STATE OF MICHIGAN

COURT OF APPEALS

1-800 BATHTUB, LLC, Plaintiff/Counterdefendant-Appellant/Cross-Appellee,	UNPUBLISHED April 18, 2024
v	No. 357932 Wayne Circuit Court
REBATH, LLC, Defendant/Counterplaintiff-Appellee/Cross-Appellant.	LC No. 20-004432-CB

Before: HOOD, P.J., and CAMERON and GARRETT, JJ.

PER CURIAM

This is an appeal from a circuit court order granting in part and denying in part Plaintiff 1-800 Bathtub, LLC's (Bathtub) motion to confirm an arbitration award, and Defendant ReBath, LLC's (ReBath) motion to vacate an arbitration award. The circuit court affirmed the arbitration award to the extent it found an enforceable agreement between the parties and ReBath's breach of that agreement. It vacated the arbitration award on Bathtub's related conversion claim, finding that the arbitrator should have applied the economic-loss doctrine to bar the claim. Bathtub appeals by right the circuit court's decision to apply the economic-loss doctrine to prohibit its conversion claim and deny its request for attorney fees and costs. ReBath cross-appeals the circuit court's determination that the arbitrator did not manifestly disregard the law in finding the parties' contract was valid and enforceable. We affirm the circuit court's holding because it reached the correct result. But we conclude that the separate-and-distinct doctrine, rather than the closely related economic-loss doctrine, is what bars the conversion claim. We therefore affirm.

I. BACKGROUND

This case arises out of a contract dispute over the control and use of a toll-free number, 1-800-BATHTUB or 1-800-228-4882 (the number). In February 2001, Edward Hersch, the sole member of Bathtub, a Michigan limited-liability company, acquired the number from another

company, Crescent Supply, for $10,000.[1] In July 2002, Bathtub and ReBath entered into a marketing services agreement (MSA). Under the terms of the MSA, Bathtub agreed to lease the number to ReBath, for its exclusive use, and provide services such as client billing, telephone switching, and telephone marketing. In exchange, ReBath agreed to pay a monthly fee. In 2013, the parties orally agreed to a $80,000 annual fee, which ReBath paid from 2013 to 2017.

The MSA also provided that ReBath would not communicate with the service provider for the number. Specifically, ReBath agreed that "it has no right or authority to contact, nor will it attempt to contact, any such carrier or to take any action aimed at transferring the Number to another carrier or affecting changes in the routing of calls[.]" Instead, Bathtub would receive and pay monthly invoices it received from the service provider, and ReBath would pay Bathtub. The MSA also indicated that Bathtub maintained "ownership" of the number, and nothing in the MSA should be construed to grant ReBath an ownership interest in the number. It also explicitly permitted ReBath to use the number for an 18-month period that automatically renewed.

The MSA also contained an arbitration clause. The clause required the parties to submit any controversy arising out of the agreement to arbitration. The MSA required application of Michigan law. And it included a limitation of remedies, limiting liability for "any incidental, consequential, indirect, special, exemplary, or punitive damages of any kind or nature[.]"

At some point, ReBath and its franchisees began receiving invoices from the telephone service provider. Eventually, in March 2017, ReBath came to believe that the MSA was not enforceable because it constituted illegal "hoarding" or "brokering" of a toll-free number in violation of federal regulations.[2] The next month, ReBath sent a letter of agency to Windstream, the telephone service provider appointed as the "Responsible Organization" for the number.[3] ReBath represented that it was the subscriber of the number and requested that Windstream transfer

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[1] Around the same time, Bathtub or Hersch also acquired other vanity toll-free numbers, like 1-800-EYECARE, 1-800-ASPHALT, and 1-800-GETHAIR, among others.

[2] The relevant regulation, 47 CFR 52.107 (2018) provides:

> (a) As used in this section, hoarding is the acquisition by a toll free subscriber from a Responsible Organization of more toll free numbers than the toll free subscriber intends to use for the provision of toll free service. The definition of hoarding also includes number brokering, which is the selling of a toll free number by a private entity for a fee.
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> (1) Toll free subscribers shall not hoard toll free numbers.
>
> (2) No person or entity shall acquire a toll free number for the purpose of selling the toll free number to another entity or to a person for a fee. [47 CFR 52.107 (2018).]

[3] The relevant regulation defines "Responsible Organization" as "[t]he entity chosen by a toll free subscriber to manage and administer the appropriate records in the toll free Service Management System for the toll free subscriber." 47 CFR 52.101(b) (2018).

the number to Patriot, ReBath's service provider. In April 2017, Windstream transferred the number, and ReBath directed Patriot to put a "digital lock" on the number so Patriot could not transfer it without ReBath's approval. ReBath also trademarked the number. In January 2018, ReBath stopped making payments under the MSA.

In September 2018, Bathtub started arbitration proceedings, and ReBath sent Bathtub a written notice of termination of the MSA. Bathtub's initial arbitration demand alleged breach of contract and sought $150,000 in damages, plus attorney fees and costs, based on ReBath's failure to pay the annual fee. In December 2018, Bathtub filed an amended arbitration demand, alleging breach of contract and conversion of the number. ReBath counterclaimed, seeking, in part, a declaration that the MSA was unenforceable because it was an illegal brokering of a toll-free number;[4] therefore, any funds it paid to Bathtub were improper and should be returned.

Following a three-day hearing, on March 19, 2020, the arbitrator entered an award in favor of Bathtub. The arbitrator found that Bathtub had not engaged in illegal hoarding of the number because Hersch had not acquired the number from a "Responsible Organization." The arbitrator also found that Hersch acquired the number to lease it and form joint services agreements, not to sell it. Regarding Bathtub's counterclaims, the arbitrator found that the MSA was valid and enforceable because he was convinced that it was a legal, bundled services and shared use agreement. The arbitrator, therefore, found that ReBath breached the valid contract. Regarding Bathtub's conversion claim, the arbitrator found that "[t]he actions by [ReBath] to port The Number away from [Bathtub] to [ReBath] and place a digital lock upon a retransfer of The Number were intentional and done with the knowledge that the true subscriber for The Number was [Bathtub]," which constituted illegal conversion of the number. Additionally, in finding that ReBath was liable for both common-law and statutory conversion, the arbitrator determined that, as a matter of law, "the limitation on remedies set forth in Section 17 of [the agreement] does not operate to relieve [ReBath] of liability for its willful, wanton and reckless misconduct." Regarding the economic-loss doctrine, which ReBath had argued barred the conversion claim, the arbitrator found that the doctrine did not apply "because the parties could not have contemplated at the time of executing [the agreement] that [ReBath] would engage in the willful and wrongful act of conversion [and] that [the] act of conversion stands separate and distinct from the contract claim and does not find any standing or basis in [the agreement]."

Regarding damages, the arbitrator awarded $80,000 for breach of contract. This represented ReBath's failure to pay the last fee due under the MSA. Regarding conversion damages, the arbitrator valued the asset at $400,000. In his award, the arbitrator indicated that he multiplied $80,000 by five to reach the value for the number, finding it "appropriate to use the marketing/use fees the asset generated for a reasonable period of time to establish the value of the asset." He awarded treble damages for the conversion claim, for a damages total of $1,280,000. The arbitrator also found Bathtub to be the most prevailing party under the terms of the MSA, so he awarded Bathtub attorney fees, costs, and administrative fees for the arbitration.

[4] The arbitrator did not permit ReBath to engage in discovery related to Hersch's ownership and "leasing" of other toll-free numbers. ReBath, however, has not argued that the award should be vacated on these grounds.

Later in March 2020, Bathtub filed a complaint seeking to confirm the arbitration award, and ReBath counterclaimed seeking to vacate the award on the grounds that the arbitrator exceeded his powers and acted in contravention of controlling law. Bathtub moved for summary disposition, arguing no grounds existed for overturning the arbitrator's award, particularly the factual determinations that it lawfully acquired and leased the number consistent with 47 CFR 52.107 (2018), and that its reliance on federal authorities to conclude that the economic-loss doctrine did not apply. ReBath moved to vacate the arbitration award, arguing that the arbitrator exceeded his authority by concluding that the MSA was valid and enforceable because it amounted to illegal brokering.

Following a hearing, the circuit court issued an opinion and order granting in part and denying in part the motions. First, the circuit court rejected ReBath's argument that the MSA was void. The circuit court determined that defendant had failed to show that the arbitrator erred in finding that the lease of the number was not actually a "sale" in contravention of 47 CFR 52.107 (2018), and that the arbitrator's finding that plaintiff's purchase of the number with the intent to lease it was a factual finding that could not be disturbed and was not in contravention of controlling principles of law. It however concluded that the arbitrator's failure to apply the economic-loss doctrine was in contravention of controlling principles of law, reasoning that neither Bathtub nor the arbitrator identified a duty separate and distinct from the contractual obligation as the basis for the conversion claim. Bathtub moved for reconsideration, which the circuit court denied. This appeal and cross-appeal followed.

II. STANDARD OF REVIEW

"This Court reviews de novo a circuit court's decision to vacate an arbitration award." *Hope-Jackson v Washington*, 311 Mich App 602, 613; 877 NW2d 736 (2015). Generally, courts are reluctant to disturb an arbitration award and "[t]he court's power to modify, correct, or vacate an arbitration award . . . is very limited." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991). "MCR 3.602 provides a circuit court with only three options when an arbitration award is challenged: it may (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award." *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999).

In this matter, the circuit court vacated and modified the award, in part, on the basis that the arbitrator exceeded his powers. See MCR 3.602(J)(2)(c); MCL 691.1703(1)(d). An arbitrator exceeds their power "whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). "An award will be presumed to be within the scope of the arbitrators' [sic] authority absent express language to the contrary" and the courts will not substitute their judgment for that of the arbitrator's. *Gordon Sel-Way, Inc*, 438 Mich at 497. Further, any legal error must clearly appear on the face of the award and "must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Gavin*, 416 Mich at 443. Because of the informal nature of arbitration proceedings, which lack a verbatim record, the arbitrator's "findings of fact are unreviewable" because any alleged error cannot be shown with the requisite certainty. *Id*. at 429. Likewise, on judicial review of an arbitration award, "[c]ourts may not engage in contract interpretation, which is a question for the arbitrator." *Konal*, 235 Mich App at 74.

III. REVIEWING THE VALIDITY OF THE MASTER SERVICES AGREEMENT

We begin by addressing the validity of the MSA. ReBath argues on cross-appeal that the arbitrator committed a manifest error of law in concluding that the MSA was valid and enforceable. We disagree, and like the circuit court, conclude that ReBath essentially challenges the arbitrator's findings of fact and its interpretation of the MSA. As stated, our review of an arbitration award is extremely limited. *Konal*, 235 Mich App at 74. We cannot disturb the arbitrator's factual findings. *Gavin*, 416 Mich at 429. And we largely cannot engage in contract interpretation. *Id.* at 434. See also *Konal*, 235 Mich App at 74. On cross-appeal, ReBath asks us to do both by arguing that the circuit court should have vacated the portion of the arbitration award granting relief on its breach-of-contract claim.

In substance, ReBath argues (1) that the MSA was actually a sale of the number from Bathtub to ReBath, which would be void as against public policy (namely, federal regulations), and (2) that even if the arbitrator correctly concluded the MSA was a lease of the number, the MSA was still void because Bathtub and Hersch had violated federal prohibitions against "hoarding" of toll-free numbers, specifically 47 CFR 52.107 (2018). Its first argument—that the MSA was a sale—is essentially an argument that the arbitrator misinterpreted the contract. It therefore is invitation for us to supplant the arbitrator's interpretation of the MSA our own, which we cannot do outside of very limited circumstances, none of which are present here. See *Gavin*, 416 Mich at 443. Contrary to ReBath's claims, the plain language of the MSA supports the arbitrator's conclusions. The MSA never used the term "sale." And although ReBath points to language giving it "exclusive right to use the [number]," the terms of the MSA indicate that the agreement was for an initial 18-month period of use followed by automatic periodic renewals. Each party also had the option to terminate, meaning ReBath's use of the number was subject to termination. Notably, Bathtub could terminate for nonpayment. Even if we were to revisit the arbitrator's analysis, the terms of the MSA support this aspect of the conclusion that the arbitrator reached.

In an attempt to allow this Court to engage in a de novo interpretation of the MSA, ReBath argued that the arbitrator relied on extrinsic evidence to interpret the contract without determining whether an agreement existed, thus acting in contravention of a controlling legal principle. See *Gavin*, 416 Mich at 443 (holding that an arbitrator exceeds their power when they act in contravention of a controlling legal principle). See also *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010) (holding that a court may use extrinsic evidence to show that a latent ambiguity exists). This argument fails for two reasons. First, as stated, the terms of the contract support the arbitrator's conclusion, so even if the arbitrator considered extrinsic evidence in interpreting the contract before determining whether an ambiguity existed, it did not affect the outcome. Second, to the extent the arbitrator considered extrinsic evidence, it was necessary to the resolution of whether Bathtub and Hersch violated federal regulations prohibiting hoarding, separate from the terms of the MSA.

To that end, ReBath's second argument—that Bathtub and Hersch unlawfully hoarded the number, thus rendering the MSA void as violative of public policy—also fails because it asks us to undo the arbitrator's findings of fact. See *Gavin*, 416 Mich at 429. ReBath argues that the MSA is void because Bathtub and Hersch violated 47 CFR 52.107 (2018). That regulation provides, in relevant part:

> (a) As used in this section, hoarding is the acquisition by a toll free subscriber from a Responsible Organization of more toll free numbers than the toll free subscriber intends to use for the provision of toll free service. The definition of hoarding also includes number brokering, which is the selling of a toll free number by a private entity for a fee.
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> (1) Toll free subscribers shall not hoard toll free numbers.
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> (2) No person or entity shall acquire a toll free number for the purpose of selling the toll free number to another entity or to a person for a fee.
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> (b) Tariff Provision. The following provision shall be included in the Service Management System tariff and in the local exchange carriers' toll free database access tariffs:
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> [T]he Federal Communications Commission ("FCC") has concluded that hoarding, defined as the acquisition of more toll free numbers than one intends to use for the provision of toll free service, as well as the sale of a toll free number by a private entity for a fee, is contrary to the public interest in the conservation of the scarce toll free number resource and contrary to the FCC's responsibility to promote the orderly use and allocation of toll free numbers. [47 CFR 52.107 (2018).]

ReBath argues that Bathtub and Hersch acquiring the number was illegal because it constituted "hoarding" under 47 CFR 52.107 (2018), and the MSA was void because it was a disguised sale, which the regulation prohibits. But ReBath raised this very issue before the arbitrator, and the arbitrator rejected it. The arbitrator concluded that "hoarding" under 47 CFR 52.107 (2018) has two components: (1) "acquisition," where a toll-free subscriber obtains more numbers than they intend to use for toll-free service from a responsible organization; and (2) "brokering" which prohibits a private entity from selling a toll-free number for a fee. Regarding "acquisition," he concluded that Hersch validly acquired the number from another subscriber, Crescent Supply, not a "responsible organization." The arbitrator further found that "the testimony is uncontroverted that Hersch intended to utilize The Number through leases and joint service agreements . . . [h]e did not acquire The Number for the purpose of selling to another entity or person." This finding includes the arbitrator's determination about Hersch's intent when contracting with Crescent Supply and his plans for using the number. Even if we disagree with these findings, we are prohibited from disturbing them. Regarding "brokering," the arbitrator found the testimony of Bathtub's industry expert to be convincing. She testified that bundled services and shared use agreements were a favored use of toll-free numbers. Again, this is a factual finding that we cannot disturb, whether we agree with it or not.

ReBath raised the issues it raises now before the arbitrator. The arbitrator rejected those arguments. In doing so, the arbitrator made factual findings and interpreted the MSA. ReBath has failed to present any lawful basis for us to replace the arbitrator's factual findings and interpretation of the MSA. This is not to say that the fact findings were correct, but rather our limited review prevents us from disturbing them.

IV. BATHTUB'S CONVERSION CLAIM IS BARRED UNDER THE SEPARATE-AND-DISTINCT DOCTRINE, NOT THE ECONOMIC-LOSS DOCTRINE

The circuit court correctly vacated the portion of the arbitrator's award related to conversion. In doing so, it incorrectly concluded that the economic-loss doctrine barred Bathtub's conversion claim. But the economic-loss doctrine does not apply to contracts for services, see *Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 380; 656 NW2d 858 (2002), and it does not apply to intentional torts, see *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 374; 532 NW2d 541 (1995), so it does not bar Bathtub's conversion claim. The circuit court nonetheless reached the right conclusion—that the conversion claim is barred—because the conversion claim does not impose duties separate and distinct from the duties existing under the contract, namely, not to steal the number. See *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 83-85; 559 NW2d 647 (1997).

A. THE ECONOMIC-LOSS DOCTRINE

Michigan common law has long-recognized the basic premise that, generally, economic losses that relate to commercial transactions are not recoverable in tort. See *Quest Diagnostics, Inc*, 254 Mich App at 376. This is called the economic-loss doctrine. *Neibarger v Universal Coops*, 439 Mich 512, 527-528; 486 NW2d 612 (1992). The purpose of this judge-made rule is to keep separate damages for breach of contract (economic losses) from damages for tort (unanticipated injury to persons or property). See *id.* at 521-523.

Historically, the economic-loss doctrine only related to contracts for the sale of goods. See *id.*; *Sullivan Indus, Inc v Double Seal Glass Co*, 192 Mich App 333, 339; 480 NW2d 623 (1991) ("The economic-loss doctrine is a judicially created doctrine that bars all tort remedies where the suit is between an aggrieved buyer and a nonperformance seller, the injury consists of damage to the goods themselves, and the only losses alleged are economic.") (citations omitted). Our Supreme Court said as much when it formally adopted the economic-loss doctrine in *Neibarger v Universal Coops*, holding "where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC[.]" *Neibarger*, 439 Mich at 527-528. It emphasized:

> [t]his doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. [*Id*. at 520-521.]

The Court indicated that the "proper approach requires consideration of the underlying policies of tort and contract law as well as the nature of the damages." *Id*. at 531. See also *id*. at 523 (distinguishing an individual consumer's tort remedy for products liability, which derives from duties imposed by law and policy considerations allocating risk to manufacturers and sellers rather than consumers, from commercial transactions, where "the parties to a sale of goods have the opportunity to negotiate the terms and specifications, including warranties, disclaimers, and limitation of remedies").

Since formally adopting the economic-loss doctrine in *Neibarger*, our caselaw has clarified the scope of the doctrine in at least two respects that apply directly to this case. First, this Court interpreted *Neibarger* as not expressly precluding intentional tort claims, holding that the economic-loss doctrine does not bar a claim of fraud in the inducement. *Huron Tool & Engineering Co*, 209 Mich App at 374. Second, this Court has recognized that the economic-loss rule has never been applied to a contract for services and, further, that the economic-loss doctrine does not apply when the plaintiff could not have anticipated the harm at the time of the negotiations. *Quest Diagnostics, Inc*, 254 Mich App at 379-380. Taking the jurisprudence all together, this Court articulated a rule for application of the doctrine in *Quest*, as follows:

> [P]arties to a transaction for goods are precluded recovery in tort for economic loss caused by inferior products where: (1) the parties or others closely related to them had the opportunity to negotiate the terms of the sale of the good or product causing the injury, and (2) their economic expectations can be satisfied by contractual remedies. [*Id*.[5]]

B. THE ECONOMIC-LOSS DOCTRINE DOES NOT APPLY

Here, the arbitrator concluded that the MSA was an agreement for the lease or use of the number and for valuable marketing services. As stated above, we are not permitted to review these factual findings. Our starting point is that the MSA is a lease and a contract for services. We have only applied the economic-loss doctrine to contracts for goods, and we have specifically declined to apply the doctrine to service contracts. See *Higgins v Lauritzen*, 209 Mich App 266; 530 NW2d 171 (1995) (reversing summary disposition on basis that the economic-loss doctrine was wrongly applied to a contract for services); *Quest Diagnostics, Inc*, 254 Mich App at 379 ("This Court has declined to apply the economic[-]loss doctrine where the claim emanates from a contract for services."). Because the MSA was a services contract, the economic-loss doctrine does not apply. See *Neibarger*, 439 Mich at 527-528. The arbitrator reached the correct conclusion (that the economic-loss doctrine does not apply), even if it did so for the wrong reason (that the parties could not have contemplated the conversion at the time of the MSA's execution). His refusal to apply the economic-loss doctrine—albeit for the wrong reason—was not in contravention of controlling law. The doctrine has only been applied to the sale of goods, and never to a contract for services.

Even if we were to accept that the economic-loss doctrine applies to service agreements (or that the MSA is not a service agreement), its application to the conversion claim in this case is inconsistent with the trend of Michigan caselaw. See *Huron Tool & Eng'g Co*, 209 Mich App at 374. We have recognized a limited exception to the economic-loss doctrine for the intentional tort of fraud in the inducement. See *id.* We likewise have acknowledged that "the emerging trend is clearly toward creating an exception to the economic-loss doctrine for a select group of intentional

[5] Both parties on appeal, relying on caselaw from other jurisdictions, advance a test that appears inconsistent with Michigan's economic-loss doctrine jurisprudence.

torts." *Id*. at 370.[6] And, though neither this Court nor our Supreme Court have explicitly recognized the intentional tort of conversion as an exception to the economic-loss doctrine, the policy concerns underpinning the doctrine suggest that intentional torts, including conversion, are exceptions. Cf. *Neibarger*, 439 Mich at 531 (stating that the "proper approach requires consideration of the underlying policies of tort and contract law as well as the nature of the damages").

For these reasons the arbitrator reached the correct conclusion that the economic-loss doctrine does not bar Bathtub's conversion claim, and the circuit court should not have vacated its order on that basis.

C. SEPARATE-AND-DISTINCT ANALYSIS

The circuit court nonetheless reached the correct conclusion because general common-law principles on whether an action in contract can also support an action in tort apply to bar the conversion claim. See *Hart v Ludwig*, 347 Mich 559; 79 NW2d 895 (1956). This is sometimes called separate-and-distinct analysis. *Rinaldo's Constr Corp*, 454 Mich at 83.[7] In *Hart v Ludwig*,

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[6] Other jurisdictions have reached the conclusion that the intentional tort of conversion is an exception to the economic-loss doctrine. See *Giles v Gen Motors Acceptance Corp*, 494 F3d 865, 880 (CA 9, 2007) (holding conversion is an exception to the economic-loss doctrine under Nevada law); *Indemnity Ins Co v American Aviation, Inc*, 891 So 2d 532, 542 (Fla, 2004), overruled in part on other grounds by *Tiara Condo Ass'n, Inc v Marsh & McLennan Cos, Inc*, 110 So 3d 399 (Fla, 2013) (stating that "a rule barring recovery for economic loss is not an escape hatch from intentional commercial torts[,]" including conversion under Florida law) (quotation marks and citation omitted); *Eysoldt v ProScan Imaging*, 194 Ohio App 3d 630, 636-637; 2011-Ohio-2359; 957 NE2d 780 (2011), app den 129 Ohio St 3d 1506; 2011-Ohio-5358; 955 NE2d 388 (2011) (indicating intentional tort of conversion is not prohibited by economic-loss doctrine under Ohio law); *Ellis v Louisiana-Pacific Corp*, 699 F3d 778, 783-784 (CA 4, 2012) (recognizing that conversion is an exception to North Carolina's economic-loss rule); *Ares Funding, LLC v MA Maricopa, LLC*, 602 F Supp 2d 1144, 1149 (D Ariz, 2009) (recognizing, under Arizona law, that an independent duty exists under tort law not take another's property and, therefore, the economic-loss doctrine does not bar a claim for conversion).

[7] It is unclear whether the separate-and-distinct analysis has been adopted into the analysis required for the economic-loss doctrine. This Court, for example, determined in *George v McGee*, unpublished per curiam opinion of the Court of Appeals, issued February 20, 2020 (Docket No. 347636), that the economic-loss doctrine did not apply, but then applied the separate-and-distinct analysis on the grounds that those common-law principles still apply to contract actions that also seek tort damages; whereas this Court in another case suggested that the economic-loss doctrine had evolved to include the separate-and-distinct analysis, *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 47; 649 NW2d 783 (2002). Unpublished decisions are not binding authority on this Court, but may be persuasive. *Neville v Neville*, 295 Mich App 460, 468; 812 NW2d 816 (2012). Notably, *Neibarger* does not involve a separate-and-distinct analysis as part of the economic-loss doctrine and the separate-and-distinct analysis does not appear to involve components of the

347 Mich at 559, our Supreme Court first addressed whether a plaintiff could maintain an action in tort arising out of a breach of contract. There, an orchard worker (the promisor) agreed to care for an orchard under an oral contract, but failed to perform certain care and maintenance that would otherwise amount to negligence. *Id.* at 560. The orchard owner (the promisee) sued alleging negligence, rather than breach of contract. *Id.* Addressing the divide between contract actions and tort actions, the Court relied on the dichotomy between misfeasance (action) and nonfeasance (inaction), to describe the distinction:

> If a party undertakes to perform work, and proceeds on the employment, he makes himself liable for any misfeasance in the course of that work; but if he undertakes, and does not proceed on the work, no [tort] action will lie against him for the nonfeasance. [*Id*. at 562 (quotation marks and citation omitted; quotation cleaned up).]

In other words, when the cause of action arises from a breach of a promise, it is an action in contract; when the action arises from a defendant's negligence or active misconduct (i.e., more than breach of a promise), the action is in tort. See *id.* at 562-563. Ultimately, the Court held that the orchard worker merely violated his promise to complete his contracted-for performance, so a tort action would not lie. *Id.* at 565-566.

More recently, our Supreme Court clarified the misfeasance/nonfeasance distinction for determining whether an action sounds in tort or contract in *Rinaldo's Constr Corp v Mich Bell Tel Co*. There, a construction company (and telephone service user) sued its telephone service provider alleging negligence related to a variety of problems with its telephone service. *Rinaldo's Constr*, 454 Mich at 67-69. When considering the viability of the negligence claim, the Court indicated that the threshold question is "whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." *Id*. at 84. It relied on common-law principles that " '[m]isfeasance or negligent affirmative conduct in the performance of a promise generally subjects an actor to tort liability as well as contract liability for physical harm to persons and tangible things.' " *Id.*, quoting Prosser and Keeton, Torts, § 92, pp 656–657 (emphasis omitted). Generally, there is already a duty to exercise reasonable care to avoid physical harm, and entering a contract does not change that preexisting duty. *Id.* (quotation omitted). The Court concluded, however, that duty "does not extend to intangible economic losses." *Id.* (quotation committed). Rather, for that sort of loss, the parties manifested intent controls the nature and extent of the parties' obligation. *Id.* (quotation omitted). In other words, the claim sounds in contract. See *id.* (noting that the principle dates at least as far back as *Hart*, and more recently was applied in the UCC context under the "economic loss doctrine" in *Neibarger*). Relying on these principles, the Court concluded that the defendant telephone service provider failed to perform under the terms of its promise. *Id.* at 85. The plaintiff construction company did not allege

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economic-loss doctrine. See *Neibarger*, 439 Mich at 527. Likewise, *Rinaldo's Constr* discusses separate-and-distinct analysis as an older doctrine that has been applied in the UCC context as the "economic[-]loss doctrine." See *Rinaldo's Constr Corp* , 454 Mich at 84-85. Accordingly, we have analyzed the economic-loss doctrine and the separate-and-distinct analysis separately.

physical harm nor "violation of an independent legal duty distinct from the duties arising out of the contractual relationship." *Id.* So, there was no cause of action in tort.

As with *Hart* and *Rinaldo's Constr*, these principles are tricky when we attempt to apply them to the facts of this case. We acknowledge that no published case has applied the separate-and-distinct analysis to a statutory conversion claim.[8] And the nature of conversion is such that one could characterize it as misfeasance (actively stealing or converting another's property) or nonfeasance (a failure to satisfy contractual obligations).

But here, we find it determinative that no relationship between Bathtub and ReBath existed giving rise of a legal duty separate from the MSA. Bathtub's conversion claim arises from ReBath's failure to abide by the MSA. Further, defendant's failure to perform a contractual duty cannot give rise to a tort action, unless a separate-and-distinct duty exists separate from the contractual obligations. *Smith Living Trust v Erickson Retirement Communities*, 326 Mich App 366, 395; 928 NW2d 227 (2018). As the Supreme Court noted in *Hart*, 347 Mich at 563, while misfeasance is required for a tort action to lie, "[t]here must be some breach of duty distinct from breach of contract." We conclude that there is no duty separate and distinct from the contractual obligation because any alleged duty under the statute—not to convert the number—is the same as the duty under the contract. More fundamentally, ReBath's ability or opportunity to convert the number to its own use only arose through virtue of the contractual relationship between Bathtub and ReBath. Ultimately, because there is no separate duty distinct from that existing under the contractual obligations and because breach of the duty would not have been possible but for the contractual relationship, we conclude that the arbitrator manifestly disregarded the law in concluding that Bathtub's conversion claim could lie. See *Hart*, 347 Mich at 563; *Rinaldo's Constr*, 454 Mich at 83-85. We therefore affirm the circuit court's decision to vacate that portion of the arbitrator's award but on a different basis.

V. DAMAGES

Having concluded that the circuit court reached the correct conclusion regarding Bathtub's conversion claim, we need not address Bathtub's claims related to purported errors in calculating damages for conversion. But Bathtub alternatively argues that if this Court concludes that the economic-loss doctrine (or, as we have, the separate-and-distinct doctrine) bars its conversion claim, then we should award $400,000 to Bathtub for ReBath's breach of contract on the basis of ReBath's wrongful taking of the number. We decline to do so. Bathtub's argument misconstrues the arbitrator's award. The arbitrator awarded it $80,000 for breach of contract and $400,000 multiplied by three for the conversion claim. Bathtub provides no authority upon which the circuit

[8] Several unpublished decisions have concluded that a tort claim for conversion would not lie when there was no breach of a duty distinct from the breach of contract. In those cases, however, this Court determined that the cause of action arose from the defendants' nonfeasance of a contractual obligation. See *Brooks v PHCN Investments, LLC*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2020 (Docket No. 350238); *JL Lewis & Assocs v Magna Mirrors of America, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2020 (Docket No. 347057); *Lansing Ice & Fuel v Smith*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 2017 (Docket No. 328648).

court could have rejected the conversion claim and, yet, still award the exact same damages that the arbitrator had allowed for conversion. We decline to adopt Bathtub's proposed alternative damages measurement, and like the circuit court, leave the arbitration award related to the breach of contract in place.

VI. FEES AND COSTS

Bathtub finally argues that the MSA entitles it as the prevailing party to costs and attorney fees, which the circuit court should have awarded. We disagree. Bathtub is not entitled to an award of attorney fees and costs under the MSA, for either circuit court or appellate expenses, because it failed to plead a breach of contract to enforce the attorney-fee provision. Further, we cannot conclude that the circuit court abused its discretion by declining to award Bathtub fees as the "prevailing party" under MCL 691.1705 because without victory on its conversion claim, it is not necessarily the prevailing party.[9]

"Michigan follows the 'American rule' with respect to the payment of attorney fees and costs." *Haliw v Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005). "Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Id*. at 707. Courts will also enforce parties' agreement that provides the payment of attorney fees. *Pransky v Falcon Group, Inc*, 311 Mich App 164, 194; 874 NW2d 367 (2015), lv den 499 Mich 908 (2016).

Regarding attorney fees awarded pursuant to a contractual provision, we have held that such attorney fees are a type of general damages because the authority to award them arises under contract. *Id.* at 194, citing *Fleet Business Credit, LLC v Kraphol Ford Lincoln Mercury*, 274 Mich App 584, 589-592;735 NW2d 644 (2007). "In order to obtain an award of attorney fees as damages under a contractual provision requiring such a payment, the party seeking payment must sue to enforce the fee-shifting provision, as it would for any other contractual term." *Id.* (citations omitted). In other words, "the party seeking the award of attorney fees as provided under the terms of an agreement must do so as part of a claim against the opposing party." *Id.* at 195.

Here, the circuit court denied Bathtub's request for attorney fees and costs accrued in the circuit court on the basis that neither party had "substantially prevailed." This ruling did not clearly indicate whether the circuit court considered the award of fees under the statute or the agreement. The circuit court's phrasing—denying the request because "neither party has *substantially prevailed*"—mirrored the MSA's collection provision, which provided for attorney fees, suggesting that the circuit court denied fees under the agreement.

To the extent it did, its conclusion was correct for two reasons. First, an award of attorney fees is improper under the MSA's collection provision. This is because Bathtub failed to plead a

[9] We review for an abuse of discretion a circuit court's decision to award or deny attorney fees and costs. *Anderson v Progressive Marathon Ins Co*, 322 Mich App 76, 92; 910 NW2d 691 (2017). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. (quotation marks and citation omitted).

breach-of-contract claim in its complaint to enforce the agreement's collection provision. See *Pransky*, 311 Mich App at 194-195. Instead, in its prayer for relief, Bathtub sought an order confirming the arbitrator's award "together with interest, costs and attorney's fees allowed by law, including under MCL § 691.1705." For this same reason, appellate fees and costs are also unavailable. See *id.*

Second, and more broadly, Bathtub did not, and has not, "substantially prevailed," meaning it is not entitled to fees and costs under either the MSA or MCL 691.1705(3). In addition to seeking fees under the MSA, Bathtub requested fees under MCL 691.1705(3), which gives the circuit court, at the request of a "prevailing party," the discretion to add reasonable attorney fees and expenses of litigation to a judgment confirming or vacating an arbitration award. In substance it provides:

> On request of a prevailing party to a contested judicial proceeding under section 22, 23, or 24, the court may add reasonable attorney fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award. [MCL 691.1705(3).]

Because Bathtub's conversion claim has failed, it is not the "prevailing party." We therefore cannot conclude that the circuit court abused its discretion by denying the request for attorney fees and costs.

Regarding appellate fees and costs, Bathtub has failed to establish how MCL 691.1705(3), which pertains to motions to confirm, vacate, or modify an arbitration award, authorizes an award of fees on an appeal of an order vacating in part and confirming in part an arbitration award. To the extent it seeks appellate fees and costs under the MSA, we reiterate that Bathtub failed to plead a breach-of-contract action to enforce the provision. *Pransky*, 311 Mich App at 194-195. We therefore decline to award fees and costs under either the statute or the MSA.

IV. CONCLUSION

For the reasons stated above, we affirm the circuit court's decision affirming in part and vacating in part the arbitration award. We agree with its conclusion vacating the award related to the conversion claim. Though we disagree with its conclusion that the economic-loss doctrine bars the conversion claim, we conclude that the closely related separate-and-distinct doctrine does.

We affirm.

/s/ Noah P. Hood
/s/ Kristina Robinson Garrett