

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

WILLOUGHBY ESTATES II, LLC,

Plaintiff/Counter-Defendant,

V

WIELAND CORPORATION,

Defendant/Counter-Plaintiff.

Case No. 19-000540-CB-C30

**OPINION AND ORDER
DENYING PLAINTIFF'S
MOTION FOR
RECONSIDERATION**

At a session of said Court held in Lansing, Ingham
County, Michigan, on October 9, 2020

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

Plaintiff filed a motion for reconsideration of the portion of this Court's September 15, 2020 order that dismissed Count II of the Complaint alleging negligence. Plaintiff maintains that the Court committed palpable error that, if corrected, would result in a different disposition.

Plaintiff says that it was error for this Court to decline to give effect to the rule in *Baranowski v Strating*, 72 Mich App 548 (1976) that a building contractor has an independent duty of due care which supports a negligence claim. The Court finds that *Baranowski* is not dispositive in this case. *Baranowski* did not address the issue of whether a negligence claim can survive when the claimed negligence is covered by the contract. *Baranowski* dealt with a negligence claim for failure to take soil borings that were *not* specifically required by the contract. Plaintiff's argument that *Baranowski*

controls this case presupposes that this case involves a negligence claim that is not also covered by a contract. The Court disagrees with Plaintiff's premise.¹

Plaintiff correctly notes that *Fultz v Union-Commerce Associates*, 470 Mich 460 (2004) does not apply to negligence claims where the parties are in privity of contract. The Court agrees that if it committed any error, it was to mention *Fultz*. However, such error is not palpable error that would change the outcome of the motion. Accepting the fact that third-party analysis should not be applied where there is privity of contract, we are left with all the cases outside of the *Fultz* line that have long held similar to the following:

For an action in tort to exist [here], there must be a breach of a duty separate and distinct from the duties imposed by the contract. No such breach of duty independent from the contract is alleged in the instant case. While it is true in Michigan that every contractual undertaking is accompanied by a common law duty to use ordinary care in the performance of the task undertaken, a tort action will lie only if a relation exists which would give rise to a legal duty without enforcing the contract promise itself. In the instant case, no legal duty exists which could not be fulfilled by enforcement of the contract itself. *Nelson v Northwestern Sav and Loan Ass'n*, 146 Mich App 505 (1985), citing *Hart v Ludwig*, 347 Mich 559, 560 (1956). See also, *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65 (1997).

This case alleges a breach of contract based on a contract that called for a working plumbing system, catch basins throughout the Project, and habitable conditions in the

¹ Plaintiff also says that *Baranowski* has been favorably cited by the Michigan Supreme Court as recently as 2013 in *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 246 (2013). It has, but again, not for anything pertaining to this case. *Price* cited *Baranowski* for the following: "It is the settled law of this state that the measure of damages to real property, if permanently irreparable, is the difference between its market value before and after the damage."

apartment buildings.² All of these contractual provisions are alleged to have been breached by failing to deliver working plumbing and functioning catch basins and failing to deliver Building L in a manner that is safe and fit for human occupancy because of mold (Complaint, ¶ 38-42).

The negligence claim in this case covers (1) arranging for, supervising, and approving the improper and/or defective installation of the plumbing, (2) inappropriate material storage, and causing and failing to remediate mold, and (3) failing to complete and repair the catch basins throughout the Project.

The negligence claims are all covered by the contract and they are all represented in the breach of contract allegations of the complaint. There is no legal duty which could not be fulfilled by enforcement of the contract itself, per the allegations of the Complaint. Therefore, the Court finds no palpable error that, if corrected, would change the outcome of the motion.

IT IS HEREBY ORDERED that the Plaintiff's motion for reconsideration is denied.

/s/

Joyce Draganchuk (P39417)
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Opinion and Order upon the attorneys of record by placing said document in sealed envelopes addressed to each and

² The Court was informed at the time of the hearing that the plumbing claims have been settled. They are mentioned here only to illustrate that the negligence claims are a mirror image of the breach of contract claims in their entirety.

depositing same for mailing with the United States Mail at Lansing, Michigan, on October 9, 2020.

/s/

Michael Lewycky
Law Clerk/Court Officer