STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, Michigan 49417
616-846-8315
* * * * *

CONSUMERS ENERGY COMPANY,
Plaintiff / Counter-Defendant,

v

OPINION AND ORDER

WOLVERINE POWER SUPPLY COOPERATIVE, INC., d/b/a **WOLVERINE POWER COOPERATIVE,**
Defendant / Counter-Plaintiff.
_____/

File No. 22-006876-CB

Hon. Jon Van Allsburg

Since 1980, plaintiff Consumers Energy Company and defendant Wolverine Power Supply Cooperative, Inc., have co-owned and operated the coal-fired power plant known as Campbell 3, which provides electricity to Michigan residents and businesses.[1] The parties signed the Campbell Unit No. 3 Ownership and Operating Agreement to govern the operation of the power plant.[2] In its 2018 Integrated Resource Plan (IRP) submitted to the Michigan Public Resource Commission (MPRC), Consumers publicly stated its intention to have Campbell 3 in operation through 2040. However, in the fall of 2020, Consumers began exploring an earlier retirement for the power plant. On June 23, 2021, Consumers notified Wolverine for the first time that it intended to retire Campbell 3 in 2025. Later that day, Consumers made that proposal public as part of its 2021 IRP. Wolverine objected to this early retirement decision, arguing that Campbell 3 should remain in service.

[1] Consumers has a 94.03% ownership interest. Wolverine has a 1.89% ownership interest. The remaining 4.08% interest was conveyed to the Michigan Public Power Agency under a separate ownership and operating agreement not at issue here.

[2] The Operating Agreement was also signed by Northern Michigan Electric Cooperative, which has since merged with Wolverine. The Operating Agreement was amended in 1985 to add all of Northern's rights and obligations to Wolverine's.

Consumers filed the instant action for declaratory relief and Wolverine responded with a counterclaim alleging breach of contract. In an Opinion dated October 24, 2022, this Court granted partial summary disposition in favor of Consumers, declaring that the Operating Agreement does give Consumers sole authority to retire Campbell 3, but that Consumers would nevertheless be liable for any action taken in bad faith and prejudicing Wolverine for the benefit of Consumers. Since then, Consumers and Wolverine have each filed cross motions under MCR 2.116(C)(10) for summary disposition of the remaining claims, disputing whether Consumers did act in bad faith while making the decision to shut down Campbell 3. The wisdom of a 2025 retirement date for Campbell 3 is not at issue here and plays no part in this decision.

Standard of Review

A (C)(10) motion tests the factual basis for a claim or defense.[3] "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law."[4] "[T]he disputed factual issue must be material to a dispositive legal claim."[5]

"A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact."[6] "The level of specificity required under MCR 2.116(G)(4) is that which would place the nonmoving party on notice of the need to respond to the motion made under MCR 2.116(C)(10)."[7] "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion."[8] Mere conclusory allegations are not sufficient to raise a genuine issue of fact for trial.[9] Circumstantial evidence is sufficient to establish a genuine issue of material fact.[10]

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[3] *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[4] *Haliw v City of Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001).

[5] *Kostello v Rockwell Intern Corp*, 189 Mich App 241, 243; 472 NW2d 71 (1991).

[6] MCR 2.116(G)(4), *Bullock v AAA*, 432 Mich 472, 475 n 3; 444 NW2d 114 (1989).

[7] *Barnard Mfg Co, Inc v Gates Performance Engg, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

[8] *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

[9] *Quinto v Cross & Peters Co*, 451 Mich 358, 370; 547 NW2d 314 (1996)

[10] *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004).

The court is not obligated to "scour the record to determine whether there exists a genuine issue of fact."[11] "MCR 2.116(G)(4) squarely places the burden of identifying the issues and evidentiary support on the parties, not the trial court."[12] "The trial court is not permitted to assess credibility, to weigh the evidence, or to determine the facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)."[13]

Analysis

"If a contract's language is clear, its construction is a question of law for the court."[14] "Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided."[15] The Court must "read contracts as a whole, giving harmonious effect, if possible, to each word and phrase."[16] As this Court previously ruled, there is no ambiguity between sections 7.5 and 15.2 of the Operating Agreement.

> 7.5 CONSUMERS shall have sole authority in decisions regarding the retirement from service of any and all property included in Campbell 3.
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> 15.2 CONSUMERS shall not be liable to NORTHERN or WOLVERINE for any loss, cost, damage or expense incurred by NORTHERN or WOLVERINE as a result of any action or failure to act, whether through negligence or otherwise, by CONSUMERS (or its employees, agents or contractors) in carrying out any of the provisions of this Agreement in regard to . . . the retirement, disposal, or salvaging of CAMPBELL 3, or any part thereof, or any other matter concerning CAMPBELL 3, or any part thereof, except that CONSUMERS shall be liable to NORTHERN and WOLVERINE for any action taken by CONSUMERS in bad faith and prejudicing NORTHERN and WOLVERINE for the benefit of CONSUMERS.

The plain language of these provisions together does not limit Consumers' sole authority to make retirement decisions. Consumers, alone, may make the retirement decisions it sees fit. Consumers would simply be liable to Wolverine if any of Consumers' actions are taken in bad faith and

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[11] *Barnard Mfg*, 285 Mich App at 381.

[12] *Id.* at 376.

[13] *Henry Ford Health Systems v Esurance Ins Co*, 288 Mich App 593, 597-98; 808 NW2d 1 (2010).

[14] *G & A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994).

[15] *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 166; 550 NW2d 846 (1996).

[16] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51 n 11; 664 NW2d 776 (2003).

prejudice Wolverine for the benefit of Consumers. The Operating Agreement expressly gave Consumers sole authority to make retirement decisions and established where and how bad faith could give rise to liability. The language gives this Court no room to add additional limitations to Consumers' authority beyond those that were bargained for.[17] The question for the Court is whether there is a genuine issue of material fact as to whether actions taken by Consumers were taken in bad faith and prejudiced Wolverine for the benefit of Consumers. Breaches of the Operating Agreement that do not meet this standard do not create liability for Consumers.

The parties agree on the applicable definition of bad faith: "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty."[18] "Good faith refers to an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage."[19] "The covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[20]

Wolverine's allegations can be sorted into two categories: allegations that Consumers acted in bad faith when it made its decision to retire Campbell 3 in 2025 and allegations that Consumers acted in bad faith when it failed to disclose its consideration of this decision to Wolverine until the day the proposal was announced publicly.

The Decision to Retire Campbell 3 in 2025

Wolverine's position is that Consumers' actions injured their right to receive the "fruits of the contract" under the Operating Agreement. These alleged fruits of the contract included Wolverine's right to receive a supply of baseload energy from Campbell 3, Wolverine's right to provide meaningful input on major decisions, and Wolverine's expectation that it would benefit from previous investments made to extend the useful life of Campbell 3.

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[17] *Hubbard Chevrolet Co v Gen Motors Corp*, 873 F2d 873, 876-77 (CA 5, 1989).

[18] *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 136; 393 NW2d 161 (1986).

[19] *Auto-Owners Ins Co v Campbell-Durocher Group Painting & Gen Contracting, LLC*, 322 Mich App 218, 228; 911 NW2d 493 (2017) (cleaned up).

[20] *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152; 483 NW2d 652 (1992) (cleaned up).

Wolverine's right to receive a supply of baseload energy is subject to Consumers' sole authority to make retirement decisions. "A provision in a contract for termination at the option of a party is valid."[21] The mere fact that a contract is terminated does not give rise to a claim of bad faith.[22] Wolverine cannot argue that the decision to retire Campbell 3 in 2025 was made in bad faith simply because Campbell 3 would be retired and no longer supply energy. Wolverine argues that it has a right to provide meaningful input on major decisions, but that is not supported by the text of the contract, which gives sole authority in retirement decisions to Consumers. Consumers had no obligation under the Operating Agreement to seek out or consider Wolverine's input as part of making retirement decisions. The parties' mutual duty to cooperate under section 9.1 does not override the explicit sole authority term in section 7.5, and the duty to consult or exchange information through the Administrative Committee does not impose a further obligation that Consumers include Wolverine's input in the process of deciding to retire Campbell 3 in 2025. Such an interpretation would conflict with section 7.5 and cannot be implied.

Wolverine also alleges that it had a reasonable expectation that it would benefit from previous investments made to keep Campbell 3 running through 2039. However, Wolverine has not identified any significant investments made between when Consumers began considering early retirement of Campbell 3 in September 2020 and when Consumers disclosed their proposal in June 2021. Furthermore, the reasonable expectations of a party cannot be used to rewrite a contract in Michigan.[23] Reliance, even reasonable reliance, is not an element of claim of bad faith. Wolverine has not shown that Consumers acted in bad faith by injuring Wolverine's right to receive the fruits of the contract.

Consumers seeks summary disposition under MCR 2.116(C)(10) on their claim that the decision to retire Campbell 3 in 2025 was not made in bad faith. Wolverine is therefore obligated by MCR 2.116(G)(4) to respond with evidence setting forth specific facts showing that there is a genuine issue for trial.

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[21] *JR Watkins Co v Rich*, 254 Mich 82, 84; 235 NW 845 (1931).

[22] Section 20.1 of the Operating Agreement terminates the Agreement "at such time as CAMPBELL 3 is retired from service".

[23] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003).

In *Maida v Ret & Health Servs Corp*, an unpublished federal case cited by plaintiff and applying Michigan law, a developer argued that a property owner terminated a land sale contract in bad faith.[24] The seller had the contractual right to terminate the contract if he concluded, in his sole discretion, that the purchaser's intended use of the property might adversely affect the sale or development of the seller's adjoining property.[25] The seller testified that he terminated the contract because he believed the sale would burden the adjoining property with easements.[26] Without any evidence that the seller lied about his understanding of the easements, the developer argued that the seller acted in bad faith because some of the seller's advisors recommended the sale proceed, that the seller did not adequately investigate whether the proposed use would adversely affect the adjoining property, that the seller only briefly discussed the matter with a few people, that the seller did not understand the nature and extent of any easements, and that the seller waited until the last minute to exercise his option to terminate.[27] The court held that no showing had been made that the seller's actions were arbitrary, reckless, indifferent, or in intentional disregard of the developer's interest. There was therefore no genuine issue as to whether the seller acted in bad faith and the seller was entitled to summary judgment on that issue.[28]

Similarly, Wolverine has failed to do so on this issue. The evidence that Wolverine proffers in response to Consumers' motion does tend to show that Wolverine suffered damages from the early retirement, but damages alone are insufficient to establish bad faith. Wolverine was obligated to show bad faith by establishing that Consumers made the early retirement decision in arbitrary, reckless, indifferent, or intentional disregard of Wolverine's interests. Wolverine has not offered evidence that this is the case, even when considered in the light most favorable to Wolverine. Wolverine has produced deposition testimony that Wolverine would incur major costs to replace the energy and capacity from Campbell 3, that Wolverine's plans relied on Campbell 3's operation through 2040, that Wolverine's CEO saw no technical, engineering, or economic basis for Campbell 3's early retirement. None of this testimony addresses Consumers' alleged disregard for

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[24] *Maida v Ret & Health Servs Corp*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued September 19, 1994 (Case Nos. 93–1625, 93–1635); 36 F3d 1097 (Table).

[25] *Id.* at *4.

[26] *Id.* at *5.

[27] *Id.* at *6.

[28] *Id.*

Wolverine's interest. Evidence that regulatory asset treatment from the MPSC benefitted Consumers but not Wolverine does not address whether Consumers made its decision in bad faith. Testimony from Consumers' corporate representatives that Consumers did consider Wolverine's interests is not contradicted by another statement that early retirement "was the best option for our company and the state of Michigan." Wolverine argues that Consumers relied on flawed and inaccurate assumptions about Wolverine's ability to replace the energy and capacity from Campbell 3 within four years, but relying on inaccurate assumptions does not constitute bad faith.[29] Wolverine has not identified a genuine issue as to any material fact regarding whether Consumers made the decision to retire Campbell 3 in 2025 in bad faith, so summary disposition is warranted under MCR 2.116(C)(10).

Failure to Inform

Wolverine also argues that Consumers breached the Operating Agreement in bad faith by failing to inform Wolverine of its proposal to shut down Campbell 3 in 2025 prior to the day the proposal was announced publicly. Wolverine points to four provisions in the Operating Agreement that were allegedly breached by Consumers.

> 9.1 CONSUMERS, NORTHERN and WOLVERINE shall cooperate with each other in all activities relating to CAMPBELL 3, including, without limitation, the filing of applications for authorizations, permits or licenses and the execution of such other documents as may be reasonably necessary to carry out the provisions of this Agreement.

The other three of these provisions describe the responsibilities of an Administrative Committee established by section 16.1 of the Operating Agreement. The Administrative Committee was to have one member designated by each party to the Operating Agreement and meet annually as a means of providing consultation of the parties and interchange of information. It is conceded by both parties that the Administrative Committee was not populated and did not meet between September 2020 and June 23, 2021, the period between when Consumers began considering early retirement of Campbell 3 and when it informed Wolverine of its proposal to do so. With respect to the parties' obligations to notify and consult, the Operating Agreement provides in relevant part:

> 16.4 The Administrative Committee shall have the following functions:

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[29] *Id.*

> 16.4.1 Provide liaison among all PARTIES at the management level and exchange information with respect to significant matters of licensing, design, construction, operation, and maintenance of CAMPBELL 3.
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> 18.1 In accordance with the provisions of Article 16, the members of the Administrative Committee will consult in connection with any major matter arising under this Agreement.
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> 18.3 If, after the Commercial Operation Date of CAMPBELL 3, any disagreement arises on . . . major retirement matters pertaining to CAMPBELL 3, such matters shall be discussed by the members of the Administrative Committee and timely mutual agreement sought among such members in regard thereto.

Consumers suggests that the failure of the Administrative Committee to meet waives any duties of the parties under articles 16 and 18 of the Operating Agreement. However, Consumers has not attempted to show that the course of conduct between the parties established mutual agreement to a knowing waiver of those contract terms.[30] Such a showing would be required to modify a contract.[31] Factual development is necessary to determine whether the contract was modified, so summary disposition is inappropriate as to the duties of the Administrative Committee, or whether Consumers breached its duties under sections 16.4 or 18.1.

On the other hand, Section 18.3 describes a duty to discuss major retirement matters that applies only if a disagreement arises. A disagreement cannot possibly arise between two parties when one party is unaware of the matter giving rise to the purported disagreement. For that reason, no breach of section 18.3 could have taken place until after Wolverine was informed of Consumers' proposal to retire Campbell 3 in 2025. Accordingly, no breach of section 18.3 can serve as the basis for a claim that Consumers acted in bad faith prior to disclosing its proposal to Wolverine.

The language in Section 9.1 clearly requires both parties to cooperate with each other in all activities relating to Campbell 3. Consumers nevertheless argues that a requirement to cooperate generally does not imply a specific obligation to notify Wolverine whenever it began analyzing any possible retirement of Campbell 3. Such an interpretation conflicts with section 18.1. In addition, the conduct at issue is Consumers' failure to notify Wolverine of its retirement proposal

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[30] *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003).

[31] *Id.*

while negotiating its own deals for replacement capacity and energy, at a time when Wolverine also had a need (unknown to Wolverine) to negotiate its own deals for replacement capacity and energy. Wolverine has argued that this specifically was bad faith. Consumers presents some evidence that it had legitimate concerns about the consequences of the workforce at Campbell 3 finding out about the proposed early retirement before Consumers was ready. However, Wolverine pointed to Consumers' internal board presentations and witness testimony that the purpose of keeping the retirement proposal secret was to preserve a negotiating position for Consumers while it arranged its own replacement capacity and energy. Wolverine has thus shown a genuine issue of material fact as to whether Consumers acted in bad faith. The plaintiffs' claims of bad faith in *Ferrell v Vic Tanny Intern, Inc*, were dismissed when the plaintiffs made no allegations disputing the defendant's stated legitimate purpose for its actions.[32] In this case, Wolverine has made allegations and produced evidence disputing Consumers' explanation for keeping the retirement proposal confidential and supporting a finding of prejudice to Wolverine for the benefit of Consumers. Summary disposition of this allegation of bad faith is not warranted.

Conclusion

Wolverine has not identified a genuine issue as to any material fact regarding whether Consumers decided in bad faith to retire Campbell 3 in 2025. Summary disposition is GRANTED IN PART in favor of Consumers as to this issue and OTHERWISE DENIED. Wolverine has identified a genuine issue of material fact as to whether Consumers breached the Operating Agreement in bad faith by failing to notify Wolverine of its consideration of early retirement for Campbell 3 and failing to consult before the public announcement.

IT IS SO ORDERED.

This is not a final order and does not close this case.

Date: March 1, 2024

Hon. Jon A. Van Allsburg, Circuit Judge

[32] *Ferrell v Vic Tanny Intern, Inc*, 137 Mich App 238, 243-44; 357 NW2d 669 (1984).