

STATE OF MICHIGAN  
COURT OF APPEALS

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NORTHERN WAREHOUSING INC., d/b/a  
NORTHERN FOOD SERVICE,

Plaintiff-Appellee,

v

STATE OF MICHIGAN, DEPARTMENT OF  
EDUCATION,

Defendant-Appellant.

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UNPUBLISHED  
August 22, 2006

No. 260598  
Court of Claims  
LC No. 04-000239-MK

ON REMAND

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. *Northern Warehousing Inc, v State*, 475 Mich 859; 714 NW2d 287 (2006). In our earlier opinion, *Northern Warehousing Inc, v State*, unpublished opinion per curiam of the Court of Appeals, issued March 7, 2006 (Borrello, J. *dissenting*) Docket No. 260598) (*Northern I*), we affirmed the trial court's order granting a preliminary injunction to plaintiff which enjoined defendant from diverting United States Department of Agriculture (USDA) food commodities to cooperatives that certain school districts had formed. *Id.* at \*1. We found that plaintiff had a likelihood of success on the merits of at least one of its claims, specifically its claim for promissory estoppel. *Id.* at \*15. Since plaintiff only needed to present a likelihood of success on one claim, we did not address the plaintiff's other causes of action presented to the trial court<sup>1</sup>. *Id.* at \*15 n 3.

The Supreme Court disagreed and reversed the decision of this Court, stating:

Promissory estoppel requires reasonable reliance on the part of the party asserting estoppel. The contract between the parties contains an integration clause. Reliance on pre-contractual representations is unreasonable as a matter of law when the contract contains an integration clause. See *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 504 (1998). We REMAND

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<sup>1</sup> Plaintiff's complaint also alleged causes of action for a violation of the Urban Cooperation Act, breach of contract, silent fraud and fraudulent misrepresentation.

this case to the Court of Appeals for expedited consideration of the likelihood of success of plaintiff's other causes of action. [*Northern I, supra.*]

We now consider the likelihood of success of plaintiff's other causes of action to determine if another basis for granting injunctive relief exists. We find that plaintiff did not show a likelihood of success on its claims for a violation of the UCA, breach of contract, silent fraud or fraudulent misrepresentation. Accordingly, we reverse the grant of the preliminary injunction.

## I. STANDARD OF REVIEW

A granting of injunctive relief is within the discretion of the trial court and this Court reviews for an abuse of discretion. *Mich Coalition of State Employees Unions v Mich Civil Serv Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). "The exercise of this discretion may not be arbitrary, but rather must be in accordance with the fixed principles of equity and jurisprudence and the evidence in the case." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263; 489 NW2d 211 (1992). This Court will not overturn a trial court's findings of fact unless it is convinced that it would have reached a different result. *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich 647, 661; 588 NW2d 133 (1998). Additionally, "[w]hether a plaintiff has a cause of action under the statute presented a question of statutory interpretation" that this Court reviews de novo. *Long v Chelsea Community Hosp*, 219 Mich App 578, 581-82; 557 NW2d 157 (1996).

## II. ANALYSIS

### A. Violation of the Urban Cooperation Act

We find that plaintiff does not have a likelihood of success on the merits of its claim for a violation of the Urban Cooperation Act (UCA), MCL 124.501 et seq. In its brief on appeal, plaintiff states that it "does not claim a private right of action under [the RSC or UCA] for enforcement of either statute. Instead, plaintiff claims breach of contract facilitated through a violation of the RSC and UCA." However, in plaintiff's first amended complaint, Count II alleges a "VIOLATION OF THE URBAN COOPERATION ACT." Plaintiff goes on to allege that defendants have "materially and substantially violated the requirements" of the UCA in various ways. Thus, as before us on the record, plaintiff has alleged a violation of the UCA and we agree with the defendant that plaintiff cannot prevail on the merits of such a claim as no private right of action exists.

This Court stated in *Long, supra* at 583:

If the common law provides no right to relief, and the right to such relief is instead provided by statute, then plaintiffs have no private cause of action for enforcement of the right unless: (1) the statute expressly creates a private cause of action or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions.

We again addressed this concept when we stated "where a statute creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other

enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred.” *Claire-Ann Co v Christenson & Christenson, Inc*, 223 Mich App 25, 31; 566 NW2d 4 (1997) (citations omitted). Here, the UCA created a new right that is unknown to our common law; however, it failed to expressly provide for a private right of action. Furthermore, a cause of action cannot be inferred as the UCA provided a means of enforcement by entrusting the responsibility of upholding the law to a public officer by requiring the governor to approve all such interlocal agreements. MCL 124.510. Therefore, there is no private right of action, plaintiff does not have a likelihood of success on the merits of its claim of a violation of the UCA, and the trial court abused its discretion in finding that plaintiff had a likelihood of success on the claim.

## B. Breach of Contract

We find that plaintiff does not have a likelihood of success on the merits of its claim for breach of contract. The contract between plaintiff and defendant provided, in pertinent part:

The State of Michigan shall enter into an agreement with a Contractor(s) to provide Warehousing and Delivery Services for various region(s) . . . for the State of Michigan. . . . The contractor will be the primary distributor of commodities within a region, *however, some recipients may have sufficient volume as to allow direct shipment from USDA. Direct shipment to recipients shall be at the discretion of [the Michigan Department of Education].*

*Exact quantities to be received, warehoused and distributed are unknown.* The contractor will be required to provide services related to the food that may be ordered during the Contract period. Quantities specified, are estimates based on prior year receipts and/or anticipated USDA shipments, and the State is not obligated to order in these or any other quantities. (Emphasis added).

Defendant argued, inter alia, that plaintiff cannot show a likelihood of success on this claim because the contract language specifically states that receiving agencies may obtain commodities directly from the USDA and that the contract does not guarantee plaintiff a minimum volume of commodities to store and distribute. We agree.

The goal of interpreting a contract is to discern the intent of the contracting parties. *Quality Products & Concepts Co v Nagel Precision*, 269 Mich 362, 375; 666 NW2d 251 (2003). Parties are presumed to understand and intend what the language employed clearly states. *Chestonia Twp v Star Twp*, 266 Mich App 423, 432; 702 NW2d 631 (2005). When interpreting contracts, we give effect to every word and phrase insofar as practicable. *Hunter v Pearl Assurance Co*, 292 Mich 543, 545; 291 NW2d 58 (1940). If the language of the contract is clear and unambiguous, interpretation is limited to the words used and parol evidence may not be used to show a different intent. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). “The judiciary may not rewrite contracts on the basis of discerned ‘reasonable expectations’ of the parties.” *Id.* at 656-57.

We find the language of this contract to be clear and unambiguous. The contract refers to plaintiff as the “primary distributor.” The court of claims relies upon this reference to find defendant’s breach, stating that defendant “systematically disregarded” the contract by allowing

other school districts to form cooperatives in order to directly receive commodities from the USDA. However, the court of claims and plaintiff both ignore the second part of the “primary distributor” clause which explicitly gives defendant that right by stating, “...however, some recipients may have sufficient volume as to allow direct shipment from USDA. Direct shipment to recipients shall be at the discretion of [the Michigan Department of Education].” In giving effect to each word of this phrase, the conclusion that plaintiff is not the primary and *exclusive* distributor and that not *all* commodities *must* come from plaintiff is inescapable. To conclude otherwise is a direct contradiction of the words and would render the first part of the phrase utterly meaningless. Furthermore, the contract plainly states that the quantities that may be ordered are unknown. The language of this paragraph is not mandatory. Defendant was under no obligation to provide plaintiff with any specified amount of business at any particular time. This substantiates the interpretation that plaintiff is not the *sole* provider because some recipients may be receiving shipment directly from the USDA.

From this, we are convinced that the trial court’s finding of fact that the language of the contract was ambiguous is wrong. Thus, the trial court erred by allowing in extrinsic evidence when considering the likelihood of success on plaintiff’s breach of contract claim. Based upon the clear and unambiguous language of the contract alone, we accordingly find that plaintiff does not have a likelihood of success on a breach of contract claim.

### C. Silent Fraud and Fraudulent Misrepresentation

These two causes of action will be addressed together as the defendant asserts the same defense to both causes of action which the plaintiff rebuts with the same argument. Defendant argues that plaintiff’s claims for silent fraud and fraudulent misrepresentation are barred by governmental immunity and thus the trial court erred in finding that there was a likelihood that plaintiff would prevail on these claims. We agree.

Governmental immunity is addressed by the government tort liability act (GTLA), which states:

(1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. [MCL 691.1407(1).]

The exceptions provided in the act are the highway exception, MCL 691.1402, the motor vehicle exception, MCL 691.1405, the public building exception, MCL 691.1406, the proprietary function exception, MCL 691.1413, and the governmental hospital exception, MCL 691.1407(4). The only other tort claims that will survive a grant of immunity are “those that arise from the exercise or discharge of a nongovernmental function.” *Tate v City of Grand Rapids*, 256 Mich App 656, 659; 671 NW2d 84 (2003). A governmental function is an activity which is “expressly or impliedly mandated or authorized by constitution, statute, or other law.” *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984); MCL 691.1401(f).

The language is clear that only five exceptions to the GTLA exist and none apply here to plaintiff’s claims. However, plaintiff asserts that the immunity does not apply because the State was not authorized to expand the pilot program because the cooperatives were formed in violation of the UCA; thus the State’s action were unlawful, ultra vires actions for which there

was no legal authority. Plaintiff relies upon *Richardson v Jackson County*, 432 Mich 377; 443 NW2d 105 (1989) to support this argument; however, both plaintiff and the trial court omit an important part of *Richardson* that improper performance of an authorized activity is still authorized. *Id.* at 385.

In *Richardson*, our Supreme Court determined that failure to comply with § 141 of the Marine Safety Act (MSA) did not render defendant's operation of a beach unauthorized under § 1 of 1917 PA 156. *Id.* at 380-31. Section 1 of 1917 PA 156 authorizes the county to operate recreational facilities such as a public beach. *Id.* at 381; MCL 123.51. Section 192 of the MSA regulates this authorized activity by requiring that buoys be placed to mark a safe swimming area in accordance with § 141. *Richardson, supra* at 382; MCL 281.1192(1). Section 141 contains buoy application, inspection, permit and placement requirements. *Richardson, supra* at 382-83; MCL 281.1141. The county failed to comply with the requirements of § 141 but our Supreme Court found this failure to comply insufficient to render the county's activity unauthorized, stating:

Improper performance of an activity authorized by law is, despite its impropriety, still "authorized" within the meaning of the *Ross* governmental function test. An agency's violation of a regulatory statute that requires the agency to perform an activity in a certain way cannot render the activity ultra vires, as such a conclusion would swallow the *Ross* rule by merging the concepts of negligence and ultra vires. [*Richardson, supra* at 385-86.]

Here, defendant's failure to comply with the specific requirements of the UCA in forming its cooperatives does not defeat its authority to form them under the RSC. Similar to the general language of § 1 of 1917 PA 156, the RSC does not impose strict requirements to establish a cooperative, but rather generally authorizes their creation by stating:

(4) A general powers school district may enter into agreements or cooperative arrangements with other entities, public or private, or join organizations as part of performing the functions of the school district. [MCL 380.11a(4)]

Then, similar to the stricter regulations provided by §§ 141 and 192 of the MSA, the UCA provides the regulations by which a cooperative is to be formed by requiring, inter alia, an interlocal agreement, MCL 124.505b, and approval of the governor, MCL 124.510. See MCL 124.501 et seq. As in *Richardson*, failure to comply with these specific regulations does not render the actions unauthorized. The Legislature has explicitly authorized the creation of cooperatives. By regulating the manner in which the cooperative must be formed, the Legislature did not withdraw that power. *Richardson, supra* at 385. In fact, the UCA explicitly provides that:

If any provision of this act conflicts with any other statute of this state providing for the authorization or performance of joint or cooperative agreements or undertakings between public agencies of this state or between public agencies of this state and public agencies of other states or of Canada, the provisions of *the other statute shall control*. Emphasis added. [MCL 124.503.]

This further substantiates the assertion that the Legislature had no intent to withdraw the power given to school districts to enter into cooperatives by the RSC. Since the authority for school districts to form cooperatives explicitly exists, the school districts actions were authorized, despite the failure to comply with the strict requirements of the UCA. *Richardson, supra* at 385-86. Plaintiff does not have a likelihood of success on the merits of its claims for silent fraud and fraudulent misrepresentation. The trial court abused its discretion in finding that defendant's actions were unlawful, ultra vires actions for which there was no legal authority.

### III. CONCLUSION

We conclude that plaintiff did not show a likelihood of success on its claims for a violation of the UCA, breach of contract, silent fraud or fraudulent misrepresentation. Thus, the standard for issuing a preliminary injunction under *Mich State Employees Ass'n v Dept of Mental Health*, 421 Mich 152, 157-58; 365 NW2d 93 (1985) was not satisfied. We accordingly reverse the grant of the preliminary injunction and we dissolve the stay of the injunction granted by our Supreme Court. Further, we give our judgment immediate effect pursuant to MCR 7.215(F)(2).

/s/ Michael R. Smolenski

/s/ Bill Schuette

/s/ Stephen L. Borrello