STATE OF MICHIGAN

COURT OF APPEALS

CHALLENGE MFG COMPANY, LLC,

Plaintiff-Appellee/Cross-Appellant,

v

METOKOTE CORPORATION,

Defendant-Appellant/Cross-Appellee.

FOR PUBLICATION
January 26, 2023
9:10 a.m.

No. 357280
Kent Circuit Court
LC No. 19-010312-CB

Before: RIORDAN, P.J., and MARKEY and REDFORD, JJ.

PER CURIAM.

In this commercial breach-of-contract action, defendant-appellant/cross-appellee, MetoKote Corporation, appeals by leave granted[1] the portion of the Kent Circuit Court's order that granted summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact) in favor of plaintiff-appellee/cross-appellant, Challenge MFG Company, LLC, on the issue pertaining to whether the parties' contract involved the sale of goods and was subject to the Uniform Commercial Code (UCC), MCL 440.1101 *et seq*. Challenge filed a cross-appeal from the same order, in which the trial court denied its motion for summary disposition pertaining to the validity of a revised purchase order (PO).

On appeal, MetoKote asserts that the trial court erred by concluding that the contract at issue involved the sale of goods to which the UCC applies because MetoKote provides a service, making the UCC inapplicable. In Challenge's cross-appeal, it asserts that the trial court erred by denying its full motion for summary disposition because it had preserved its rights pursuant to the UCC, and further argument was unnecessary to invalidate the revised PO. For the reasons explained in this opinion, we conclude that the trial court erred by determining that the parties' contract concerned the sale of goods governed by the UCC. Therefore, we reverse the portion of the order granting Challenge's motion for summary disposition. Further, it is unnecessary for this Court to consider the issue raised in Challenge's cross-appeal because we conclude that the UCC

[1] *Challenge MFG Co LLC v MetoKote Corp*, unpublished order of the Court of Appeals, entered September 22, 2021 (Docket No. 357280).

does not apply to the parties' contract and that the trial court should consider the validity of the revised PO pursuant to the common law on remand.

I. FACTUAL AND PROCEDURAL HISTORY

This case arises from a commercial contract dispute between two companies that are involved in the automotive supply chain. Challenge manufacturers a variety of automotive parts. Its largest customer is General Motors (GM). The dispute concerns a metal part called a "plenum." The plenum is used in the manufacture of mid-sized pickup trucks, such as the Chevrolet Colorado and the GMC Canyon. The plenum is a structural component that is placed in the back of the engine housing, between the engine compartment and the passenger cab. MetoKote provides electrocoat (e-coat), powder coat, and liquid paint services for parts used in a variety of different industries, including automotive. Pertinent to this case, Challenge contracted with MetoKote for the e-coating of the plenum. The e-coat increases the plenum's corrosion (rust) resistance, which is required by GM. Challenge shipped MetoKote the "raw" plenums, and MetoKote sent the plenums through its e-coat process. MetoKote then shipped the coated plenums back to Challenge. The e-coating process is extensive, with more than 20 steps. Essentially, the plenums are cleaned, sprayed by an activator spray to help with adhesion, and then submerged into a bath of the e-coat material. Aside from loading and unloading the plenums from the line, the entire process is automated. MetoKote's parent company, PPG Coating Services, provides the material that MetoKote uses in the e-coating process. The e-coat is meant to be permanent.

In November 2014, the parties agreed to the price of $1.50 to e-coat each plenum. The price included the coating process and materials. The parties operated under this agreement until 2017. At that point, MetoKote asked for a price increase to $1.61. Challenge initially pushed back on the increase. However, Challenge eventually agreed, as long as MetoKote agreed to the addition of language prohibiting any other price increases in the updated PO. MetoKote agreed. Challenge issued a revised PO reflecting the $1.61 price. The PO also provided that "Metokote agrees that it will not request any further price increase for the life of the part, and will continue to support the Customer's full production demands for the life of the program."

However, in September 2019, MetoKote again sought a price increase to $1.95. Challenge resisted that additional price increase, pointing out that the parties previously agreed that there would not be any additional price increases for the life of the program. The parties continued to dispute the price increase through telephone calls and e-mail messages. In an e-mail, a sales manager for MetoKote explained that MetoKote would require an updated PO reflecting the $1.95 price before December 1, 2019, warning that "[p]roduct cannot be received after this date if we do not have an updated PO."

Challenge filed the lawsuit that gives rise to this appeal. In its complaint, Challenge alleged that MetoKote breached the revised PO by refusing to perform (continue e-coating plenums) unless Challenge issued another updated PO with a price increase. After the lawsuit was filed, the vice president of Challenge sent an e-mail to MetoKote's sales manager explaining that "this contract dispute will end up being settled in court. Challenge will be updating its pricing to you this morning under protest, [Challenge] will be sending the updated PO shortly." Later that same day, Challenge sent MetoKote an updated PO reflecting the new $1.95 price, which would become effective on December 1, 2019.

Early in the proceedings, Challenge moved for summary disposition under MCR 2.116(C)(9) (failure to state a valid defense) and MCR 2.116(C)(10). However, the trial court denied the motion, concluding that additional discovery was necessary to properly resolve the claims raised in the case, including the issue concerning whether the parties' agreement involved the sale of goods or performance of services.

After the conclusion of discovery, the parties filed cross-motions for summary disposition. The trial court held a hearing and then took the matter under advisement to consider the parties' arguments and cited caselaw. In an extensive written opinion, the trial court denied MetoKote's motion for summary disposition, granted summary disposition to Challenge as to the applicability to the UCC, abstained from granting any further relief to Challenge, and allowed Challenge leave to amend its complaint.

This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). When reviewing a motion brought pursuant to MCR 2.116(C)(10), this Court "must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). This Court's "task is to review the record evidence, and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial." *Id*. A genuine issue of material fact exists when the record, "giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (quotation marks and citation omitted).

"Whether the Uniform Commercial Code (UCC) applies in a particular case is a question of law that we review de novo." *Bev Smith, Inc v Atwell*, 301 Mich App 670, 681; 836 NW2d 872 (2012). "When interpreting a uniform act, such as the Uniform Commercial Code, it is appropriate for this Court to look for guidance in the caselaw of other jurisdictions in which the act has been adopted." *Id*. (quotation marks and citation omitted). "Generally, the question whether goods or services predominate in a hybrid contract is one of fact." *Higgins v Lauritzen*, 209 Mich App 266, 269; 530 NW2d 171 (1995). "However, where there is no genuine issue of material fact in dispute regarding the provisions of the contract, a court may decide the issue as a matter of law." *Id*. at 269-270.

B. APPLICABILITY OF THE UCC

MetoKote asserts that the trial court erred by concluding that the parties' contract predominately involved the sale of goods to which the UCC applies. We agree.

Michigan has adopted the UCC, MCL 440.1101 *et seq*. See *Buckley's Inc v Tell-Mall, Inc*, 93 Mich App 570, 572; 287 NW2d 3 (1979). MCL 440.1103 concerns the construction and application of the UCC. MCL 440.1103(1) provides:

> This act must be liberally construed and applied to promote the following underlying purposes and policies:
>
> (a) To simplify, clarify, and modernize the law governing commercial transactions.
>
> (b) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties.
>
> (c) To make uniform the law among the various jurisdictions.

"To achieve these goals, Article 2 of the code governs the relationship between the parties involved in 'transactions in goods.' " *Neibarger v Univ Coop, Inc*, 439 Mich 512, 519; 486 NW2d 612 (1992), quoting MCL 440.2102. In pertinent part, "goods" are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities [MCL 440.8101 *et seq*.] and things in action." MCL 440.2105(1).

Our Supreme Court adopted the test expressed in *Bonebrake v Cox*, 499 F2d 951, 960 (CA 8, 1974), to determine whether the UCC applies to a contract involving a combination of goods and services. *Neibarger*, 439 Mich at 534. The court in *Bonebrake* explained:

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom). [*Bonebrake*, 499 F2d at 960 (citations omitted).]

In regard to contracts involving a mix of goods and services, *Neibarger* further explained:

> It is difficult to imagine a commercial product which does not require some type of service prior to its purchase, whether design, assembly, installation, or manufacture. If a purchaser were able to avoid the UCC by pleading negligent execution of one of the services required to produce the product, Article 2 could be easily and effectively negated. A court faced with this issue should examine the purpose of the dealings between the parties. If the purchaser's ultimate goal is to acquire a product, the contract should be considered a transaction in goods, even though service is incidentally required. Conversely, if the purchaser's ultimate goal is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service. [*Neibarger*, 439 Mich at 536.]

This test is known as the "predominant purpose" or "predominant factor" test. See *id*. at 534. If the UCC does not apply, then the common law may apply instead. *Citizens Ins Co v Osmose Wood Preserving, Inc*, 231 Mich App 40, 45; 585 NW2d 314 (1998).

The trial court agreed with Challenge's assertion that the predominate purpose of the contract in this case was for the sale of goods, meaning that the UCC was applicable.

On the other hand, MetoKote maintained that the application of the e-coat was a service to which the UCC was inapplicable. To support its position, MetoKote relied on Indiana Supreme Court case *Insul-Mark Midwest, Inc v Modern Materials, Inc*, 612 NE2d 550 (Ind, 1993). In that case, the plaintiff supplied contractors with roofing fasteners and other products such as abrasives, tools, bolts, and anchors. *Id*. at 551. The defendant applied liquid and powder coatings to the products of its customers. *Id*. at 551-552. The defendant received the parts, applied the coating, and returned them to the customer. *Id*. at 551. Specific to the dispute that eventually arose, the defendant was tasked with applying a fluorocarbon coating to large volumes of screws that the plaintiff then sold to a third party. *Id*. at 552. The purpose of the coating was to resist rust. *Id*. The court provided the following explanation in regard to the defendant's process in coating the screws:

> After receiving a coating order from Kor–It, Modern Materials would coat the specified screws in batches according to their length. Application of the coating to the screws involved a multi-step process. First, Kor–It inspected the screws for physical flaws, discarding those which were broken or bent. The remaining screws were then transported to a cleaning room, where they were alkaline washed, rinsed and dried. The screws were then placed in the basket of the dip-spin machine for coating. The basket, with screws, was then dunked into the coating material, while the spinning of the machine discarded excess coating. Finally, the screws were placed on trays and oven-cured on a belt conveyor. The adequacy of the curing was checked through a wipe test. The screws were adequately cured if the coating did not come off after they were swabbed and wiped. [*Id*. at 552-553.]

The defendant also periodically tested the rust resistance of the screws. *Id*. at 553. However, the plaintiff eventually terminated its contract with the defendant after receiving multiple complaints regarding the quality of the screws. *Id*. The plaintiff then sued the defendant for costs related to the faulty screws. *Id*.

The Indiana Supreme Court was tasked with determining whether the UCC applied to the dispute. *Id*. The court observed that the contract at issue was "mixed," meaning that it involved both goods, the coating material, and services, the application of the coating. *Id*. at 554. To determine whether the UCC applied, the court applied the predominate-purpose test and considered factors such as (1) the language of the contract; (2) the circumstances of the parties, such as the primary reason they entered into the contract, and whether the final product the purchaser bargained to receive could be described as a good or a service; and (3) whether the purchaser was charged for a good or for both goods and services. *Id*. at 555.

The Indiana Supreme Court ultimately concluded that the contract was predominantly for the performance of a service. *Id*. The court reasoned that the plaintiff did not involve itself in any

decisions concerning the coating material used. *Id*. at 556. Instead, the plaintiff was only concerned with the finished product, the rust-resistant screws. *Id*. The court further wrote:

> The performance Kor–It contracted to obtain was the transformation of its screws from a non-coated form to a coated form with enhanced rust-resistance. Modern Materials' complex multi-step application process was the crucial element completing this transformation. The transfer of the coating material, a good, in the process was incidental to the larger service.
>
> Particularly revealing is the pricing method Modern Materials used for the coating. Kor–It was charged not by the gallon for the coating, as Modern Materials was charged by its coating supplier. Instead, it was charged by the pound of screws coated. If the coating material itself were the predominant thrust of the contract, presumably Kor–It would have paid a price based on the gallons of coating used. Charging instead by the pound of screws coated appears to tie the price to the cost of processing such an amount of screws. [*Id*.]

The court held that the contract was predominately for the performance of services. *Id*. Therefore, the UCC did not apply, and the parties' dispute was governed by the common law. *Id*.

Other Michigan cases provide additional guidance in regard to the application of the UCC in a contract involving a mixture of goods and services. In *Neibarger*, 439 Mich at 516, the plaintiffs contracted for the purchase and installation of a milking system on their dairy farm. Our Supreme Court concluded that the purpose of the contract was to acquire the milking systems—which amounted to goods—that "incidentally required design and installation services." *Id*. at 537. The Court specifically rejected the plaintiffs' argument that the UCC did not apply because the dispute concerned the poor design or installation of the machines. *Id*. The Court reasoned that "[a]t the heart of the complaints in these cases is the fact that the plaintiffs purchased products which proved inadequate for their purposes, causing them lost profits and, perhaps, consequential losses or property damage compensable in a timely suit under the provisions of the UCC." *Id*.

On the other hand, in *Higgins*, 209 Mich App at 267-268, 270, this Court concluded that a contract for the installation of a well with an electrical water pump on a dairy farm was predominately a contract for services. This Court reasoned that the plaintiffs specifically contacted the defendant for the defendant's expertise and knowledge for drilling a well through rock. *Id*. at 271. The plaintiff stated that the method for drilling, equipment used, and the exact location of the well was decided by the defendant. *Id*. Moreover, plaintiff was never shown any literature as to the type of materials the defendant intended to use. *Id*. This Court found the facts to be distinguishable from the milking system that was purchased and installed in *Neibarger*. *Id*. at 271-272. As a result, this Court concluded that the transaction was not subject to the UCC. *Id*. at 272.

In this case, Challenge entered into an agreement with MetoKote for the e-coating of its plenums to increase the part's resistance to corrosion or rust as required by GM. It is accurate that the coating adds value to the plenums and that the plenums could not be supplied to GM without it. However, this case is analogous to *Insul-Mark Midwest, Inc*. Challenge was not concerned with the ingredients used in the coating or the coating process, as long as the coatings met GM's specifications. Instead, Challenge was predominately concerned with price and location when it

investigated a coating supplier. Deposition testimony provided that MetoKote only had one type of e-coat material, which was provided by PPG. Although PPG subsequently acquired MetoKote, MetoKote did not formulate the material or alter that material on the basis of customer specifications. Application of the e-coating constituted an extensive process with more than 20 steps. After the process, the e-coating could not be removed without damaging the plenum. The coating was also thin, measuring between 0.7 and 1.2 thousandths of an inch. Once the plenums were coated, MetoKote sent them back to Challenge, where a foam sealant and additional fixtures were added before Challenge sent the assembly to GM. Moreover, MetoKote periodically tested both the process and the material for its quality. The pricing was calculated per plenum. There were not separate charges for the material and labor.

Although the e-coating material itself may be characterized as constituting a good, it was incidental to the larger service MetoKote supplied, its application. Like the coating process of screws in *Insul-Mark Midwest, Inc*, 612 NE2d at 556, defendant MetoKote's extensive application process, with its more than 20 distinct steps, was crucial to the transformation of the raw plenums to the coated plenums with their increased resistance to rust. Accordingly, the trial court erred by concluding that the parties' contract was predominately for the sale of goods subject to the UCC. The contract between the parties predominately concerned service, which is governed by the common law.[2]

Because we conclude that the trial court erred by ruling that this contract was for the sale of goods governed by the UCC, we decline to consider Challenge's claim that it properly reserved its rights to dispute the price increase pursuant to the UCC. To the extent that Challenge also asserts that it is entitled to summary disposition under the common law because it did not agree to the price increase, the trial court did not specifically decide that issue. "Generally, this Court will not review issues that were not raised and decided by the trial court." *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 628; 692 NW2d 388 (2004) (quotation marks and citation omitted). The trial court should consider this claim on remand.

III. CONCLUSION

The trial court erred by concluding that the parties' contract predominately involved the sale of goods subject to the UCC. Consequently, the trial court erred by granting summary disposition in favor of Challenge in this regard.

[2] In ruling otherwise, the trial court relied upon *PFG Enterprises v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2012 (Docket No. 305948). Although unpublished opinions of this Court are not binding precedent, they may be considered persuasive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). We conclude that *PFG Enterprises* is distinguishable because the plaintiff in that case produced "proprietary coatings," and those unique coatings were sought by its customers. *PFG Enterprises*, unpub op at 4. In this case, in contrast, the evidence indicates that Challenge did not seek a unique coating by MetoKote, but instead simply sought a coating that would satisfy its other contractual obligations.

Accordingly, we reverse the order granting partial summary disposition to Challenge to that extent and remand to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ James Robert Redford