

STATE OF MICHIGAN
COURT OF APPEALS

AERO TAXI-ROCKFORD, C & M AIRWAYS,
INC., CHERRY-AIR, INC., CONTRACT AIR
CARGO, INC., IFL GROUP, INC., MURRAY
AVIATION, INC., RELIANT AIRLINES,
ROYAL AIR FREIGHT, INC., SPECIAL
AVIATION SYSTEMS, INC., TRAFFIC
MANAGEMENT CORPORATION, d/b/a TMC
AIRLINES, INC., and ZANTOP
INTERNATIONAL AIRLINES,

Plaintiffs-Appellants,

v

GENERAL MOTORS CORPORATION,

Defendant-Third-Party Plaintiff-
Appellee,

and

DELPHI AUTOMOTIVE SYSTEMS,

Defendant,

and

KITTY HAWK CHARTERS, INC.,

Third-Party Defendant.

UNPUBLISHED
May 30, 2006

No. 259565
Wayne Circuit Court
LC No. 01-134096-CZ

Before: Murphy, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant General Motors Corporation (GM) pursuant to MCR 2.116(C)(10). Plaintiffs'

lawsuit involves their attempt, premised on various legal theories, to obtain payment for freight transport services. We affirm in part, and reverse and remand in part.

I

Plaintiffs, various air cargo companies that provide freight transport services, did not receive payment for services rendered in late 1999 and early 2000 relative to the movement and delivery of automobile parts, components, and systems within GM's manufacturing operations. Plaintiffs dealt with third-party defendant Kitty Hawk Charters, Inc. (KH), in regard to bids on GM transport projects and the arrangements for carrying out GM freight transport services. KH was GM's charter manager pursuant to a Master Agreement for Air Charter Transportation Services (Master Agreement) that was entered into in 1990, prior to which time GM dealt directly with cargo companies or carriers in transporting freight. Neither KH nor GM directly paid plaintiffs for the services at issue, although GM apparently made substantial payments to KH to cover the services, but the payments were not forwarded to plaintiffs. KH subsequently filed a voluntary petition for bankruptcy under chapter 11 of the Bankruptcy Code, 11 USC 1101 *et seq.*, in May 2000. Plaintiffs filed proofs of claim in the bankruptcy proceedings, listing KH as a debtor in regard to the unpaid services. Pursuant to a settlement in an adversarial action in the bankruptcy court, GM agreed to pay KH monies (\$700,000) that represented a portion of the amount that KH claimed was owed by GM to KH under the Master Agreement (\$1.8 million). Plaintiffs claimed that approximately \$5 million in outstanding invoices had not been paid for services performed under hundreds of oral contracts related to particular freight movements. They eventually filed this suit in state circuit court against GM and defendant Delphi Automotive Systems (Delphi) for the unpaid services under the theory that KH was GM's and Delphi's agent and not an independent contractor as maintained by GM and Delphi.¹ The agency theory formed the basis for plaintiffs' breach of contract claim. Plaintiffs, relying on alleged assurances by GM that KH was financially stable and that plaintiffs would be paid, also asserted causes of action predicated on detrimental reliance, unjust enrichment, implied contract, fraud-misrepresentation, and equitable estoppel. The trial court found, as a matter of law, that there was no agency relationship and dismissed all of the various claims made by plaintiffs. Plaintiffs appeal as of right.

II

This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Issues of contract interpretation are questions of law that are similarly reviewed *de novo*. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a

¹ The trial court also granted summary disposition in favor of Delphi, and plaintiffs are not challenging that ruling on appeal. Therefore, for purposes of this opinion, we shall limit our discussion to defendant GM unless otherwise indicated.

matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

III

Plaintiffs first argue that issues of fact exist regarding their breach of contract action against GM. Plaintiffs proceed on the theory that KH acted as GM's agent, or appeared to have apparent authority to act as GM's agent, and thus the numerous oral contracts for freight transport services were actually contracts between plaintiffs and GM. According to plaintiffs, these contracts were breached when plaintiffs were not compensated for their services; therefore, GM is liable as the principal under the contracts. Plaintiffs also maintain that it makes no difference if GM paid KH for the services; GM remains liable.² They further argue that the determination of whether an agency relationship exists is within the province of the jury rather than the trial court.

"Where there is a disputed question of agency, any testimony, either direct or inferential, tending to establish agency creates a question of fact for the jury to determine." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). The apparent authority of an agent to act on behalf of the principal is to be determined by viewing all of the facts and circumstances, and ordinarily this is a question of fact for the jury. *Central Wholesale Co v Sefa*, 351 Mich 17, 26; 87 NW2d 94 (1957). In general, and if the record is conflicting, the existence of a principal-agent relationship is for a jury to decide. *Lincoln v Fairfield-Nobel Co*, 76 Mich App 514, 519; 257 NW2d 148 (1977); *Jackson v Goodman*, 69 Mich App 225, 230; 244 NW2d 423 (1976). Accordingly, the issue of agency is not always for the jury to decide, but rather, if there is no testimony or evidence sufficient to create a factual issue regarding agency, the court may decide the issue. But this Court has also stated that "where the relationship of the parties has been defined by written agreement, it is the province of the trial judge to determine the relationship." *Birou v Thompson-Brown Co*, 67 Mich App 502, 506-507; 241 NW2d 265 (1976), citing *Keiswetter v Rubenstein*, 235 Mich 36, 42; 209 NW 154 (1926); *Ayer v Devlin*, 179 Mich 81, 88-

² Plaintiffs rely, in part, on Restatement Agency, 2d, § 183. This section provides, "A disclosed or partially disclosed principal is not discharged from liability to the other party to a transaction conducted by an agent by payment to, or settlement of accounts with, the agent, unless he does so in reasonable reliance upon conduct of the other party which is not induced by the agent's misrepresentations and which indicates that the agent has settled the account." GM does not argue that payment to an agent by a principal legally discharges the principal's liability to a third party who transacts business through the agent but is not paid.

89; 146 NW 257 (1914). The Master Agreement provides that “[t]he relationship between GM and [KH] shall, at all times, be that of independent contractors.” Plaintiffs argue that there are a number of other provisions in the Master Agreement, evidencing GM’s control over KH, that run contrary to a conclusion that KH was an independent contractor, thereby making the Master Agreement ambiguous. Our Supreme Court in *Keiswetter, supra* at 42-43, cited in *Birou*, did suggest that if there exist ambiguities in the written agreement, the jury should hear the matter. And in *Lincoln, supra* at 520, this Court noted that “[t]he manner in which the parties designate the relationship is not controlling. If an act done by one person on behalf of another is in its essential nature one of agency, then he is an agent regardless of the title bestowed upon him.” The Court stated that the fact that the defendant “attempted to use many of the incidents of an independent contractual relationship with regards to its salesmen is not determinative.” *Id.*

The *Meretta* panel, setting forth the basic principals regarding agency, stated:

An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account. The test of whether an agency has been created is whether the principal has a right to control the actions of the agent.

* * *

The authority of an agent to bind the principal may be either actual or apparent. Actual authority may be express or implied. Implied authority is the authority which an agent believes he possesses. After the agency relationship and the extent of the agent’s authority have been shown, the principal has the burden of proving that the agent’s authority was limited.

An agent has implied authority from his principal to do business in the principal’s behalf in accordance with the general custom, usage and procedures in that business. However, the principal must have notice that the customs, usages and procedures exist.

* * *

[A]pparent authority may arise when acts and appearances lead a third person reasonably to believe that an agency relationship exists.

Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances.

* * *

“Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and such particular act has

been performed, the principal is estopped from denying the agent's authority to perform it." [Meretta, supra at 697-700 (citations omitted).]³

The trial court here focused on the case of *Little v Howard Johnson Co*, 183 Mich App 675; 455 NW2d 390 (1990), in which the plaintiff was injured when she slipped on an icy walkway that was located on property on which a restaurant business was being operated as a franchise of the defendant, Howard Johnson Company. The plaintiff posited multiple theories with respect to why the defendant was liable for her injuries, including theories of vicarious liability based on agency principles and liability based on ostensible agency. *Id.* at 677-678. This Court noted that "[i]n Michigan, the test for a principal-agent relationship is whether the principal has the right to control the agent." *Id.* at 680. The *Little* panel, summarizing the parties arguments, stated:

The threshold question here is what constitutes "control" sufficient to deem a franchisee to be an agent of a franchisor. Defendant argues that a franchisor must have the right to control the day-to-day operations of a franchisee in order to establish an agency relationship. Plaintiff, on the other hand, maintains that an agency relationship is created where the franchisor retains the right to set standards regarding the products and services offered by the franchisee, the right to regulate such items as the furnishings and advertising used by the franchisee, and the right to inspect for conformance with the agreement. We agree with defendant. [*Id.*]

The Court determined that it was necessary to examine the defendant's control of the franchisee in terms of the defendant's right to take part in the day-to-day operation of the restaurant business in analyzing whether a principal-agent relationship existed. *Id.* at 682. The Court found that no agency relationship existed after examination of the facts.

The franchise agreement in this case primarily insured the uniformity and standardization of products and services offered by a Howard Johnson restaurant. These obligations do not affect the control of daily operations. Furthermore, while defendant retained the right to regulate such matters as building construction, furnishings and equipment, and advertising, it retained no power to control the details of the restaurant's day-to-day operations. Defendant had no

³ In *Flat Hots Co, Inc v Peschke Packing Co*, 301 Mich 331, 337; 3 NW2d 295 (1942), our Supreme Court stated:

An implied agency cannot exist contrary to the express intention of an alleged principal although it may spring from acts and circumstances permitted by the principal over a course of time through acquiescence. Agency by estoppel can be established only where defendant holds the agent out as being authorized, and the plaintiff, relying thereon, has acted in good faith upon such representation. [Citation omitted; see also *Norcross Co v Turner-Fisher Assoc*, 165 Mich App 170, 182-183; 418 NW2d 418 (1987).]

control over hiring and firing or supervision of employees. Defendant retained no control over the daily maintenance of the premises other than to obligate the franchisee to maintain such in a “clean” and “orderly” condition. Again, the methods and details of maintenance were controlled by the franchisee. Although defendant had the right to conduct inspections, defendant’s actual control was limited to the right to hold the franchisee in breach of the franchise agreement for any deviation. We conclude that plaintiff did not present a triable issue concerning defendant’s right to control the day-to-day operations of the franchisee. [*Id.* (citation omitted).]⁴

The *Little* panel also held that the plaintiff could not establish liability on an ostensible or apparent agency theory. *Id.* at 683. The Court concluded that the plaintiff failed to present evidence showing that “she was harmed as a result of relying on the perceived fact that the franchisee was an agent of defendant,” nor evidence showing that the plaintiff “justifiably expected that the walkway would be free of ice and snow because she believed that defendant operated the restaurant.” *Id.*⁵

In *St Clair Intermediate School Dist v Intermediate Ed Ass’n / Michigan Ed Ass’n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998), the Michigan Supreme Court further explained the principles of agency:

Under the common law of agency, in determining “[w]hether an agency has been created,” we consider “the relations of the parties as they in fact exist under their agreements or acts” and note that in its broadest sense agency “includes every relation in which one person acts for or represents another by his authority.” *Saums v Parfet*, 270 Mich 165, 170-171; 258 NW 235 (1935). We further recognized in *Saums* that “[t]he characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons.” *Id.* at 172. Also fundamental to the existence of an agency relationship is the right to control the conduct of the agent, *Capitol City Lodge No 141, FOP v Meridian Twp*, 90 Mich App 533, 541; 282 NW2d 383 (1979), with respect to the matters entrusted to him. See *Int’l Longshoremen’s Ass’n, AFL-CIO v NLRB*, 312 US App DC 241, 249; 56 F3d 205 (1995), citing 1 Restatement Agency, 2d, § 14, p 60, and cases applying this principle. [Alterations in original.]

⁴ The Court noted that “[i]t is not enough that the owner retained mere contractual control, the right to make safety inspections, or general oversight.” *Little, supra* at 681.

⁵ The Court stated that there is a three-part test that is utilized in determining whether an ostensible or apparent agency relationship exists. *Little, supra* at 183. First, the person dealing with the agent must do so reasonably believing in the agent’s authority. *Id.* Second, the belief must be generated by some act or neglect of the charged principal. *Id.* And third, the person relying on the agent’s apparent authority must not be guilty of negligence. *Id.*

As opposed to the situation in *Little*, here the dispute does not involve a franchisor-franchisee relationship and vicarious liability for a personal injury, but rather focuses on whether KH was an independent contractor or agent of GM relative to contract formation.

An independent contractor is one who, carrying out an independent business, contracts to do certain work according to his own methods and without being subject to the control of his employer as to the methods and means of accomplishing the work but only as to the results to be accomplished by the work. *Marchand v Russell*, 257 Mich 96, 100; 241 NW 209 (1932); *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 553-554; 487 NW2d 499 (1992). The *Marchand* Court further elaborated that the circumstances that generally go to show that one is an independent contractor, while not necessarily conclusive on their own, are the independent nature of the business, the existence of a contract for the performance of a specific piece of work, the agreement to pay a fixed price for the work, the employment of assistants who are under the control of the alleged independent contractor, the furnishing by one of the necessary materials, and the right to control the work while it is in progress except as to results. *Marchand, supra* at 100-101 (citations omitted). “It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent.” *Van Pelt v Paull*, 6 Mich App 618, 624; 150 NW2d 185 (1967).

We decline to discuss in this opinion the details of all of the voluminous deposition testimony and other documentary evidence that was presented to the trial court, nor will we recite the numerous provisions of the Master Agreement. The parties can rest assured, however, that this panel has painstakingly and carefully scrutinized and examined all of the documentary evidence presented by the parties. We hold that there exists an abundance, if not a mountain, of factual disputes relevant to the determination of whether GM and KH had an agency relationship. There was evidence that GM indicated to plaintiffs that KH was its agent, that KH informed plaintiffs that it was GM’s agent, that GM dictated ground handlers, that GM, on occasion, would choose the carrier, that GM dictated transport routes, that GM prohibited KH to terminate a carrier on one occasion and constantly battled with KH over the selection of carriers, and that GM would on occasion directly hire a carrier and pay them, leaving KH out of the loop. Further, there was evidence that GM suppliers were required to use KH, that GM controlled the packaging of freight, that GM dictated that only GM freight be transported by the carriers, that GM would at times communicate directly with the carriers, that GM performed financial and performance audits on KH, and that GM had a say regarding payment terms. We note the following testimony from Kenneth Donaldson of Cherry-Air and Robert Hunter of KH.

Donaldson testified:

- Q. And in line with his question could you explain to me in what ways you believe that [GM] exercised control over KH?
- A. [GM] told the dispatchers at [KH] where they needed to pick the freight up, at what time it needed to be picked up, how to load the freight, whether it needed to be palletized or loose loaded, where the freight needed to go to, which customs brokers to use If there was a problem with the trip, there was times when we would get calls from [GM.] That clearly indicated to me that [KH] wasn’t calling the shots.

Hunter testified:

Q. [E]ven though this contract [Master Agreement] says [what is stated in § 3.2 – independent contractor provision] and its purpose is to govern the relationship as it pertains to that clause, did that really happen?

A. No.

* * *

Q. [Counsel reading from the Master Agreement and asking if events actually transpired that way] That air charter manager shall have sole and exclusive control over the establishment of a network of certified operators, surface carriers, and necessary others to satisfy the transportation needs of GM and the GM facilities.

A. That's just not true. We did not have complete control. . . .

* * *

Q. [Counsel again reading from the Master Agreement and asking if events actually transpired that way] [T]he air charter manager and the transportation suppliers have sole and exclusive control over the manner in which they perform the transportation services.

A. That's not true.

There is a genuine issue of fact with respect to whether an actual agency relationship existed and whether an apparent agency arose such that plaintiffs reasonably believed that KH was acting as GM's agent and that the contracts for transport services were contracts with GM, thereby contractually obligating GM to see that plaintiffs were indeed paid.

The Master Agreement itself, although including a provision labeling KH an an independent contractor, contained numerous provisions giving GM control over KH with regard to the movement of GM freight. The label or designation placed on the relationship by GM and KH is not controlling. *Lincoln, supra* at 520. Aside from the language in the Master Agreement, there was sufficient documentary evidence presented indicating that, in reality and when freight transport services were actually provided (acts and circumstances), GM was in control at such a significant level that reasonable minds could differ with respect to whether KH was merely GM's agent, especially in the context of apparent agency. There was evidence that GM not only controlled the result to be accomplished by the work, i.e., the delivery of freight, but the methods and means by which the work would be accomplished. *Marchand, supra* at 100-101; *Kamalnath, supra* at 553-554.

GM emphasizes that plaintiffs filed proofs of claim in the bankruptcy court against KH, listing KH as the debtor, and thus this establishes that they did not reasonably believe that KH was GM's agent. We agree with plaintiffs' response that their action can reasonably be viewed as simply taking measures to protect their interests through every possible mechanism to

effectuate payment, especially considering that it is not clear whether KH was GM's agent or an independent contractor. Arguably, it might constitute legal malpractice if an attorney did not file claims in the bankruptcy court under these circumstances. GM does not counter plaintiffs' argument that both an agent and the principle can be held liable for a debt to a third party. We do note that an agent for a disclosed principal generally cannot be held liable for the principal's failure to perform. *Riddle v Lacey & Jones*, 135 Mich App 241, 247; 351 NW2d 916 (1984). But again, because it is arguable whether KH was or was not GM's agent, and given that some payments were made to KH by GM and not passed on to plaintiffs, filing claims with the bankruptcy court to cover all avenues would seem sensible and not necessarily reflect a definitive belief that KH was the principal. The bankruptcy filings simply become part of the evidence that the jury may consider in determining the agency issue.

With respect to GM's apparent payment to KH of a substantial amount, if not all, of the monies claimed, this would not relieve GM of paying plaintiffs under agency law, nor does GM make that argument. See Restatement Agency, 2d, § 183. In regard to GM's focus on the fact that plaintiffs were typically paid by KH during the existence of the Master Agreement, we fail to see how this negates a conclusion that KH was GM's agent, especially considering that KH had been clearly paying plaintiffs with GM funneled money. This certainly cannot be an odd occurrence in agency relationships. As to GM's reliance on the fact that KH, for the most part, worked directly with plaintiffs in arranging flights, we again fail to see how this leads to a necessary conclusion that KH was not GM's agent. Everyone was well aware that GM freight was being handled and that GM operations were at stake when freight movements were made. These arguments are factors to be considered by the jury in determining agency, but not controlling.

Next, in regard to plaintiffs' arguments under Part 125 of FAA regulations,⁶ there was evidence showing that some plaintiffs were Part 125 carriers and were well aware of that fact, that GM was aware of this fact, that GM realized that, when utilizing Part 125 carriers or aircraft, KH needed to stand in the shoes of an agent, and that KH, through a vice-president, told GM that KH had to sign as GM's agent and GM acquiesced. The arguments concerning FAA regulations do not necessarily support the conclusion that KH was in fact GM's agent; there may have been violations of federal law. However, the FAA regulations could have relevance in interpreting the Master Agreement, and they lend support to the proposition that plaintiffs reasonably believed that KH was GM's agent, thus supporting the apparent agency theory.

Regarding *Little*, we give credence to plaintiffs' argument that it is distinguishable because it dealt with vicarious liability for personal injuries in the context of a franchisor-franchisee relationship; therefore, a focus on day-to-day operations was sound and understandable in such a situation. Additionally, the day-to-day control discussion in *Little* was limited to the issue of actual agency and not apparent agency. As opposed to the facts in *Little*, there was evidence here that plaintiffs were financially harmed because of their belief that KH was simply GM's agent and that they could look beyond KH to GM to obtain satisfaction. The

⁶ See 14 CFR 125 *et seq.*, and 69 FR 61429-02.

general principle in determining agency concerns control or the right to control, and there was sufficient evidence submitted on the issue of control that a jury must be left to decide the issue.

In sum, we conclude that application of the legal principles set forth above, in conjunction with the documentary evidence submitted by the parties, dictate reversal as issues of fact exist on the matter of agency. Accordingly, the trial court erred in dismissing the breach of contract claim.

IV

Plaintiffs next argue that the trial court erred in dismissing their claim for detrimental reliance because genuine issues of material fact existed regarding whether plaintiffs detrimentally relied on statements made by GM personnel that conveyed a promise to pay for services rendered. Plaintiffs contend that they should be paid by GM for their services after they relied on GM's statements and actions in continuing to provide services for GM's benefit. Plaintiffs assert that in late 1999 and early 2000, it was known in the industry that KH was not in good financial condition, and plaintiffs were concerned with being paid, especially considering that they had experienced a slowing of payments and KH was unusually far in arrears. Assurances from GM officials that KH was financially sound and that payment would be received convinced plaintiffs to keep transporting freight. Plaintiffs argue that all of the unpaid invoices at issue are for movements performed in reliance on GM's representations.

A review of the record and the documentary evidence reflects that owners and officials of the various cargo companies, i.e., plaintiffs, testified that KH's payments were slow and late toward the end of 1999 and in early 2000, making the carriers worrisome and concerned about KH's financial stability and about continued payment, which led plaintiffs to question whether they should continue providing services. Plaintiffs communicated their concerns, verbally and in writing, to GM officials, and chiefly Mike Raysin, who was the GM transportation manager or specialist. On occasion, Raysin would initiate the contact. There was evidence that in these discussions and exchanges, which took place in late 1999 and early 2000, before the bankruptcy, plaintiffs were assured that GM stood 100 percent behind KH and that payment would be received; they were told not to worry. One official testified that Raysin even guaranteed payment and stated, "[I]f you don't get paid, we'll pay you."

The evidence indicates that Raysin conveyed to plaintiffs that GM had made or would be making substantial payments to KH to cover the freight transport services, and thus payment would be forthcoming. Raysin stated that he would check into any problems at KH that might be causing a delay in payment. There was documentary evidence that plaintiffs also discussed a proposed plan with Raysin involving plaintiffs directly invoicing GM and GM directly paying plaintiffs. According to carrier officials, Raysin stated that he would look into the idea and expressed, at one time, that such a plan would indeed be pursued, but he eventually informed

plaintiffs that GM and its legal department would not agree to making direct payments to the carriers and no payments were made.⁷

Further, there was documentary evidence submitted showing that plaintiffs relied on GM's assurances in deciding to continue providing freight transport services for which they never received payment.

A review of the case law indicates that there is no cause of action for "detrimental reliance," nor do plaintiffs cite any cases supporting the proposition that such a cause of action exists.⁸ Rather, detrimental reliance is an element of other causes of action, for example, promissory estoppel and innocent misrepresentation. See *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-688; 599 NW2d 546 (1999). In their complaint, and on appeal, plaintiffs also present a claim of equitable estoppel.⁹ However, equitable estoppel is also not a cause of action. *American Federation of State, Co & Muni Employees v Bank One, NA*, 267 Mich App 281, 292-293 n 3; 705 NW2d 355 (2005). "[E]quitable estoppel is clearly not an independent

⁷ Raysin testified that he most likely spoke with all of plaintiffs' owners and officials before the bankruptcy just as they claimed. Raysin acknowledged that he told plaintiffs that GM stood 100 percent behind KH. Plaintiffs also voiced a concern to Raysin about continuing with freight shipments because KH was not paying their bills. Raysin indicated that he "may have said that [he] wanted them to keep flying." He did not think he told plaintiffs not to worry. Raysin thought it possible that he told plaintiffs, at some point, that everything would be alright because GM had just paid KH \$4 million. He was not aware of ever telling plaintiffs that GM was working on a plan to have them bill GM directly. Raysin also stated, however, that he may have told some of the plaintiffs to get a SCAT code (standard carrier association code), which would allow a carrier to directly bill GM. He also testified that it is possible that he told plaintiffs to send their aging receivables to GM. But Raysin followed up by asserting that, if he had received aging receivables, he would have forwarded them on to KH, telling them to resolve the problem.

⁸ Plaintiffs cite *Michigan Educational Employees Mut Ins Co v Morris*, 460 Mich 180, 198-199; 596 NW2d 142 (1999); however, our Supreme Court was discussing a claim of unjust enrichment-restitution-quasi contract and simply noted that if a recipient of a benefit relies to his detriment on the benefit, a plaintiff would be estopped from demanding reimbursement. Also, the Court stated that the burden of establishing detrimental reliance is on the party opposing the restitution claim. *Id.* at 199. There is no suggestion that detrimental reliance is an independent cause of action. Plaintiffs also cite *Farrell v Automobile Club of Michigan (On Remand)*, 187 Mich App 220, 229; 466 NW2d 298 (1991), but *Farrell* was a wrongful-termination action, and the term "detrimental reliance" was merely used in stating that it need not be present to establish contractual rights under a legitimate-expectations theory. Plaintiffs further cite *Goldstein v Kern*, 82 Mich App 723, 727-728; 267 NW2d 165 (1978); however, the *Goldstein* panel stated that "[a]n employee's detrimental reliance in foregoing another employment opportunity in order to accept the offered employment does not estop the employer from terminating his employment contract." This language has no relevance to the case before us today. Finally, plaintiffs cite an irrelevant criminal case.

⁹ The equitable estoppel claim is predicated on the same facts as those relied on in claiming detrimental reliance.

cause of action, but is merely a defense to be applied only when a party justifiably relies and acts on the belief that misrepresented facts are true.” *Id.*

Based on the equitable principles and the specific facts alleged by plaintiffs in their complaint, we conclude that plaintiffs stated a cause of action for promissory estoppel despite using the wrong verbiage or nomenclature. See *Klein v Kik*, 264 Mich App 682, 686; 692 NW2d 854 (2005) (“regardless of plaintiff’s word choice, the gravamen of plaintiff’s complaint remains a cause of action for . . .”); *Electrolines, Inc v Prudential Assurance Co, LTD*, 260 Mich App 144, 159; 677 NW2d 874 (2003) (courts look beyond the face of the plaintiff’s pleadings to determine the gravamen or gist of the cause of action contained in the complaint when considering a motion for summary disposition).¹⁰ Therefore, we shall address a promissory estoppel claim. “The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided.” *Novak, supra* at 686-687.

The trial court focused primarily on the agency issue. Indeed, it is difficult to determine from the court’s limited ruling and superficial treatment of the issues if it ever was directly addressing the claims outside those related to the agency issue. The trial court did state that only an inference arose, created by Raysin’s statement that GM stood behind KH 100 percent, that there was an agreement on the part of GM to cover KH’s debts. The court further stated that “[t]here was no definite statement to that effect that anyone could justifiably rely on to believe that General Motors would pay if Kitty Hawk didn’t.”

GM maintains that plaintiffs’ quasi-contractual theories of liability are precluded where there is an express contract that governs the matter at issue. GM, citing the “economic loss doctrine,” also argues that allegations giving rise to a breach of contract action cannot give rise to an independent cause of action in tort. Further, GM contends that plaintiffs’ quasi-contract claims are in essence an attempt to hold GM liable as a guarantor or surety of KH, which required evidence of a clearly manifested intent that GM would become liable for KH’s debts, and no such evidence exists.

Initially, we find that the “economic loss doctrine” has no application under the facts of this case. In *Neibarger v Universal Coops, Inc*, 439 Mich 512, 527-528; 486 NW2d 612 (1992), our Supreme Court formally adopted the “economic loss doctrine,” which provides that “where a plaintiff seeks to recover for economic loss caused by a defective product purchased for

¹⁰ Additionally, MCR 2.111(B)(1) requires only that the complaint contain a statement of facts, on which the pleader relies to state a cause of action, with the specific allegations necessary to reasonably inform the adverse party of the nature of the claims the adverse party is called on to defend. The factual allegations set forth in plaintiffs’ complaint relative to equitable estoppel, detrimental reliance, and unjust enrichment encompass the facts necessary to support promissory estoppel, and thus GM was reasonably informed of the nature of a promissory estoppel claim such that it will not be prejudiced by us simply applying the correct legal label to the action.

commercial purposes, the exclusive remedy is provided by the UCC, including the statute of limitations.” See also *Farm Bureau Mut Ins Co v Combustion Research Corp*, 255 Mich App 715, 719 n 2; 662 NW2d 439 (2003). “This Court has declined to apply the economic loss doctrine where the claim emanates from a contract for services.” *Quest Diagnostics, Inc v MCI Worldcom, Inc*, 254 Mich App 372, 379; 656 NW2d 858 (2002). Accordingly, the “economic loss doctrine” does not bar plaintiffs’ promissory estoppel claim.

A contract will be implied only if there is no express contract covering the same subject matter. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003); see also *Martin v East Lansing School Dist*, 193 Mich App 166, 177-178; 483 NW2d 656 (1992) (contract will be implied only if there is no express contract); *Cascade Electric Co v Rice*, 70 Mich App 420, 426; 245 NW2d 774 (1976) (while an express contract is in force between parties, a contract cannot be implied in law with respect to the same matter).

Here, the subject matter of the alleged contract is the same as the subject matter of the promissory estoppel claim, i.e., payment for freight transport services, although the underlying facts creating the alleged contract are different from the facts giving rise to the promissory estoppel claim, where the contract claim arises out of GM’s promise to pay for services by way of its alleged agent KH and plaintiffs’ performance of the services, but where the promissory estoppel claim arises out of assurances by GM to plaintiffs that plaintiffs would be paid. Nonetheless, both claims relate to payment for freight transport services.¹¹ Nothing, however, precluded plaintiffs from pursuing a contract action and a claim for promissory estoppel because parties may argue alternative or inconsistent theories.¹² MCR 2.111(A)(2)(b) (party can state as many separate claims regardless of consistency and whether they are based on legal or equitable grounds or both); *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). This Court in *H J Tucker & Assocs, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 574; 595 NW2d 176 (1999), stated that the plaintiff was not required to elect to proceed under an express contract theory or an implied contract theory, but could pursue recovery on the basis of either an express verbal contract, or an implied contract if the trier of fact found that the express verbal contract did not exist. Here, it is clear that plaintiffs’ equitable theories of recovery constituted alternative bases of recovery should the agency-breach of contract argument fail. We have ruled that issues of fact exist with respect to the agency-breach of contract issue, and, as can be gleaned below in our continuing discussion on promissory estoppel, we are going to rule that factual issues exist with regard to the promissory estoppel claim. But, if this case proceeds to jury trial, the court is to instruct the jury that it can only

¹¹ In *Paradata Computer Networks, Inc v Telebit Corp*, 830 F Supp 1001, 1007 (ED Mich, 1993), the federal court stated that Michigan law indicates that where the performance which is said to satisfy the detrimental reliance requirement of a promissory estoppel claim is the same performance which represents the consideration for a written contract, promissory estoppel is not available. Further, promissory estoppel is not a doctrine that was designed to give a party to a commercial bargain a second bite at the apple in the event that it fails to establish a breach of contract. *Id.*

¹² We are proceeding on the assumption that promissory estoppel is an “implied contract” theory.

consider promissory estoppel if it fails to find the existence of an express contract, or in other words, if it finds that an agency relationship did not exist.

With respect to the guarantor or surety issue, the Supreme Court in *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 505; 620 NW2d 531 (2001), held that “[a] personal guarantee for the debt of another can arise only where such an intent is clearly manifested.” The Court explained:

[A] court must approach with caution a claim that the parties have formed a guaranty contract. Ordinary experience teaches that assumption of another’s debt is a substantial undertaking, and thus the courts will not assume such an obligation in the absence of a clearly expressed intention to do so. These principles have been in place in Michigan for over a century. [*Id.* at 512-513 (citation omitted).]

Plaintiffs’ attempt to hold GM liable for alleged promises assuring payment is consistent with a claim that GM stood in the shoes of a guarantor, and a clearly expressed intention to guarantee payment was required. With this in mind, we now turn to the analysis of the promissory estoppel claim.

We hold that, minimally, there are issues of fact concerning whether Raysin, and thus GM, should reasonably have expected to induce action of a definite and substantial character on the part of plaintiffs based on his statements, and there exist genuine factual issues concerning whether the statements indeed produced reliance on plaintiffs’ part such that they acted to continue shipping GM freight. The difficult aspect of our analysis concerns whether Raysin’s statements constituted a “promise” that GM would directly pay plaintiffs if KH failed to pay, or in other words, guarantee payment, even if GM had paid KH for the services but KH failed in turn to pay plaintiffs. Raysin’s communications could be interpreted simply as a promise that GM would make the payments to KH to cover the services. An additionally difficult issue regards whether “justice” requires payment. We conclude that these issues should be presented to the trier of fact for determination as reasonable minds could differ.

First, as noted above, there was deposition testimony that GM’s Raysin assured plaintiffs that they would receive payment, that GM was 100 percent behind KH, that GM guaranteed payment, that GM would pay plaintiffs if not paid by KH, that plaintiffs should not worry, and that plaintiffs should continue providing services. Reasonable minds could find that such statements were clear manifestations that GM was guaranteeing payment to plaintiffs for services GM received and plaintiffs provided, even if KH had already been paid by GM for those same services but failed to pass the payments on to plaintiffs.¹³ On the other hand, Raysin also communicated to plaintiffs the manner in which the payment process worked, which process included GM making payments to KH and then KH making payments to plaintiffs. Raysin also conveyed to plaintiffs that he would look into problems at KH that might explain why payments

¹³ We note that the simple statement that GM stood 100 percent behind KH suggests that GM was guaranteeing payment under all circumstances.

made to KH by GM for services rendered had not yet reached plaintiffs. Reasonable minds could conclude that Raysin was only promising that GM would make its payments to KH and push KH to pay plaintiffs, but not that Raysin was promising that GM would directly pay for the services as KH's guarantor should KH not pass GM payments on to plaintiffs. We hold that a jury-triable issue exists on this matter.

Furthermore, with regard to justice and equity, the record is not entirely clear concerning whether GM actually paid KH for all of plaintiffs' outstanding invoices. The bankruptcy proceedings, and specifically the settlement agreement, clearly indicate that GM agreed to pay KH \$700,000 under the Master Agreement; however, KH claimed that \$1.8 million was actually due under the Master Agreement. Plaintiffs claim approximately \$5 million in unpaid services. Additionally, GM relies on the testimony of Toby Skaar relative to payment by GM to KH on the outstanding invoices claimed by plaintiffs, and GM argues that he testified that all outstanding invoices had been paid by GM. Skaar's testimony, however, reflects that he was reviewing a selected summary of invoices, and when confronted with a list that supposedly included all of the invoices specifically at issue in this litigation, Skaar could not state, at that point in time, whether he had already reviewed those previously as part of the summary and his determination that invoices had been paid. GM also attached the selected summary of invoices referenced by Skaar, which includes payment notations, as proof of payment to KH. But again, Skaar did not have the opportunity to reconcile the summary with all of the invoices actually claimed by plaintiffs. We cannot discern from the summary whether it includes or references every invoice claimed by plaintiffs. Plaintiffs argue that there is a lack of proof that GM *actually* paid to KH the amounts claimed by plaintiffs. It does appear, however, that GM made substantial payments to KH that never reached plaintiffs. It is conceivable that a reasonable juror, in the context of equity, might determine that GM is partially liable under the promissory estoppel claim with respect to any differences between the dollar amount due for the services performed by plaintiffs and the amount actually paid by GM to KH. Also, it is conceivable that a reasonable juror, again in the context of equity, might hold GM entirely liable notwithstanding any payments by GM to KH because plaintiffs were not paid for services rendered and because of GM's actions, conduct, and assurances. Again, we hold that a jury-triable issue exists on this matter.

V

Plaintiffs next argue that the trial court erred in dismissing the claim of unjust enrichment because GM received a benefit, freight transport services and avoidance of shutting down its facilities, and it would be inequitable or unjust for GM to retain the benefit in light of the fact that plaintiffs have not been paid.

In *Belle Isle, supra* at 478, this Court summarized the elements of and principles regarding unjust enrichment:

In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). If this is established, the law will imply a contract in order to prevent unjust enrichment. *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656

(1992). However, a contract will be implied only if there is no express contract covering the same subject matter. *Id.*

In *Michigan Educational Employees Mut Ins Co v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999), our Supreme Court also discussed unjust enrichment and the accompanying principle of restitution.

This Court has long recognized the equitable right of restitution when a person has been unjustly enriched at the expense of another.

* * *

This Court has . . . previously held:

“Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, ‘[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.’ The remedy is one by which ‘the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received’ to ensure that ‘exact justice’ is obtained.”

“The essential elements of a quasi contractual obligation, upon which recovery may be had, are the receipt of a benefit by a defendant from a plaintiff, which benefit it is inequitable that the defendant retain.” [Citations omitted; alteration in original.]

A review of the trial court’s ruling indicates that the court failed to address this cause of action, where there is no finding regarding whether GM received a benefit and whether it would be inequitable for GM to retain the benefit.

GM presents the same arguments as those presented in regard to our discussion of detrimental reliance – equitable estoppel – promissory estoppel. Additionally, GM maintains that it was not unjustly enriched because it paid for the services at issue.

For the reasons stated in our analysis of the promissory estoppel claim, we reject GM’s arguments regarding the “economic loss doctrine” and regarding quasi-contractual or implied contract theories and the claimed necessity that no express contract control the same subject matter.

There is no dispute that a benefit was conferred on GM when plaintiffs provided freight transport services. Whether it would be unjust for GM not to pay plaintiffs for the services is a matter that we conclude should be left to the jury for resolution as reasonable minds could differ as indicated in our discussion of promissory estoppel.

VI

Plaintiffs next argue that they intended GM to be their customer, that GM was in fact their customer, that GM acted as if it was plaintiffs’ customer, and that GM payments, until the period of nonpayment, covered the freight transport services. Plaintiffs maintain that GM must

pay them for the reasonable value of the services because the law implies a contract between GM and plaintiffs, and this contract was breached.

“The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement and mutuality of obligation. The elements requisite for the establishment of an implied contract are identical.” *Borg-Warner Acceptance Corp v Dep’t of State*, 169 Mich App 587, 590; 426 NW2d 717 (1988), rev’d on other grounds 433 Mich 16; 444 NW2d 786 (1989); see also *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989) (implied contracts must also satisfy elements of mutual assent and legal consideration). In *Erickson v Goodell Oil Co, Inc*, 384 Mich 207, 211-212; 180 NW2d 798 (1970), the Michigan Supreme Court, explaining the basis for finding an implied contract, stated:

A contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding, of men, show a mutual intention to contract. A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction. The existence of an implied contract, of necessity turning on inferences drawn from given circumstances, usually involves a question of fact, unless no essential facts are in dispute. [Citations omitted.]

“An implied contract cannot be enforced where the parties have made an express contract covering the same subject matter.” *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 93; 468 NW2d 845 (1991).

The trial court did not directly address “implied contract” and its elements in its ruling. However, implicit in the court’s ruling was a conclusion that no contract existed between plaintiffs and GM. GM again focuses its arguments on the “economic loss doctrine,” surety law, and plaintiffs’ reliance on a claimed express contract that allegedly negates a claim of implied contract. For the reasons stated above, we conclude that these arguments are not legally sound. But we also conclude that the implied contract claim is distinguishable from the promissory estoppel and unjust enrichment claims and that it was correctly dismissed.

This particular cause of action arises where the parties act as if they have a contract, but yet no express contract or agreement was ever entered into. Such an action still requires mutuality of agreement or mutual assent. While one might argue that there may have been an implicit agreement between GM and plaintiffs that plaintiffs would transport GM parts and components as evidenced by the history between the parties, there is no indication whatsoever in the documentary evidence that GM had a history, during the life of the Master Agreement, of directly paying plaintiffs for the services. Rather, for the most part, KH was paid by GM for the services, and KH paid plaintiffs. Even on the issue of an alleged implicit agreement to transport freight, the history of the parties in this action indicates that, for the most part, KH, and not GM, arranged particular freight transport services with plaintiffs. The evidence does not support a finding that there was an implicit contract directly between GM and plaintiffs, without consideration of KH, relative to freight transport services and payment. The discussion of this issue is obviously outside of the context of any consideration of the agency issue and the possible

existence of a contract between GM and plaintiffs based on agency principles. We affirm the dismissal of the implied contract claim.

VII

Plaintiffs next argue that the trial court erred in dismissing the fraud-misrepresentation claim. Plaintiffs' argument is predicated on theories of fraudulent or intentional misrepresentation, innocent misrepresentation, bad-faith promise, and fraud in the inducement. All of these theories ultimately arise out of statements to plaintiffs regarding KH's financial stability and assurances that plaintiffs would be paid.

To establish a claim for fraudulent misrepresentation, a plaintiff must show that (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result. *Novak, supra* at 688. The plaintiff's reliance on the misrepresentation must be reasonable. *Id.* at 690-691; see also *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994) ("A misrepresentation claim requires reasonable reliance on a false representation.").

A claim of innocent misrepresentation is established when a party to a contract detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *Novak, supra* at 688. Innocent misrepresentation represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a fraudulent purpose or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in the connection with the making of a contract. *M&D, Inc v McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998). "[I]nnocent misrepresentation only applies to parties in privity of contract[.]" *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 119; 313 NW2d 77 (1981).

The general rule is that promissory statements that one will do a particular act in the future, as opposed to misstatements of past or existing facts, are not misrepresentations, but are contractual in their nature, and do not constitute fraud. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976) ("fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact"); *Boston Piano & Music Co v Pontiac Clothing Co*, 199 Mich 141, 147; 165 NW 856 (1917). An exception lies where there exists a promise made in bad faith without intent to perform. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 90; 443 NW2d 451 (1989). "This exception pertains where, although no proof of the promisor's intent exists, the facts of the case compel the inference that the promise was but a device to perpetrate a fraud." *Hi-Way, supra* at 339. "To fall within this 'bad faith' exception, the evidence of fraudulent intent must relate to conduct by the actor at the time the representations are made or almost immediately thereafter." *Jim-Bob, supra* at 90.

Michigan additionally recognizes the tort of fraud in the inducement, which occurs when a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied on and are indeed relied on. *Samuel D Begola Services, Inc v*

Wild Bros, 210 Mich App 636, 639; 534 NW2d 217 (1995). “Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party.” *Id.* at 640.

Again, the trial court did not directly address the fraud-misrepresentation claim. The court did state that no one could justifiably rely on Raysin’s statement that GM stood 100 percent behind KH as indicating that GM would pay if KH did not pay.

We hold that the fraudulent and innocent misrepresentation claims were properly dismissed because, relative to the claim that GM indicated that KH was financially sound, any reliance on such a representation would not be reasonable as a matter of law. Plaintiffs, through its owners and officials, repeatedly testified concerning their beliefs that KH was in serious financial trouble as evidenced by slow and late payments, talk in the industry, and the fact that certain people were leaving KH. Any claim that plaintiffs relied on indications by Raysin and GM that KH was financially sound in deciding to continue providing services lacks merit under the circumstances. Moreover, the documentary evidence reflects that plaintiffs continued providing freight delivery services in reliance on Raysin’s comments and assurances that plaintiffs would be paid and not on any statements that KH was financially sound.

We also conclude that the fraudulent and innocent misrepresentation claims were properly dismissed because, relative to the claim that Raysin assured payment, such a claim is not predicated on a statement relating to a past or an existing fact, but rather on a promise of future conduct. We note that GM argues that plaintiffs, savvy regarding the air charter industry, were aware on the basis of history and the Master Agreement that KH arranged the freight transport services and that KH was responsible for paying plaintiffs and had done so regularly. Thus, plaintiffs could not have relied on, or reasonably relied on, any representations that might indicate that GM would guarantee or assure payment or make payment to plaintiffs. We believe that reasonable minds could differ on this issue because, under the circumstances in which KH was late with payments, the carriers were considering not continuing their shipping services, and GM needed the services to continue production, it is conceivable that GM would guarantee and assure payment and that plaintiffs would reasonably rely on such promises. Regardless, as indicated above, the misrepresentation claims are legally untenable. We now turn to the theories of bad-faith promises and fraud in the inducement.

Fraud in the inducement appears to relate most often to the avoidance of contracts. “Fraud in the inducement is a defense to the formation of a contract.” *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 160; 702 NW2d 588 (2005), lv gtd 474 Mich 986 (2005). “Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party.” *Wild Bros, supra* at 640. The theory does not fit in the context of this case. Plaintiffs are not attempting to avoid a contract. Regardless, a difficulty that exists with respect to fraud in the inducement and a claim of bad-faith promises is the lack of evidence indicating that Raysin was intending to perpetrate a fraud, and this is assuming that his statements actually constituted a promise that GM would pay for freight transport services even if GM had already paid KH. The facts of the case do not compel an inference that Raysin’s promises were but a device to perpetrate a fraud when those promises were made. *Hi-Way, supra* at 339; *Jim-Bob, supra* at 90. In plaintiffs’ argument section on fraud-misrepresentation, they discuss the assurances that were allegedly given, but there is not any discussion or citation to evidence relative to the assurances being made in bad faith or with fraudulent intent. We conclude that the evidence is insufficient to find a genuine issue of fact regarding bad faith and fraudulent intent,

and thus we hold that the trial court did not err in dismissing in its entirety the complaint's fraud count.

VIII

Plaintiffs finally argue that the trial court erred in not allowing additional time for discovery before granting summary disposition. Plaintiffs wished to take the deposition of Susan Wright, who supposedly supervised Raysin beginning in 1998. The parties had agreed to depose Wright; however, due to medical reasons she has been unavailable, and thus plaintiffs did not have the opportunity to depose her before the hearing on summary disposition. Plaintiffs argue that they are of the belief that her testimony would show that GM controlled the actions of KH in operating as charter manager and that GM acted in such a way as to give rise to an apparent agency. As a general rule, summary disposition is premature if discovery on a disputed, relevant issue has not been completed. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). Given that we have reversed the trial court on the agency issue and have remanded the action for proceedings in furtherance of the breach of contract claim, this issue is moot because Wright's purported testimony relates to the agency issue.

IX

We reverse and remand for further proceedings with respect to the agency issue and related breach of contract claim, the promissory estoppel claim, and the unjust enrichment action. We affirm the trial court's dismissal with regard to the implied contract and fraud-misrepresentation claims.

Affirmed in part, and reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy