that there is no genuine dispute is that HBPW may not recover attorney fees generated by HBPW's prosecution of count II.

Article V, Section F. of the MLS contract provides, in pertinent part, that WLS "will defend, indemnify … HBPW … from and against all … damages … (including … reasonable fees … of … attorneys …) arising out of or resulting from the … lack of performance of any Work … under this Contract … by Contractor [WLS] …."

"[M]ichigan follows the 'American rule' with respect to the payment of attorney fees and costs." *Haliw* v *Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005). Under the

[1] Defendants also rely on the deposition testimony of Zachariah Meyer, pp 122-123. Meyer testified that in his opinion, "the work" is described not in Exhibit A, but in the RFP. However, the MLS contract contains an integration clause, Article V, Section H., which states: "This Contract … constitutes the entire agreement of the parties." Therefore, any description of "the work" contained in the RFP did not form part of the parties' agreement. Meyer further testified that his interpretation of Exhibit A was that the "description" of all the items listed in Exhibit A would be complete by August 1, 2015. His understanding of Exhibit A finds no support in the text of Exhibit A.

American rule, a trial court may not award attorney fees to the prevailing party either as costs or as damages unless a statute, a court rule, a recognized common-law exception, or a contract authorizes such an award. *Nemeth* v *Abonmarche Dev Inc*, 457 Mich 16, 37-38; 567 NW2d 641 (1998).

In *Zeeland Farm Services, Inc* v *JBL Enterprises, Inc*, 219 Mich App 190; 555 NW2d 733 (1996), the Michigan Court of Appeals stated: "The parties to a contract may include a provision that the breaching party will be required to pay the other side's attorney fees." *Id.* at 195-196. "However, recovery is limited to reasonable attorney fees." *Id.*

In Article V, Section F., WLS expressly agreed to defend HBPW and to indemnify HBPW for HBPW's reasonable attorney fees resulting from WLS' lack of performance of the work under the MLS contract. A contract to pay attorney fees is a recognized exception to the American Rule. HBPW has incurred and will continue to incur reasonable attorney fees resulting from WLS' lack of performance of the work. As to count II, WLS' motion for summary disposition is denied. Pursuant to MCR 2.116(I)(2), except as to the amount of damages, summary disposition is granted in favor of HBPW as to count II.

Next, we turn to count III, declaratory judgment (indemnity). For the reasons stated in the preceding paragraph, as to count III, WLS' motion for summary disposition is denied and pursuant to MCR 2.116(I)(2), except as to the amount of damages, summary disposition is granted in favor of HBPW as to count III.

Turning to count IV, negligent misrepresentation, it appears from defendants' brief that the specific issue of fact as to which defendants contend that there is no genuine dispute is that HBPW has failed to produce evidence that would provide a factual basis for a claim in negligent misrepresentation.

HBPW relies on the deposition testimony of Daniel Nally[2] as forming the factual basis for HBPW's claim in count IV. Nally's testimony is not a model of clarity, due in no small part

[2] Nally was HBPW's project manager for a new power plant that had been built by HBPW. The pipeline was to transport natural gas to this power plant.

to the attorneys' convoluted questions and repeated interruptions. Nevertheless, one possible reading of Nally's testimony[3] is this: sometime between September 22 and October 7, 2015, Hackert orally assured Nally that WLS would provide HBPW with all of the necessary rights-of-way within one week and that, in reliance on Hackert's oral assurances, Nally advised Dave Koster[4] to go ahead and execute the pipeline contract with Roberts.[5] Read in this manner, Nally's deposition testimony provides an adequate factual basis for HBPW's allegations in count IV. While reasonable men may have honest and principled disagreements as to the proper interpretation of Nally's deposition testimony, such disagreements are for the jury to resolve. As to count IV, defendants' motion for summary disposition is denied.

Next, we turn to count V, professional negligence. As to count V, judging from defendants' brief, it appears that the specific issue of fact as to which defendants contend that there is no genuine dispute is that because there are no educational requirements and no state licensure requirements for "landmen," defendants "cannot possibly be professionals subject to a professional negligence claim." This argument presents a question of law rather than a question of fact, which is this: does Michigan recognize a cause of action in professional malpractice against landmen?[6]

In *Stephens* v *Worden Insurance Agency*, LLC, 307 Mich App 220; 859 NW2d 723 (2014), the Court of Appeals stated that the Michigan Supreme Court has repeatedly held that malpractice "must be given its common-law meaning." *Stephens*, 307 Mich App at 232. The Court of Appeals further stated that the Michigan Supreme Court has defined "common law" to mean "those rules or precepts of law in any country, or body of its jurisprudence, which is of

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[3] At pages 109-114.

[4] HBPW's general manager.

[5] WLS argues that HBPW's reliance on Hackert's oral assurances was not reasonable because of other knowledge that HBPW had from other sources at the time. Whether HBPW's reliance was reasonable under all the facts and circumstances presents a question of fact for the trier of fact.

[6] Because defendants' motion for summary disposition as it pertains to count V presents a question of law rather than a question of fact, the motion is more properly brought pursuant to MCR 2.116(C)(8) rather than MCR 2.116(C)(10). However, the mislabeling of a motion does not prevent a court from reviewing the motion and granting the motion on the appropriate ground so long as neither the moving party nor the opposing party is misled. See *Ruggeri Electrical Contracting Co, Inc* v *City of Algonac*, 196 Mich App 12, 18; 492 NW2d 469 (1993).

equal application in all places, as distinguished from local laws and rules, as well as the embodiment of principles and rules inspired by natural reason, an innate sense of justice, and the dictates of convenience, and voluntarily adopted by men for their government in social relations." *Id.* The *Stephens* panel went on to note that the Michigan Supreme Court has held that the principles and rules inspired by natural reason "cannot be limited to a review of only Michigan caselaw" and that "the traditional nature and origin of the common law make it clear that a consideration of judicial decisions from other jurisdictions is not prohibited." *Id.* at 232-233.

Stephens held that an action in professional malpractice may not be brought against an insurance agent on the ground that the "limited educational and licensing requirements [for insurance agents] are not commensurate with the professions generally deemed subject to professional negligence liability, i.e., malpractice." *Stephens*, 307 Mich App at 234 (citing *Garden* v *Frier*, 601 So 2d 1273, 1275 (Fla, 1992). The panel held that "a vocation is considered a profession subject to professional malpractice if a higher level of education, such as a graduate degree, is required before a license may be granted." *Id.*

In Michigan, there are no educational or licensing requirements for landmen. Applying the rationale of *Stephens* to the facts in the case at bar, this Court finds the absence of such requirements is not commensurate with the educational and licensing requirements for those professions that have generally been deemed subject to an action in professional negligence, i.e. malpractice, in the courts of this state. For this reason, the Court holds that in Michigan, landmen – and the agencies or entities that employ them – are not subject to an action in professional malpractice. As it pertains to count V, defendants' motion for summary disposition is granted pursuant to MCR 2.116(C)(8).[7]

[7] HBPW argues that should the Court grant defendants' motion for summary disposition to count V, the Court should hold that count V states "a viable ordinary negligence claim" against defendants. To establish a prima facie case of negligence, a plaintiff must prove that the defendant owed the plaintiff a legal duty. *Loweke* v *Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Whether a defendant owes a plaintiff a duty presents a question of law. *Hill* v *Sears, Roebuck and Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). There are four factors that a court must consider when determining the existence of a duty: (1) the relationship of the parties; (2) the foreseeability of the harm; (3) the burden on the defendant; and (4) the nature of the risk presented. *Hill*, 492 Mich at 661. The most important factor is the relationship of the parties. *Id.*

Finally we turn to count VI, breach of fiduciary duty. Defendants contend that they did not owe HBPW a fiduciary duty.

Whether to recognize a cause of action for breach of fiduciary duty usually presents a question of law. *Calhoun County* v *Blue Cross Blue Shield of Michigan*, 297 Mich App 1, 20; 824 NW2d 202 (2012). In Michigan, a fiduciary relationship arises in one of four situations: "(1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling with the scope of the relationship, (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer." *Id.* (quoting from *In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003).

As to situation (1) – when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first – there is no evidence in the case at bar that suggests that HBPW placed "trust" in the "faithful integrity" of the defendants or that defendants somehow gained "superiority" or "influence" over HBPW. Instead, all the evidence suggests that HBPW expected nothing more from the defendants than the performance of their obligations under the MLS contract. As to situation (2) – when one person assumes control and responsibility over another – there is likewise no evidence that suggests that defendants assumed control over HBPW or responsibility for HBPW. Instead, all the evidence suggests that HBPW's agents retained control over and responsibility for HBPW throughout the construction of the pipeline. As to situation (3) – when one person has a duty to act for or give advice to another on matters falling with the scope of the relationship – there is no evidence that suggests that either WLS or Hackert had a duty to act for or give advice to HBPW. Defendants had a contractual obligation committing them to the acquisition of the rights-of-way. Nothing in the MLS contract calls on defendants to act for HBPW or to give advice to HBPW. As to situation (4) – when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as

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The only relationship between the defendants and HBPW is the relationship established by the MLS contract. But for the MLS contract, there would have been no relationship between the defendants and HBPW at all. This Court holds that defendants owed HBPW no duty that would support a claim in ordinary negligence.

with a lawyer and a client or a stockbroker and a customer – HBPW has failed to cite a Michigan case that stands for the proposition that a contractual relationship between a landman and another contracting party has traditionally been recognized as involving fiduciary duties. As it pertains to count VI, defendants' motion for summary disposition is granted pursuant to MCR 2.116(C)(8).[8]

Defendants' motion for summary disposition is DENIED as to counts I, II, III, and IV and GRANTED as to counts V and VI.

Summary disposition is GRANTED in favor of HBPW as to counts I, II, and III.

IT IS SO ORDERED.

Dated: April 15, 2019

Hon. Jon A. Van Allsburg, Circuit Judge

[8] Cf. *Harding Co* v *Sendero Resources, Inc*, 365 SW3d 732 (TX, 2012).