STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

CARD PROPERTIES, LLC,
a Michigan limited liability company,
and NAHIL H. KHAMI, an individual,

Plaintiffs/Counter-Defendants,

vs. Case No. 2021-003940-CB

MARGARET M. DEHONDT REVOCABLE
LIVING TRUST DATED MAY 27, 2004, a Michigan
revocable trust, FAZAL KHAN & ASSOCIATES, INC.,
a Michigan corporation, NOWAK & FRAUS, P.L.L.C.,
a Michigan professional limited liability company,
FAZLULLAH M. KHAN, P.E., an individual, MAJJU KHAN,
an individual, and THOMAS DEHONDT, an individual,

Defendants/Counter-Plaintiffs

and

KING SURVEYING, INC., a Michigan corporation,
DONALD H. KING, an individual, and AIELLI CONSTRUCTION
COMPANY, INC., a Michigan corporation.

Defendants.
_____/

OPINION AND ORDER

This matter is before the Court on Defendant Thomas DeHondt's ("DeHondt") motion for summary disposition under MCR 2.116(C)(10).

I. Background

This complex civil action arises out of the purchase of land and its subsequent development into a residential project known as "Remar Farms." Relevant to the instant motion, in November 2015, Plaintiff Card Properties ("Card") entered into a contract (the "FKA Agreement") with Defendant Fazal Kahan & Associates ("FKA") to perform engineering and surveying services at Remar Farms. DeHondt was a professional

engineer who worked for FKA and was allegedly in charge of FKA's work on Remar Farms.

In June 2020, problems were allegedly discovered during the construction of Remar Farms. Card and its owner, Plaintiff Nahil Khami (collectively, "Plaintiffs"), filed suit on October 22, 2021, against a number of individuals and entities involved in the purchase, design, engineering, and construction of Remar Farms, including FKA and DeHondt. Plaintiffs filed a first amended complaint on January 14, 2022. As to DeHondt, Plaintiffs allege a single-count for professional malpractice. Specifically, they allege DeHondt "had a duty to use his technical skill, ability, and diligence, as required by professional engineers, in preparing the plans and supervising the work." (First Am. Compl., ¶125.) They allege he "breached those duties by preparing or by supervising and approving the creation of erroneous drawings and specifications in addition to . . .failing to properly inspect and supervise the staking and structural work performed at the Subject Property." (Id., ¶126.)

On July 11, 2022, DeHondt moved for summary disposition under MCR 2.116(C)(10). Plaintiffs filed their response on July 22, 2022 and a supplemental response on July 26, 2022. DeHondt filed his reply on July 28, 2022. The Court held oral arguments on August 1, 2022 where it took the matter under advisement and directed the parties to file supplemental briefs with the deposition testimony of Plaintiffs' expert witnesses. The parties have filed their respective supplemental briefs and the Court has reviewed them.

II. Standard of Review

A motion filed under MCR 2.116(C)(10) "tests the factual sufficiency of a claim." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Summary disposition is

appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors*, 469 Mich 177, 183; 665 NW2d 468 (2003). The court considers the documentary evidence submitted by the parties in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 120. "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*, 469 Mich at 183. The initial burden is on the moving party to support its position "by affidavits, depositions, admissions, or other documentary evidence." *Smith v Globe Life Ins*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden then shifts to the opposing party to set forth specific facts via admissible evidence that establish a genuine issue of disputed fact exists. *Maiden*, 461 Mich at 121.

However, where the moving party is challenging the non-movant's claims, it may satisfy its burden under MCR 2.116(C)(10) in one of two ways: (1) by "submit[ting] affirmative evidence that negates an essential element of the nonmoving party's claim," or (2) by "demonstrat[ing] to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Lowrey v LMPS & LMPJ*, 500 Mich 1, 7; 890 NW2d 344 (2016). In the latter, the movant "is not required to go beyond showing the insufficiency of [the non-movant's] evidence." *Id. at* 9. It doesn't have "to proffer evidence to negate one of the elements of [the non-movant's] claim." *Id.*

Law and Analysis

A. Economic Loss Doctrine

DeHondt argues the professional malpractice claim against him is barred by the economic loss doctrine because Plaintiffs have not alleged he breached a duty separate

and distinct from the FKA Agreement and they are only seeking damages for economic loss. In response, Plaintiffs assert their claim against DeHondt is for professional malpractice based on his breach of the standard of care of a professional engineer to verify the accuracy of the survey in the plans he sealed, not for breach of contract.

The economic loss doctrine provides that a plaintiff cannot bring a tort claim where the legal duty breached arises out of a contractual promise. *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 83; 559 NW2d 647 (1997). To proceed on a tort claim, "there must be some breach of duty distinct from breach of contract." *Id.* quoting *Hart v Ludwig*, 347 Mich 559, 563; 79 NW2d 895 (1956); see *Sherman v Sea Ray Boats,* 251 Mich App 41, 52; 649 NW2d 783 (2002) ("an action in tort may not be maintained where a contractual agreement exists, unless a duty, separate and distinct from the contractual obligation, is established.") The purpose of the doctrine is "to avoid confusing contract and tort law." *Huron Tool & Engg Co v Precision Consulting Services*, 209 Mich App 365, 374; 532 NW2d 541 (1995). Though the term "economic loss doctrine" is frequently used in the context of the UCC, its core principle, that a tort claim must be based on "a legal duty separate and distinct from the contractual obligation" also applies to contracts for services. *Rinaldo's Const*, 454 Mich at 84-85; *Hart*, 347 Mich at 562. "[T]he threshold inquiry is whether the plaintiff alleges a violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's*, 454 Mich at 84. Whether a defendant owes a duty a plaintiff is a question of law for the court. *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004).

In support of his argument that the economic loss doctrine applies here, DeHondt relies on *Ric-Man Constr v Neyer, Tiseo & Hindo Ltd*, unpublished opinion of the Court of

Appeals, issued January 17, 2017 (Docket No. 329159), application for leave to appeal denied, 501 Mich 942 (2017) and *Auburn Hills Tax Increment Fin Auth v Haussman Constr Co*, unpublished opinion of the Court of Appeals, issued January 11, 2018 (Docket No. 333972).[1] As unpublished opinions, these decisions are not binding precedent. See MCR 7.215(C)(1). Moreover, the Court finds they are factually distinguishable and not persuasive. Here, DeHondt is not a party to the contract between Plaintiffs and FKA, and has no contractual obligations to Plaintiffs. Given that defendant DeHondt's argument that the economic loss doctrine bars a professional malpractice claim against a professionally licensed defendant that is not a party to a contract relies solely on unpublished opinions which this Court finds neither binding nor persuasive, defendant DeHondt's motion for summary disposition must be denied.

DeHondt further argues that despite the lack of contractual privity between him and Plaintiffs the economic loss doctrine still applies. He cites to *Citizens Ins Co v Osmose Wood Preserving*, 231 Mich App 40, 45; 585 NW2d 314 (1998) to support his position. However, *Citizens v Osmose Wood Preserving* involves the application of the economic loss doctrine for a plaintiff who seeks to recover economic loss caused by a defective product purchased for commercial purposes. Thus, *Osmose* is distinguishable from this case and not applicable. Unlike *Osmose*, which involved tort claims involving the purchase of a product for commercial purposes by a commercial business, this case involves a claim of professional malpractice for professional services rendered by an engineer. Additionally, unlike the manufacturer in *Osmose*, DeHondt's invocation of the

[1] Plaintiffs also cite *McConnell v Servinsky Eng'g PLLC*, 22 F Supp 3d 610, 614-18 (WD Va 2014). That case involves the interpretation and application of Virginia law and the Court finds it unpersuasive.

economic loss doctrine is not based on the exclusive remedy under the UCC. Though the *Osmose* Court "expressly rejected the argument that the economic loss doctrine does not apply in the absence of privity of contract," the facts of the case and the Court's analysis, including its citations to *Sullivan Industries*, 192 Mich App 333, and *Freeman*, 212 Mich App 34, indicate that holding is limited to cases where the economic loss doctrine is applied to commercial disputes between a consumer and a manufacturer over the sale of defective goods and the exclusive remedy under the UCC. Those issues are not present in this case and the Court is unpersuaded that the holding in *Osmose* applies here.

Finally, DeHondt argues that because Plaintiffs' damages are purely economic in nature, the economic loss doctrine applies to bar their tort claim for professional malpractice. However, the caselaw relied on by DeHondt in support of this argument is distinguishable. First, *Rinaldo's,* 454 Mich at 78-79, is distinguishable as it does not involve a claim for professional malpractice and, unlike this case, the defendant there was in contractual privity with the plaintiff. DeHondt also cites the Supreme Court's statement in *Henry v Dow Chem Co*, 473 Mich 63, 78; 701 NW2d 684 (2005), that "a plaintiff must demonstrate a present physical injury to person or property in addition to economic losses that result from that injury in order to recover under a negligence theory." However, the economic loss doctrine was not an issue in that case. Moreover, the *Henry* Court distinguished the plaintiffs' negligence claim, which was based on the plaintiffs' fear of potential injuries from chemical exposure, "from other causes of action, such as libel or *professional malpractice*, in which a plaintiff may recover for economic losses without showing present physical harm." *Id*. at 78 (emphasis added). Thus, the court's limitation on negligence claims based solely on economic losses did not extend to claims of

professional malpractice. Accordingly, on this basis, DeHondt's motion for summary disposition must be denied.

B. DeHondt's Status as an Employee of FKA

DeHondt next argues he is not liable to Plaintiffs because he was working as an employee (i.e., an agent) for FKA (i.e., a disclosed principal) when the alleged malpractice occurred. In response, Plaintiffs contend DeHondt's status as an employee of FKA does not shield him from claims of professional malpractice.

In support of his argument that he cannot be liable for malpractice because he was working as an employee for FKA, who was party to the contract with Plaintiffs, DeHondt cites a number of Michigan cases. *Howard & Howard Attorneys PLLC v Jabbour*, 311 Mich App 524, 525; 880 NW2d 1 (2015); *Natl Trout Festival v Cannon*, 32 Mich App 517, 520; 189 NW2d 69, 70 (1971) *Huizenga v Withey Sheppard Assoc*, 15 Mich App 628, 629; 167 NW2d 120, 121 (1969); and *Miller v Joaquin*, 431 F Supp 3d 906, 912 (ED Mich. 2019). However, none of those cases involved claims of professional malpractice like this case. Rather, each of them involves claims for breach of contract and the courts affirmed the unremarkable proposition that "an agent who contracts with a third party on behalf of a disclosed principal is generally not liable to the third party in the absence of an express agreement to be held liable." *Howard & Howard*, 311 Mich App at 526. See also MCL 600.2912. The authority cited by DeHondt does not support his position. Accordingly, DeHondt's motion for summary disposition in this regard must also be denied.

C. DeHondt's Liability for Survey Errors

Finally, DeHondt argues that as a professional engineer, he is not liable for surveying errors. In response, Plaintiffs argue that based on their expert's testimony, the

standard of care for professional engineers requires professional engineers to confirm the accuracy of a survey that is used in a document sealed by the engineer.

A claim of malpractice against an engineer or architect "requires proof of simple negligence based on a breach of a professional standard of care." *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 409; 516 NW2d 502 (1994) overruled in part on other grounds, *Ormsby v Capital Welding* 471 Mich 45 (2004).The applicable standard of care and its breach are questions of fact and expert testimony is usually required to establish those elements "because the ordinary layperson is not equipped by common knowledge and experience to judge the skill and competence of the service and determine whether it meets the standard of practice in the community." *Broz v Plante & Moran, PLLC*, 331 Mich App 39, 53; 951 NW2d 64 (2020); see *Phillips*, 204 Mich App at 409.

DeHondt contends that because land surveyors and engineers are different professions with different licensure requirements and they are both governed by different regulations and statutes, DeHondt, as an engineer, is not liable for survey errors in the plans and documents he sealed as an engineer. Although he cites to the various licensure statutes and administrative regulations for surveyors and engineers, see MCL 339.2004(2) (professional engineer licensure requirements); MCL 339.2004(3) (professional surveyor licensing requirements); Mich Admin Code R 16031(2) (regulating engineers); and Mich Admin Code R 339.17403 (regulating surveyors), he has not cited any authority that limits the standard of care of a professional engineer to only those statutory and regulatory provisions that apply to engineers. Nor is the Court aware of any such authority, and it is unpersuaded that the different statutory and regulatory provisions between engineers and surveyors determines a professional engineer's standard of care.

On the contrary, as previously noted, caselaw demonstrates that determining the applicable standard of care of a professional engineer ordinarily requires expert testimony regarding the standard of practice of professional engineers in the community. See *Phillips*, 204 Mich App at 409; *Broz*, 331 Mich App at 53.

Consistent with the requirement that expert testimony be introduced to establish the applicable standard of care, Plaintiffs have provided expert testimony from James Van Havermaat, a licensed professional engineer and surveyor. Van Havermaat, when asked to explain the standard of care, testified, "I have a responsibility as an engineer or a surveyor to look at what I'm being asked to seal." (Pltfs.' Supp. Ex. E, p 29.) He explained that if there's an apparent discrepancy in a survey "then you're at fault, I think, for not taking adequate care to make sure you did your job." (Id.) He testified that in this case, the survey drawings showed an encroachment on the easterly fence line and a gap on the westerly fence line, which indicated that there was possibly an error in the survey. (Id., p 22-23.) He explained that because there was an apparent discrepancy in the survey, "I would be going back to the surveyor and say, 'Hey, this doesn't look right, you know, you've got a gap here and an overlap here, they seem to be equal, it doesn't seem to fit the adjoining property.'" (Id., p 25.) He agreed, that if an engineer "sends the survey team back out to double-check their work and receives the same information that [would] suffice as . . . being a sufficient attempt by the engineer to verify whether the original survey work was correct or not[.]" (Id., p 27.) However, he testified that "if [the engineer] didn't question [the encroachment and gap in the survey] and get a solid answer confirming, then you're at fault, I think, for not taking adequate care to make sure you did

your job." (Id., p 28.) Van Havermaat's testimony is sufficient to create a genuine issue of material fact as to the applicable standard of care of a professional engineer.

DeHondt further argues there's no dispute that he met the standard of care because he asked "survey team to confirm the accuracy of their work." (DeHondt Supp., p 1.) In support of this argument, he cites to his own supplemental affidavit which states that he requested the FKA surveyors "verify the location of the fences along the east and west boundary lines with respect to the boundary survey." (DeHondt Supp., Ex. AA, ¶3.) According to DeHondt, "[i]t was verified that the location of the fences was correct relative to the boundaries." (Id.) In contrast to DeHondt's affidavit, Plaintiffs have provided the affidavit of Donald King, a surveyor for FKA who performed the survey on the Remar Farms project. (Pltfs' Supp., Ex. G.) King states, "I do not recall anyone from [FKA], including Tom DeHondt or anyone else contacting him about rechecking the Boundary Survey for the Remar Farms project prior to or after leaving my employment at [FKA]." Construing the competing affidavits in a light most favorable to Plaintiffs, reasonable minds could differ whether DeHondt asked FKA's survey team to verify the accuracy of the survey. *West*, 469 Mich at 183. ("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.") Consequently, there being a genuine issue of material fact, DeHondt's motion for summary disposition must be denied. Additionally, to the extent Plaintiffs seek summary disposition under MCR 2.116(I)(2), the existence of these genuine issues of material fact also preclude this request.

V. Conclusion

For the reasons set forth above, DeHondt's motion for summary disposition is

DENIED, and Plaintiffs request for summary disposition under MCR 2.116(I)(2) is also DENIED. This Opinion and Order neither resolves the last pending claim nor closes this case. MCR 2.602(A)(3).

IT IS SO ORDERED.

Kathryn A. Viviano

Signed by KATHRYN VIVIANO 10/07/2022 09:00:46 NqnHEngL

Date: 10/07/2022

Hon. Kathryn A. Viviano, Circuit Court Judge