STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE SCO GROUP, INC.,

Plaintiff,

vs.

Civil Action No. 04-056587-CKB

DAIMLERCHRYSLER CORPORATION,

Honorable Rae Lee Chabot

Defendant.

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ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT DAIMLERCHRYSLER CORPORATION

Defendant DaimlerChrysler Corporation ("DCC"), through its counsel, Dykema Gossett PLLC, for its Answer and Affirmative Defenses to the Complaint ("Complaint") of Plaintiff The SCO Group, Inc. ("Plaintiff") states as follows:

INTRODUCTION

1. DCC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 1 of the Complaint.

2. DCC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 2 of the Complaint. DCC denies the allegations contained in the second sentence of paragraph 2 of the Complaint.

3. DCC denies the allegations of paragraph 3 of the Complaint, except that it admits that it is the successor in interest to Chrysler Motors Corporation for an agreement designated SOFT-01341 between AT&T Information Systems and Chrysler Motors Corporation.

4. DCC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and second sentences of paragraph 4 of the Complaint. DCC denies the allegations contained in the third sentence of paragraph 4 of the Complaint.

5. DCC denies the allegations contained in paragraph 5 of the Complaint.

PARTIES, JURISDICTION AND VENUE

6. DCC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint.

7. DCC admits that it is a Delaware corporation with its principal place of business in the County of Oakland, State of Michigan.

8. Paragraph 8 of the Complaint states legal conclusions to which no answer is required. To the extent an answer may be required, DCC denies the allegations contained in paragraph 8 of the Complaint.

9. Paragraph 9 of the Complaint states legal conclusions to which no answer is required. To the extent an answer may be required, DCC denies the allegations contained in paragraph 9 of the Complaint.

BACKGROUND FACTS

10. DCC admits that UNIX is a computer software operating system. DCC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 10 of the Complaint.

11. DCC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the Complaint.

12. DCC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the Complaint.

13. DCC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the Complaint.

14. DCC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the Complaint.

15. Paragraph 15 of the Complaint states legal conclusions to which no answer is required. To the extent an answer may be required, DCC denies the allegations contained in paragraph 15 of the Complaint.

16. DCC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Complaint.

17. DCC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the Complaint.

FIRST CAUSE OF ACTION
(BREACH OF CONTRACT/DECLARATORY JUDGMENT)

18. DCC incorporates its responses to the preceding paragraphs as if set forth fully herein.

19. Paragraph 19 of the Complaint states legal conclusions to which no answer is required. To the extent an answer may be required, DCC denies the allegations set forth in paragraph 19 of the Complaint and further states that the AT&T Information Systems, Inc. Software Agreement, Agreement No. SOFT-01341, entered into by Chrysler Motors Corporation and AT&T Information Systems, Inc. (the "License Agreement") speaks for itself. To the extent

that paragraph 19 contains allegations which purport to characterize the contents of the License Agreement, DCC denies them.

20. Paragraph 20 of the Complaint states legal conclusions to which no answer is required. To the extent an answer may be required, DCC denies the allegations set forth in paragraph 20 of the Complaint and further states that the License Agreement speaks for itself. To the extent that paragraph 20 contains allegations which purport to characterize the contents of the License Agreement, DCC denies them.

21. Paragraph 21 of the Complaint states legal conclusions to which no answer is required. To the extent an answer may be required, DCC denies the allegations set forth in paragraph 21 of the Complaint and further states that the License Agreement speaks for itself. To the extent that paragraph 21 contains allegations which purport to characterize the contents of the License Agreement, DCC denies them.

22. Paragraph 22 of the Complaint states legal conclusions to which no answer is required. To the extent an answer may be required, DCC denies the allegations set forth in paragraph 22 of the Complaint and further states that the License Agreement speaks for itself. To the extent that paragraph 22 contains allegations which purport to characterize the contents of the License Agreement, DCC denies them.

23. Paragraph 23 of the Complaint states legal conclusions to which no answer is required. To the extent an answer may be required, DCC denies the allegations set forth in paragraph 23 of the Complaint and further states that the License Agreement speaks for itself. To the extent that paragraph 23 contains allegations which purport to characterize the contents of the License Agreement, DCC denies them.

24. Paragraph 24 of the Complaint states legal conclusions to which no answer is required. To the extent an answer may be required, DCC denies the allegations set forth in paragraph 24 of the Complaint and further states that the License Agreement speaks for itself. To the extent that paragraph 24 contains allegations which purport to characterize the contents of the License Agreement, DCC denies them.

25. Paragraph 25 of the Complaint states legal conclusions to which no answer is required. To the extent an answer may be required, DCC denies the allegations set forth in paragraph 25 of the Complaint and further states that the License Agreement speaks for itself. To the extent that paragraph 25 contains allegations which purport to characterize the contents of the License Agreement, DCC denies them.

26. DCC denies the allegations set forth in paragraph 26 of the Complaint and states that the letter dated December 18, 2003 alleged in paragraph 26 of the Complaint (the "SCO Letter") speaks for itself. To the extent that paragraph 26 contains allegations which purport to characterize the contents of the SCO Letter, DCC denies them.

27. DCC denies the allegations contained in paragraph 27 of the Complaint.

28. DCC denies the allegations contained in paragraph 28 of the Complaint.

29. DCC denies the allegations contained in paragraph 29 of the Complaint.

WHEREFORE, Defendant DaimlerChrysler Corporation respectfully requests that this Court dismiss Plaintiff's Complaint with prejudice, award DCC its costs and attorney's fees as may be permitted by law, and grant such other relief as may be appropriate.

AFFIRMATIVE DEFENSES

Defendant DaimlerChrysler Corporation ("DCC"), through its counsel, Dykema Gossett PLLC, for its Affirmative Defenses to the Complaint ("Complaint") of Plaintiff The SCO Group, Inc. states as follows:

1. Failure to State a Claim. The Complaint fails to state a claim against DCC upon which relief can be granted.

2. Waiver, Estoppel, Laches, Unclean Hands and Acquiescence. Plaintiff's claims are barred by the doctrines of waiver, estoppel, laches, unclean hands and/or acquiescence.

3. Lack of Capacity to Sue. Plaintiff is not a party to the License Agreement attached to the Complaint, and therefore Plaintiff may lack the capacity to sue.

4. Lack of Standing. Plaintiff is not a party to the License Agreement attached to the Complaint, and therefore Plaintiff may lack standing to sue. Plaintiff also lacks standing to sue because the terms of Plaintiff's contract with Novell, Inc. ("Novell") require Plaintiff to waive its right to enforce the License Agreement upon Novell's request, which, upon information and belief, Novell has expressly requested Plaintiff to do.

5. Lack of Case or Controversy. Plaintiff's action for declaratory judgment fails for lack of a case or controversy because DCC did not breach the License Agreement.

6. Lack of Breach/Cure of Alleged Breach. Plaintiff fails to identify a duty under the License Agreement that DCC breached, and DCC has cured any alleged failure to comply with an actual duty under the License Agreement. Nothing set forth herein shall be construed as an admission by DCC that it has failed to comply with any duty under the License Agreement.

7. Mitigation of Damages. The damages sought by Plaintiff are not recoverable because Plaintiff has failed to mitigate its damages.

8. Plaintiff's Claims are Moot. The claims asserted in the Complaint are moot because DCC has provided Plaintiff with a proper certification under the License Agreement.

9. Bar by Third-Party Contract. Plaintiff is barred from asserting the claims in the Complaint by its contract with Novell, Inc.

10. Reservation of Right. DCC reserves the right, upon completion of its discovery and investigation or otherwise, to assert such additional defenses as may be appropriate.

WHEREFORE, Defendant DaimlerChrysler Corporation respectfully requests that this Court dismiss Plaintiff's Complaint with prejudice, award DCC its costs and attorney's fees as may be permitted by law, and grant such other relief as may be appropriate.

DYKEMA GOSSETT PLLC

By: _____

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Dated: April 15, 2004

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties and/or attorneys of record for all parties to the above cause at their respective addresses as indicated on the pleadings, on the 15th day of April, 2004, by:

☒ U.S. Mail
☐ Hand Delivery
☐ Facsimile
☐ Overnight Mail

Donna Tonelli

DET01\401761.1
ID\TSB

STATE OF MICHIGAN

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DAIMLERCHRYSLER CORPORATION'S MOTION FOR SUMMARY DISPOSITION

Defendant DaimlerChrysler Corporation ("DaimlerChrysler"), through its counsel, Dykema Gossett PLLC, moves for summary disposition of Plaintiff The SCO Group, Inc.'s Complaint pursuant to MCR 2.116(C)(10).

In support of this Motion, DaimlerChrysler relies upon the facts and law set forth in its Memorandum of Law In Support Of Motion For Summary Disposition, filed contemporaneously herewith, and its exhibits, the pleadings and other documents on file with the Court, and all matters of which the Court may take judicial notice.

WHEREFORE, Defendant DaimlerChrysler Corporation respectfully requests that this Court grant this Motion and enter an order, pursuant to MCR 2.116(C)(10), dismissing Plaintiff The SCO Group, Inc.'s Complaint in its entirety with prejudice.

Respectfully Submitted,

DYKEMA GOSSETT PLLC

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties and/or attorneys of record for all parties to the above cause at their respective addresses as indicated on the pleadings, on the 15th day of April, 2004, by:

☒ U.S. Mail ☐ Facsimile
☐ Hand Delivery ☐ Overnight Mail

DONNA TONELLI

DET01\401911.1
ID\TSB

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DAIMLERCHRYSLER CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

Defendant DaimlerChrysler Corporation ("DaimlerChrysler") submits this Memorandum of Law in Support of its Motion for Summary Disposition pursuant to Michigan Court Rule ("MCR") 2.116(c)(10).

This case presents the rare circumstance where summary disposition at the initial stage of the litigation is not only appropriate, but required. The SCO Group, Inc. ("SCO") alleges a sole cause of action for breach of contract and declaratory judgment. However, the two documents that SCO itself attaches to the complaint in ostensible support of its claim instead defeat the claim as a matter of law. The documents – a letter from SCO seeking a certification it says DaimlerChrysler is required to provide pursuant to a license agreement, and the license agreement itself – show that there is no genuine issue of material fact as to whether

DaimlerChrysler breached the agreement. The license agreement delineates, in unambiguous terms, what the certification must include, and by those plain terms, DaimlerChrysler has no contractual duty to provide the information that SCO demands in its letter. In addition, DaimlerChrysler has provided SCO with the only certification required under the license, demonstrating that DaimlerChrysler is not even using and has not used the licensed software for more than seven years. Accordingly, there is no genuine issue of material fact, and SCO's claim fails as a matter of law.

STATEMENT OF UNDISPUTED FACTS

1. In 1988, Chrysler Motors Corporation ("Chrysler"), and AT&T Information Systems, Inc. ("AT&T-IS") entered into the AT&T Information Systems, Inc. Software Agreement, Agreement No. SOFT-01341 (the "License Agreement") for the license of certain AT&T-IS software products. *See* Complaint ("Cmpl.") Exhibit A (License Agreement) at 1.

2. DaimlerChrysler is Chrysler's successor-in-interest to the License Agreement. *See* Affidavit of Paul R. Eichbauer ("Eichbauer Aff.") (attached hereto as Exhibit A) Exhibit 1.

3. The software products that AT&T-IS licensed to DaimlerChrysler pursuant to the License Agreement included "UNIX System V Release 3.0 Source Code" and certain modifications and certain derivative works based thereon. *See* Cmpl. Exhibit A (License Agreement) § 2.01 and attached Schedule at 4, 5, 6.

4. Section 2.05 of the License Agreement provides:

> On AT&T-IS's request, but no more frequently than annually, Licensee shall furnish to [AT&T-IS] a statement, certified by an authorized representative of Licensee, ***listing the location, type and serial number of all Designated CPUs*** hereunder and stating that the use by Licensee of Software Products subject to this Agreement has been reviewed and ***that each such Software Product is being used solely on such Designated CPUs*** (or temporarily on back-up CPS) ***for such Software Products in full compliance with the provisions of this Agreement.***

Cmpl. Exhibit A (License Agreement) § 2.05 (emphases added).

5. SCO claims to be the successor to AT&T-IS's rights under the License Agreement. *See* Cmpl. ¶ 19 and Exhibit B (Letter from Bill Broderick to Chrysler Motors Corp. dated December 18, 2003 ("SCO Letter")).

6. On or about December 18, 2003, SCO sent a letter addressed to the "Chief Executive Officer of Chrysler Motors Corporation" in Highland Park, Michigan purporting to seek a certification from DaimlerChrysler pursuant to Section 2.05 of the License Agreement. *See* Cmpl. Exhibit B (SCO Letter).

7. However, the SCO Letter actually demanded that written certification pursuant to Section 2.05 "must include certifications that:

> 1. You have held, at all times, all parts of the Software Products (including methods and concepts) in confidence for SCO.
>
> 2. You have appropriately notified each employee to whom you have disclosed the software products, and taken steps to assure that such disclosure was made in confidence and must be kept in confidence by such employee. Please provide evidence of your compliance with this obligation. This evidence may include, but not be limited to, nondisclosure agreements, employee policies or manuals, or other such evidence of compliance.
>
> 3. Neither you nor your employees with access to the Software Products have contributed any software code based on the Software Products for use in Linux or any other UNIX-based software product.
>
> 4. Neither you or you employees have used any part of the Software Products directly for others, or allowed any use of the Software products by others, including, but not limited to use in Linux or any other UNIX-based software product.
>
> 5. Neither you nor your employees have made available for export, directly or indirectly, any part of the Software Products covered by this Agreement to any country that is currently prohibited from receiving such supercomputing technology, including Syria, Iran, North Korea, Cuba, and any other such

country, through a distribution under the General Public License for Linux, or otherwise.

6. Neither you nor your employees have transferred or disposed of, through contributions to Linux or otherwise, any part of the Software Product.

7. Neither you nor your employees have assigned or purported to assign, any copyright in the Software Products to the General Public License, or otherwise for use in Linux or another UNIX-based software product."

Id. at 2-3 (the "Linux Certifications").

8. The SCO Letter also demanded "written certification ...within 30 days of receipt of this letter." *Id.* at 2.

9. By its terms, Section 2.05 of the License Agreement does not require DaimlerChrysler to respond to the Licensor's request for certification within 30 days of receipt. *See* Cmpl. Exhibit A (License Agreement) § 2.05.

10. No other provision of the License Agreement imposes a requirement that DaimlerChrysler respond to a certification request within 30 days of receipt of such request. *See generally* Cmpl. Exhibit A (License Agreement).

11. Section 2.05 of the License Agreement specifies the required contents of a proper certification:

(i) a list of the location, type and serial number of all Designated CPUs under the License Agreement;

(ii) a statement that the Licensee has reviewed the use of Software Products subject to the License Agreement; and

(iii) a statement that "each such Software Product is being used solely on such Designated CPUs (or temporarily on back-up CPS) for such Software Products in full compliance with the provisions of this Agreement."

See Cmpl. Exhibit A (License Agreement) § 2.05.

12. By its unambiguous terms, Section 2.05 does not require DaimlerChrysler to include the Linux Certifications in response to a request from the Licensor. *See* Cmpl. Exhibit A (License Agreement) § 2.05.

13. By its terms, Section 2.05 does not require DaimlerChrysler to "provide evidence of compliance by producing copies" of its policies or manuals, which SCO demanded DaimlerChrysler provide in its second Linux Certification. *See* Cmpl. Exhibit B (SCO Letter) at 2.

14. After receiving the SCO Letter, DaimlerChrysler did not furnish SCO with the Linux Certifications. *See* Eichbauer Aff. Exhibit 1.

15. SCO did not contact DaimlerChrysler after sending the SCO Letter and prior to initiating this lawsuit.

16. Instead, SCO filed its Complaint on March 3, 2004, claiming it had been "compelled" to do so by DaimlerChrysler's "refusal" to respond to the SCO Letter. *See* Cmpl. ¶¶ 4-5, 26-27.

17. DaimlerChrysler responded to the SCO Letter on April 6, 2004. *See* Eichbauer Aff. Exhibit 1 (Letter from Susan J. Unger to Bill Broderick (the "DaimlerChrysler Letter")).

18. The DaimlerChrysler Letter attached a letter from Norman A. Powell, Senior Manager of Tech Services for DaimlerChrysler, which provided SCO with the following certification: "No SOFTWARE PRODUCT licensed under the subject Agreement is being used or has been used in more than seven years, and as a result there is full compliance with the provisions of the subject Agreement." *Id.*

19. Because the DaimlerChrysler Letter satisfies any certification obligation that DaimlerChrysler may have had to SCO under Section 2.05 of the License Agreement,[1] DaimlerChrysler requested in its letter that SCO withdraw its Complaint. *Id.*

20. To date, SCO has neither withdrawn its Complaint nor otherwise responded to the DaimlerChrysler Letter.

ARGUMENT

SCO claims that DaimlerChrysler breached the License Agreement by failing to provide SCO with the Linux Certifications. Put simply, this claim fails because DaimlerChrysler has no obligation under the plain terms of the License Agreement to provide SCO with the Linux Certifications. SCO's inability to identify any express contractual provision that DaimlerChrysler breached requires dismissal of its claim. *See, e.g., Hesse v. Chippewa Valley Schools*, No. 209080, 2001 WL 789540, at *5 and n.6 (Mich App, Jan. 12, 2001) (per curiam) (attached hereto as Exhibit B) (reversing trial court's refusal to grant defendant summary disposition where plaintiff's breach claim was based on an argument that the agreement was "not controlled by its express terms," and finding that plaintiffs had submitted no evidence that defendants "failed to honor their obligations under the plan."); *Pirrera v. Bath & Tennis Marina Corp*, 2 AD3d 613; 769 NYS2d 565 (2003) (reversing denial of summary judgment where unambiguous terms of license agreement constrained plaintiff's use of a boat slip to a specific time period; absence of right of renewal in license defeated plaintiff's claim that failure to renew constituted a breach).

[1] DaimlerChrysler contests that it owes SCO any obligation under the License Agreement. *See, e.g.*, Answer and Affirmative Defenses of Defendant DaimlerChrysler Corporation ¶¶ 2, 4-5, 27-29.

I. STANDARD OF REVIEW.

MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *See Singerman v. Mun Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997); *see also Spiek v. Mich Dep't of Trans*, 456 Mich 331, 337; 572 NW2d 201 (1998). "The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law." *Podorsek v. Lawyers Title Ins Co*, No. 241450, 2003 WL 22928819, at * 3 (Mich App, Dec. 11, 2003) (per curiam) (attached hereto as Exhibit C) (citing *Amer Cmty Mut Ins Co v. Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992)). A motion for summary disposition under MCR 2.116(C)(10) may be raised at any time. MCR 2.116(D)(3).

A motion seeking summary disposition pursuant to MCR 2.116(C)(10) must specifically identify the issues as to which the movant believes that there is no genuine issue of material fact. *LoPiccolo Homes, Inc. v. Grand/Sakwa of Brooklane*, No. 241386, 244800, 2003 WL 23018549, slip op. at * 2 n.1 (Mich App, Dec. 23, 2003) (per curiam) (attached hereto as Exhibit D) (citing MCR 2.116(G)(4)); MCR 2.116(G)(4)). The movant has the initial burden of supporting its position with affidavits, pleadings, admissions, and other documentary evidence. *Id.* (citing *Quinto v. Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996)). The burden then shifts to the opposing party to set forth specific facts showing a genuine issue of material fact for trial. *Id.* (citations omitted). If there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law. *See Maiden v. Roxwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The test is whether the kind of record that might be developed will leave open an issue upon which reasonable minds might differ. *Singerman*, 455 Mich at 139.

This case presents no issue on which reasonable minds might differ. The unambiguous terms of Section 2.05 of the License Agreement are susceptible to only one reasonable interpretation, and bar SCO's claim for breach and declaratory judgment as a matter of law.

Moreover, because the License Agreement's terms are unambiguous, no amount of discovery would enable SCO to develop a record that would leave open the issue of breach. Accordingly, this Court should grant summary disposition in favor of DaimlerChrysler on SCO's claims.

II. THERE IS NO GENUINE ISSUE OF FACT AS TO WHETHER DAIMLER CHRYSLER BREACHED THE LICENSE AGREEMENT.

A. The Plain Terms of the License Agreement Do Not Require DaimlerChrysler to Provide the Linux Certifications.

A trial court "should grant summary disposition" on a breach of contract claim where the terms of the contract are plain and unambiguous, and subject to only one reasonable interpretation.[2] *See Henderson v. State Farm Fire and Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999); *see also LoPiccolo*, No. 241386, 244800, 2003 WL 32018549, at * 2 (the meaning of unambiguous contract terms may be determined in a summary disposition proceeding); *R/S Assocs v. NY Job Dev Auth*, 98 NY2d 29, 32-33; 771 NE2d 240 (2002) (citations and internal quotations omitted) (affirming grant of summary judgment to defendant on ground that contract term was unambiguous, and rejecting plaintiffs' interpretation as unreasonable); *Sutton v. East River Sav Bank*, 55 NY2d 550, 555; 435 N.E.2d 1075 (1982) (if a contract term is unambiguous on its face, its proper construction is a question of law). *Cf. SSC Assoc Ltd P'ship v. Gen Ret Sys of the City of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1992) (a contract term is ambiguous, and summary judgment inappropriate, where its terms are subject to more than one reasonable interpretation); *Leon v. Lukash*, 121 A.D.2d 693, 694; 504 N.Y.S.2d 455 (1986) (when language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment).

[2] Though Michigan procedural law applies, New York law applies to the construction and performance of the License Agreement. *See* Cmpl. Exhibit A (License Agreement) § 7.12. DaimlerChrysler therefore cites the law of both jurisdictions in support of its motion.

In both New York and Michigan, "[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accordance with the parties' intent." *Greenfield v. Philles Records, Inc.*, 98 NY2d 562, 569; 780 NE2d 166 (2002); *see also Klever v. Klever*, 333 Mich 179, 186; 52 NW2d 653 (1952) ("The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties."). "The best evidence of what the parties to a written agreement intended is what they say in their writing." *Slamow v. Del Col,* 79 NY2d 1016, 1018; 594 NE2d 918 (1992); *see also Nichols v. Nichols*, 306 NY 490, 496 119 NE2d 351(1954)("The first and best rule of construction of every contract, and the only rule we need here, is that, when the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein."); *Qual Prods and Concepts Co v. Nagel Precision, Inc.*, 469 Mich 362, 375; 666 NW2d 251 (2003) (an unambiguous contractual provision is reflective of the parties' intent as a matter of law).

Thus, when the terms of an agreement are clear and unambiguous, the contract "is to be interpreted by its own language...[and the] writing should be enforced according to its terms." *R/S Assocs*, 98 NY2d at 32 (citations omitted); *see also Teitelbaum Holdings Ltd v. Gold*, 48 NY2d 51, 56; 396 NE2D 1029 (1979) (reinstating trial court's refusal to read settlement agreement as providing defendant a right of set-off where agreement expressly provided for set-off in only one circumstance, and noting, "matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument."); *Mich Chandelier Co v.* Morse, 297 Mich 41, 48; 297 NW 64 (1941) (where contract language is clear and unambiguous and has definite meaning, court must determine parties' intent from the words used in the contract); *Zurich Ins Co v. CCR and Co,* 226 Mich App 599, 603-604; 576 NW2d 392 (1998)(affirming summary disposition based on contract's clear and unambiguous language,

and refusing to permit plain meaning of the words, and parties' intent, to be impeached by extrinsic evidence).

A contract is unambiguous if the language it uses has a "definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion." *Greenfield*, 98 NY2d at 569 (internal quotations and citations omitted); *see also SSC Assocs Ltd.*, 192 Mich App at 363 (ambiguity exists if the terms of a contract are subject to two or more reasonable interpretations). "An ambiguity never arises out of what was not written at all but only out of what was written so blindly and imperfectly that its meaning is doubtful." *Greenfield*, 98 NY2d at 573 (quoting *Trs of Freeholders & Commonality of Town of Southampton v. Jessup*, 173 NY 84, 90; 65 NE 949 (1903)).

These fundamental principles of contract law dictate dismissal of SCO's action here. SCO bases its breach claim on Section 2.05 of the License Agreement, which provides:

> On AT&T-IS's request, but no more frequently than annually, Licensee shall furnish to [AT&T-IS] a statement, certified by an authorized representative of Licensee, listing the location, type and serial number of all Designated CPUs hereunder and stating that the use by Licensee of Software Products subject to this Agreement has been reviewed and that each such Software Product is being used solely on such Designated CPUs (or temporarily on back-up CPS) for such Software Products in full compliance with the provisions of this Agreement.

Cmpl. Exhibit A (License Agreement) § 2.05. Thus, Section 2.05 expressly delineates the requirements for certification: (1) a statement, (2) certified by an authorized representative, (3) listing the location, type and serial number of all Designated CPUs and (4) stating (a) that the Licensee has "reviewed its use of the Software Products" and (b) "that each such Software Product is being used on such Designated CPUs for such Software Products in full compliance with the provisions of the Agreement." *Id.*

By these plain terms, DaimlerChrysler's certification obligations are limited to listing the required information about Designated CPUs and making the required statements (1) that DaimlerChryler has reviewed its use and (2) that its use is in full compliance with the contract. Nothing in the language of Section 2.05 manifests the slightest intent by the parties to permit the Licensor to demand, or to require DaimlerChrysler to provide, additional statements, more detailed statements, or any further information, documentation or "evidence of compliance" such as that sought in the Linux Certifications.[3] *See* Cmpl. Exhibit B (SCO Letter).

Indeed, Section 2.05's express recitation of the requirements for certification precludes reading that language to require DaimlerChrysler to provide the seven Linux Certifications. *See, e.g., Teitelbaum*, 48 NY2d at 56 (finding that contract provided right to set-off in only one instance and that there was "simply [. . .] no basis for viewing this language as ambiguous or covering situations not expressly mentioned"); *Maysek v. Moran, Inc*, 284 AD2d 203, 204; 726 NYS2d 546 (2001) (affirming summary judgment where agreement unequivocally stated that plaintiff was retained for a particular purpose, and refusing to read into contract broader purpose in the absence of language indicating broader purpose).

A finding to the contrary also would violate the time-honored canon of contract construction known as "*expresso unius est exclusion alterius*" (the express mention of one thing implies the exclusion of another). Under this interpretive principle, the specific description in Section 2.05 of the certification's contents – including the setting forth the language to be used in each of the two required statements – compels a finding that the omission of the Linux Certifications is intentional and unambiguous. *See Uribe v. Merch Bank of NY*, 91 NY2d 336,

[3] SCO contends that it is entitled to the Linux Certifications because Section 2.05 constitutes "a monitoring and reporting mechanism designed to detect (and thus deter) violations of [the License Agreement]." *See* Cmpl. ¶ 1. Even if that characterization were accurate, which it is not, the sole "reporting" obligation defined in Section 2.05 is the obligation to provide the specified information about Designated CPUs and the specified statement of compliance, and the sole "monitoring" right is the right to receive that specified information. No language in Section 2.05 gives the Licensor the right to demand anything further.

340-341; 693 NE2d 740 (1998) (affirming rejection of plaintiff's argument that term "valuable papers" was ambiguous and could include cash, applying principle of "*inclusion unius est exclusion alterius* (the inclusion of one is the exclusion of another)" to conclude that the omission of "cash" was "intentional and unambiguous," and noting that plaintiff's proposed definition "rest[ed] on an impermissibly strained reading to find an ambiguity which otherwise might not be thought to exist.")(internal quotation and citation omitted); *Two Guys From Harrision-NY, Inc v. S.F.R. Realty Assocs*, 63 NY2d 396, 403-04; 472 NE2d 315 (1984) (invoking doctrine of *inclusion unius est exclusion alterius* to affirm conclusion that express specification of certain authorized alterations should be read as implicitly prohibiting other alterations); *Payne v. Palisades Interstate Park Comm'n*, 226 AD2d 902, 902; 640 NYS2d 683 (App Div 1996) (agreement's delineation of express rights to one party to construct dwellings on land compelled finding that contract implicitly prohibited other party from constructing dwellings on land). Moreover, if the parties to the License Agreement – two sophisticated business entities – had intended to require that Licensees provide the seven Linux Certifications, or anything like them, they would and could have included such language in Section 2.05. *See Uribe*, 91 NY2d at 340-341.

Nor is there any ambiguity in Section 2.05's terms that could justify expanding it into an obligation to make the seven additional affirmative representations, or to provide the additional internal documentation, described in the Linux Certifications. The phrase "stating that" is a restrictive clause with a clear and definite meaning, and is not susceptible to alternate reasonable interpretations. *See, e.g., Webster's Modern Office Dictionary* (Random House 1999) at 362-363 (defining "state" as "to express in speech or writing") and 385 (defining "that" as a conjunctive "(used to introduce a subordinate clause expressing cause, purpose, result, etc.): *I'm sure that*

you'll like it" (emphasis in original)). As a result, Section 2.05's requirement that the certification "state[] that each such Software Product is being used on such Designated CPUs for such Software Products in full compliance with the provisions of the Agreement" can only be read as obligating the Licensee to provide the statement specified, *i.e.*, "each such Software Product is being used...in full compliance with the provisions of the Agreement." There is nothing indefinite or ambiguous about what the certification must state, and no basis for enlarging the Licensor's rights beyond this specific and limited requirement.

DaimlerChrysler's certification obligation is limited to the unambiguous terms of Section 2.05, which cannot be read to include the Linux Certifications. As a result, DaimlerChrysler did not breach the License Agreement when it elected not to provide the Linux Certifications to SCO.[4] SCO's effort to rewrite the License Agreement 16 years after it was written by other parties, and more than seven years after DaimlerChrysler stopped using the licensed software, fails as a matter of law.

B. SCO's Failure to Identify a Contractual Breach is Fatal to its Claim.

SCO's failure to identify an express provision of the License Agreement that DaimlerChrysler allegedly breached entitles DaimlerChrysler to judgment as a matter of law. It is axiomatic that a requisite element for a breach of contract claim is an actual breach. *See Uribe*, 91 NY2d at 342 (affirming summary judgment dismissing claim for breach of contract where court found that plain language of agreement precluded plaintiff's claim for breach); *Old Kent Bank v. Sobczak*, 243 Mich App 57, 69-70; 620 NW2d 663 (2000)(reversing a denial of summary judgment to defendants where the court found that defendants were not in default of

[4] To the extent that SCO claims that DaimlerChrysler breached the License Agreement's confidentiality provisions, *see* Cmpl. ¶ 28, that claim fails based on the absence of breach under Section 2.05. SCO expressly predicates its allegation on the assumptions: (1) that failure to make the Linux Certifications constitutes a breach; and (2) that the only basis for not making the Linux Certifications is an underlying breach of the confidentiality provisions. *See id.* Thus, SCO's inability to establish a breach based on the Linux Certifications negates the assumptions on which SCO bases its claim that DaimlerChrysler somehow violated the confidentiality provisions of the License Agreement, and that claim also fails as a matter of law since it is entirely predicated on SCO's faulty argument about Section 2.05.

contract based on the contract's plain language). SCO cannot establish any genuine issue of material fact as to breach because the undisputed evidence demonstrates that DaimlerChrysler acted in accordance with its contractual obligations and that no breach occurred.

The SCO Letter provides the purported basis for SCO's contention that it requested certification pursuant to Section 2.05 and that DaimlerChrysler breached the License Agreement by failing to provide the "contractually required compliance certification." *See* Cmpl. ¶¶ 2, 26-27. However, the SCO Letter makes clear that SCO unilaterally purported to define DaimlerChrysler's alleged obligation under Section 2.05 as a duty to provide the Linux Certifications. *See* Cmpl. Exhibit B at 1. Because the License Agreement does not impose such an obligation on DaimlerChrysler, DaimlerChrysler was not required to respond to the SCO Letter.[5] Further, DaimlerChrysler acted in accordance with the Agreement by not providing SCO with the Linux Certifications. Absent a contractual duty to provide that information, there was no breach. *See, e.g., Pirrera*, 769 NYS2d at 566 (reversing denial of summary judgment because defendant's failure to renew could not constitute breach where unambiguous terms of agreement did not provide plaintiff with right of renewal).

In any event, DaimlerChrysler has provided SCO with a certification that complies with the express requirements of Section 2.05. *See* Eichbauer Aff. Exhibit 1. Specifically, the DaimlerChrysler Letter provides SCO with the required information about Designated CPUs (explaining that none are in use); certifies that an authorized person reviewed DaimlerChrysler's use; and states that "no software product licensed under the subject Agreement is being used or has been used in more than seven years, and as a result there is full compliance with the provisions of the subject Agreement." *Id.* In so doing, DaimlerChrysler has discharged any

[5] Even if DaimlerChrysler had been required to respond to SCO's letter, the License Agreement contains no provision requiring DaimlerChrysler to respond within a particular time frame, much less within 30 days. *See* Cmpl. Exhibit A (License Agreement) § 2.05 and generally. Accordingly, DaimlerChrysler did not breach the License Agreement by responding on April 6, 2004 rather than within 30 days.

conceivable certification obligation it may have under Section 2.05. DaimlerChrysler has not breached the License Agreement, and SCO's claim fails as a matter of law.

C. There is No Reasonable Chance That Discovery Will Result in Factual Support For SCO's Claim of Breach.

Summary disposition before the completion of discovery is proper "where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Prysak v. R.L. Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992) (affirming grant of summary disposition in defendant's favor); *see also Greenbaum v. Barthman*, 210 AD2d 160, 160-161; 620 NYS2d 954 (App Div 1994) (affirming summary judgment and denial of plaintiff's requests for additional discovery where contract was unambiguous and plaintiff failed to establish that facts essential to justify opposition to summary judgment existed). For a court to rule against summary disposition and allow discovery to continue, the party opposing the motion must identify the disputed issue and support that issue with independent evidence. *See Hyde v. Univ of Mich Bd Of Regents*, 226 Mich App 511, 519; 575 NW2d 36 (1997)(affirming grant of summary disposition where "plaintiff failed to show by affidavit that further development would support his claims").

Summary disposition should be granted here because SCO cannot support its breach claim with independent evidence. The sole basis for SCO's claim is its contention in the SCO Letter that a certification pursuant to Section 2.05 of the License Agreement must include the Linux Certifications. Because the plain terms of the License Agreement itself contradict that contention, extrinsic evidence may not be introduced to rewrite the License Agreement's plain terms, and no amount of factual discovery would enable SCO to uncover factual support for its

position.[6] *See, e.g., Prysak*, 193 Mich App at 11 (concluding that summary disposition was not granted prematurely because discovery would not have uncovered factual support for plaintiff's claim); *Wright v. DaimlerChrysler Corp*, 220 F Supp 2d 832, 844 (ED Mich, 2002)(granting defendant's motion for summary judgment where plaintiff did not show that additional discovery was necessary). Therefore, this Court should grant summary disposition in DaimlerChrysler's favor on SCO's claim for breach of contract.

III. SCO'S CLAIM FOR DECLARATORY JUDGMENT FAILS FOR LACK OF AN ACTUAL CONTROVERSY.

SCO's failure to identify an actual breach by DaimlerChrysler requires dismissal of its claim for declaratory judgment as well. Under the Michigan Court Rules, a party may only obtain a declaratory judgment "[i]n a case or actual controversy...." *See* MCR 2.605(A); *McGill v. Auto Ass'n of Mich,* 207 Mich App 402, 407; 526 NW2d 12 (1994). An "actual controversy" exists when the judgment is "necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v. Kelley*, 402 Mich 554, 589; 267 NW2d 72 (1978). If what a party seeks to protect is merely hypothetical, there is no "actual controversy," and no basis for a declaratory judgment. *Id.*

Because the undisputed facts here demonstrate that DaimlerChrysler has not breached the License Agreement, there is no "actual controversy" on which SCO can base a claim for declaratory judgment.[7] *See id.* at 589 (["B]efore affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, plead facts entitling him to the judgment he seeks and proves each fact alleged, *i.e.*, a plaintiff must allege and prove an actual justiciable

[6] Likewise, no amount of discovery could support SCO's allegation, *see* Cmpl. ¶ 28, that "refusal" to provide the Linux Certifications is evidence of a breach of the License Agreement's confidentiality provisions. *See* discussion n. 4, *supra*.

[7] SCO drafted the single cause of action in its Complaint as "Breach of Contract/Declaratory Judgment." *See* Cmpl. p. 4. Because SCO identifies no basis for a declaratory judgment other than the faulty basis alleged for breach of contract, SCO has no viable claim for declaratory judgment either.

controversy."); *McGill*, 207 Mich App at 407 (affirming trial court's denial of declaratory judgment where the "review of the record reveals no evidence that plaintiffs have suffered injury as a result of defendants' partial payment of their medical bills; nor is any injury threatened"). The Court should therefore also grant summary disposition to DaimlerChrysler on SCO's cause of action for "Declaratory Judgment," to the extent that that it deems that cause to be distinct from SCO's breach of contract claim.

CONCLUSION

For the foregoing reasons, DaimlerChrysler respectfully requests that the Court grant summary disposition in its favor and against SCO, and deny SCO its requested relief in its entirety.

Dated: April 15, 2004

Respectfully Submitted,

James Feeney, Esq.
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(348) 203-0700
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DaimlerChrysler Corporation

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties and/or attorneys of record for all parties to the above cause at their respective addresses as indicated on the pleadings, on the 15th day of April, 2004, by:

☑ U.S. Mail ☐ Facsimile
☐ Hand Delivery ☐ Overnight Mail

Donna Tonelli

DET01\401761.1
IDVTSB

Exhibit A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE SCO GROUP, INC.,

Plaintiff,

vs. Civil Action No. 04-056587-CKB

DAIMLERCHRYSLER CORPORATION, Honorable Rae Lee Chabot

Defendant.

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Barry M. Rosenbaum (P26487)
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(248) 203-0700

AFFIDAVIT OF PAUL R. EICHBAUER

PAUL R. EICHBAUER, being duly sworn, deposes and says:

1. I am Assistant General Counsel – Commercial Affairs for DaimlerChrysler Corporation ("DaimlerChrysler"). I have personal knowledge of the matters set forth herein and submit this affidavit in support of DaimlerChrysler's Motion for Summary Disposition.

2. Attached hereto as Exhibit 1 is a true and correct copy of a letter dated April 6, 2004 from Susan J. Unger to Bill Broderick, attaching a certification letter dated April 6, 2004 from Norman A. Powell to Unix System Laboratories, Inc.

Paul R. Eichbauer

Sworn to before me this
15 day of April 2004

Notary Public

LINDA A. KRIEGER
NOTARY PUBLIC MACOMB CO., MI
MY COMMISSION EXPIRES Sep 24, 2007
ACTING IN OAKLAND COUNTY, MI

Of Counsel:

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DAIMLERCHRYSLER

DaimlerChrysler Corporation
Susan J. Unger
Sr. Vice President & CIO
Information Technology Management

April 6, 2004

Bill Broderick
Director, Software Licensing
The SCO Group, Inc.
430 Mountain Avenue
Murray Hill, NJ 07974

RE: Your letter to "Chrysler Motors Corporation" dated December 18, 2003 regarding "AT&T/SCO License No. SOFT-01341"

Dear Mr. Broderick:

DaimlerChrysler Corporation ("DaimlerChrysler"), successor in interest to Chrysler Motors Corporation, understands from the lawsuit filed against DaimlerChrysler in the Oakland County Circuit Court (Case No. 04-056587-ck) that The SCO Group, Inc. ("SCO") believes that:

1. SCO "owns" certain rights under the Software Agreement referenced above ("SA"), and,
2. SCO's referenced letter was a proper request for a certified statement under Section 2.05 of the SA.

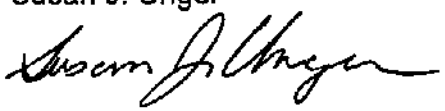
SCO is not a party to the SA, and DaimlerChrysler has no knowledge of any assignment of the rights of the Licensor under the SA to SCO. According to our records, the SA was assigned from AT&T Information Systems Inc. to UNIX System Laboratories, Inc. on or about November 1, 1990. Notwithstanding these facts, SCO has filed its suit against DaimlerChrysler. SCO's suit appears to be based on an uninformed and inaccurate assessment of DaimlerChrysler's conduct. As a result, and without waiving any of its rights under the SA or under applicable law, including without limitation its right to assert that SCO has no rights under the SA, that SCO has no right to seek the certified statement that its letter requests, that Licensor has waived any right to seek a certified statement under the SA, and that SCO has intentionally filed a meritless lawsuit for purposes of restraining competition, DaimlerChrysler provides the attached information to SCO.

DaimlerChrysler Corporation
1000 Chrysler Drive CIMS 485-13-96
Auburn Hills MI USA 48326-2766
Phone 248.512.6802
Fax 248.512.1770
Germany 011 49 711 17 24998
e-mail: sju1@daimlerchrysler.com

To the extent that SCO's suit is intended merely to obtain the information called for by Section 2.05 of the SA, all such information is contained on the attachment to this letter. Accordingly, DaimlerChrysler believes that this letter should cause SCO to dismiss its suit. Please contact DaimlerChrysler's counsel to discuss and arrange for this dismissal.

Very truly yours,

Susan J. Unger



Attachment

DAIMLERCHRYSLER

DaimlerChrysler Corporation

April 6, 2004

Unix System Laboratories, Inc.
PO Box 25000
Greensboro, NC 27420

Re: Software Agreement SOFT-01341 between DaimlerChrysler Corporation, formerly known as "Chrysler Motors Corporation", and UNIX System Laboratories, Inc. ("USL"), successor to AT&T Information Systems Inc. ("AT&T-IS")

On behalf of DaimlerChrysler Corporation, I hereby certify that, as of the date indicated above, there is no DESIGNATED CPU, or any CPU, on which the SOFTWARE PRODUCT licensed under the subject Agreement is being used. This has been the case for more than seven years. As a result, no list of the location, type and serial number of any DESIGNATED CPU is relevant or possible.

I further certify that DaimlerChrysler Corporation's use of the SOFTWARE PRODUCT licensed under the subject Agreement has been reviewed. No SOFTWARE PRODUCT licensed under the subject Agreement is being used or has been used for more than seven years, and as a result DaimlerChrysler Corporation is in full compliance with the provisions of the subject Agreement.

The terms DESIGNATED CPU, CPU, and SOFTWARE PRODUCT are used in this letter with the meanings defined in the subject Agreement. I represent that I am authorized by DaimlerChrysler Corporation to make this certification.

Sincerely,

Norman A. Powell
Senior Manager, Tech Services
DaimlerChrysler Corporation

Exhibit B

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Kenneth D. HESSE, Personal Representative of the Estate of Jason L. Hesse,
Deceased, Kenneth D. Hesse, Cynthia R. Hesse, and Amy R. Hesse, a minor, by her
next friend, Kenneth D. Hesse, Plaintiffs-Appellees,
v.
CHIPPEWA VALLEY SCHOOLS, James J. Rivard, James P. Murphy, and Ruth Ann Booms,
Defendants-Appellants,
and
ASHLAND OIL, INC., a/k/a Ashland Inc., and Valvoline Instant Oil Change, d/b/a
Valvoline Oil Company, Defendants.

No. 209080.

Jan. 12, 2001.

Before: OWENS, P.J., and JANSEN and R.B. BURNS [FN*], JJ.

FN* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

*1 Defendants-appellants Chippewa Valley Schools, James J. Rivard, James P. Murphy, and Ruth Ann Booms (hereinafter "defendants") appeal by leave granted the trial court's order denying their motions for summary disposition of plaintiffs' breach of contract and gross negligence claims under MCR 2.116(C)(7) and (C)(10). We reverse and remand for further proceedings.

On March 3, 1995, Jason Hesse, the deceased, defendant James P. Murphy, [FN1] and Steven Schneider [FN2] signed a document entitled "Chippewa Valley High School Work Study Plan." The plan provided that defendant Ashland Oil would hire sixteen-year-old Jason to perform "basic automotive service" and "basic cleaning services" at Ashland Oil's automotive service center located in Clinton Township. Also on March 3, 1995, Schneider completed a standard "CA-7 Work Permit and Age Certificate" concerning Jason's employment with defendant. The work permit provided that Jason was to work a total of 23 hours per week, at an hourly wage of $5, and also provided that Jason would not work past 7:00 p.m. Additionally, the work permit provided that defendant "must provide competent adult supervision at all times" and provided that Jason's employment "will conform to all federal, state, and local laws and regulations." Steven Schneider, Jason Hesse, and Cynthia Hesse signed the CA-7 permit. On March 6, 1995, defendant Ruth Ann Booms, acting as Chippewa Valley Schools' agent, signed and issued the work permit.

FN1. Defendant Murphy was Jason Hesse's school counselor.

FN2. Steven Schneider was the store manager of defendant Ashland Oil's "Valvoline Instant Oil Change" automobile service center in Clinton Township.

In 1995, Ashland Oil accepted used oil products from the general public at its automobile service centers. When customers dropped off used motor oil, they would identify the substance on a pre-printed form, record the amount they were leaving at the service center, provide their address and sign their name. The used motor oil was poured into a 1,000-gallon storage tank located in the basement of the service center.

On June 2, 1995, seventeen-year-old Bradley Dryer was working at defendant's Valvoline service center along with Jason and others. Schneider had left Dryer in charge of the business while he was away from the service center. That day, Dryer accepted approximately five gallons of a black liquid in a paint bucket from an unknown man. As Dryer explained, when Ashland Oil's employees accepted waste products from people, they "would look at them a little bit," but generally would not smell them unless

they noticed "a certain smell ." Dryer did not notice anything unusual about the black liquid, although he did not smell it and did not check its viscosity; he assumed it was used motor oil. However, when he poured the liquid into the storage tank, he noticed that there had been a paintbrush and some industrial plastic wrap in the paint can, along with the black liquid. A fire investigator concluded later that the substance Dryer accepted from the unknown person actually was gasoline, not motor oil.

At closing on June 2, 1995, it was Dryer's responsibility to check the level of the storage tank located in the basement. Dryer opened the top of the tank to look inside and determine its level. However, according to the fire investigator, he used the flame from his Bic lighter in order to see inside the storage tank. This caused an explosion and fire, which killed Jason, who had been standing nearby when Dryer checked the storage tank.

***2** On appeal, defendants argue the trial court erred by refusing to grant their motion for summary disposition of plaintiffs' breach of contract claims [FN3] under MCR 2.116(C)(10). We agree.

> FN3. The Estate of Jason Hesse and the individual plaintiffs filed two separate breach of contract claims against defendants.

Summary disposition of all or part of a claim or defense may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2 .116(C)(10). When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Ritchie-Gamester v. Berkley,* 461 Mich. 73, 76; 597 NW2d 517 (1999). On appeal, the trial court's decision is reviewed de novo. *Id.* [FN4]

> FN4. Defendants also motioned the trial court for summary disposition pursuant to MCR 2.116(C)(7), which allows for summary disposition where, as pertinent, a "claim is barred because of ... immunity granted by law." Generally, governmental entities such as defendant school are immune from tort liability. MCL 691.1407; MSA 3.996(107); *Koenig v. South Haven,* 460 Mich. 667, 675; 597 NW2d 99 (1999) (Taylor, J). However, governmental immunity does not extend to contract actions, even when the contract action arises out of the same facts that would support a tort action. *Id.*

To establish a breach of contract, a party must show, as pertinent to this case, (1) the existence of a valid contract or agreement, and (2) the non- performance of a duty, whether imposed by a promise stated in the contract or by a term supplied by the court. See *Woody v. Tamer,* 158 Mich.App 764, 771- 772; 405 NW2d 213 (1987). The elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Detroit Trust Co v. Struggles,* 289 Mich. 595, 599; 286 NW 844 (1939). This Court construes contractual language according to its plain and ordinary meaning, avoiding technical or constrained constructions. *St Paul Fire & Marine Ins Co v. Ingall,* 228 Mich.App 101, 107; 577 NW2d 188 (1998). The construction of unambiguous contractual language is a question of law that this Court reviews de novo. *Id.*

The first problem with plaintiffs' breach of contract claim against defendants, and one the parties have failed to address on appeal, arises from the physical aspects of the alleged contract, which is comprised of two separate documents, the work-study plan and the work permit. Both parties' arguments are premised on the assumption that this Court must read these documents together in order to determine whether plaintiffs have established the existence of a valid contract. However, while two documents may be read together to ascertain the terms of a single contract, one writing must reference the other instrument for additional contract terms. *Forge v. Smith,* 458 Mich. 198, 207; 580 NW2d 876 (1998). Here, the plan and the permit are two separate documents, neither of which contains terms referencing the other for the purpose of supplying contractual terms. Therefore, in the absence of any indication in the documents that the parties intended them to be read together to form a complete contract, we must examine each separately.

Turning first to the work permit, we find that this document, by its clear and unambiguous terms, does not constitute a contract between defendants and the parents or Jason Hesse. An examination of the clear, unambiguous terms of the work permit leads to one conclusion only: that the document is not a contract

because defendants did not obligate themselves to do anything at all insofar as the parents and Jason Hesse were concerned. By her signature on the permit, defendant Booms merely *confirmed* that, based on information with which she was provided, the listed job duties and hours of employment were in compliance with state and federal regulations. MCL 409.105; MSA provides that "the issuing officer *shall* issue a work permit upon application by the minor desiring employment and after having examined, approved, and filed" (emphasis supplied) papers that contain

> ***3** (a) A statement of intention to employ, signed by the prospective employer ... setting forth the general nature of the occupation in which the employer intends to employ the minor, the hours during which the minor will be employed, the wages to be paid and other information the department of education, in cooperation with the department of labor, requires.
> (b) Evidence showing that the minor is of the age required by this act....

The work permit certificate indicates that the prospective employer provided the required information and Jason completed the section of the form that pertained to him. Booms certified only: (1) that Jason personally appeared before her, (2) that the form was properly completed, (3) that the listed job duties (basic automotive service and basic cleaning operations) were in compliance with state and federal laws and regulations, (4) that the listed hours of employment (between 8:00 a.m. and 7:00 p.m. and not more than 23 total hours each week) were in compliance with state and federal laws and regulations, and (5) that the form was signed by both the student and the employer. Clearly, Booms undertook no responsibility on the part of defendant school to continuously monitor Jason's employment for Jason's or his parents' protection. The unambiguous language of the permit does not support such a construction. Because none of the defendants obligated themselves to do anything by issuing the permit pursuant to the statute, it does not constitute a contract between defendants and Jason Hesse or his parents.

Next, defendants argue that the trial court erred in finding a triable issue with regard to whether the work-study plan constituted a valid contract between the parties. The plan, a pre-printed form, contains the name and address of Chippewa Valley High School and lists defendant James Murphy as "Coordinator." Jason Hesse is named as the student about whom the plan is concerned. Defendant Valvoline Instant Oil Change is listed as the employer. In relevant part, the plan states that Jason was to work a maximum of 23 hours per week doing "basic automotive service" and "basic cleaning services." The plan sets forth the following "General Conditions":

> 1. The school will designate a staff member to arrange for inschool [sic] consultations and advise the parties involved in this agreement.
> 2. This agreement will not be interrupted without consulting the student, employer, and work-study coordinator.
> 3. The employer agrees to provide the student with the broadest occupational experience in keeping with the job activities listed above.
> 4. This employment shall conform to all federal, state and local laws and regulations, including non-discrimination against any employee because of race, color, creed, handicap, or national origin.
> 5. The student agrees to abide by the regulations and policies of his/her employer and school.
> 6. The school's designee will, at least once every 20 school days, visit the student and the student's supervisor to check attendance, evaluate the student's progress, and evaluate the placement in terms of the health, safety, and welfare of the student.

***4** The trial court erred in finding that the work-study plan presented a triable issue of fact concerning the existence of a valid, enforceable contract because plaintiffs have not submitted evidence to show that the promises contained in the work-study plan, if any, were supported by valid consideration. Consideration is a legal detriment that has been bargained for and exchanged for a promise. *Higgins v. Monroe Evening News*, 404 Mich. 1, 20; 272 NW2d 537 (1978) (Moody, J). The parties to a contract must have *agreed and intended* that the benefits each derived be the consideration for a contract. *Id.* at 20-21. As this Court observed in *Kamalnath v. Mercy Memorial Hosp Corp*, 194 Mich.App 543, 548; 487 NW2d 499 (1992), "a valid contract requires a 'meeting of the minds' on all the essential terms." Quoting from its opinion in *Stanton v. Dachille*, 186 Mich.App 247, 256; 463 NW2d 479 (1990), this Court stated:

> In order to form a valid contract, there must be a meeting of the minds on all the material facts. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. [citing *Heritage Broadcasting Co v. Wilson Communications, Inc*, 170 Mich.App 812, 818; 428 NW2d 784 (1988).]

Plaintiffs interpret the plan along the following lines: plaintiffs contend that the Youth Employment Standards Act [YESA], M.C.L. § 409.101 *et seq.;*

MSA 17.731(1) *et seq.*, prohibited Jason's employment with defendant Ashland Oil because his duties at the oil change center were inherently hazardous. [FN5] Plaintiffs explain that Jason could not have obtained a work permit for employment at the oil change center unless defendant school and Ashland Oil entered into a contract exempting Jason from the strictures of the YESA pursuant to M.C.L. § 409.118; MSA 17.731(18), which provides:

> This act does not apply to or prohibit the employment of a student minor 14 years of age or older by an employer if a written agreement or contract is entered into between the employer and the governing body of the school district ... at which the minor is enrolled. The employment shall not be in violation of a federal statute or regulation and a signed copy of the agreement shall be on file in the place of employment before the minor begins employment.

Plaintiffs contend that the Work Study Plan is the kind of contract contemplated by M.C.L. § 409.118; MSA 17.731(18), not a mere scholastic plan pursuant to Jason's enrollment in the school's work-study program. Indeed, plaintiffs insist that Jason was not even eligible to participate in the work study program pursuant to the school's own policies. They further argue that this alleged contract is supported by valid consideration. Plaintiffs state in their brief:

> In this case, the Plaintiff parents gave consideration by allowing their son to be employed without the protections of the Youth Employment Standards Act, in exchange for Defendant's agreement to perform certain functions and duties which are set forth above under the contract. The school district divested itself of direct financial and other responsibility for Jason during his hours at the Ashland store. The school district cannot be allowed to retain the benefits of the transaction while avoiding its obligations under the agreement.

***5** We do not accept plaintiffs' novel arguments. First, there is absolutely no indication that the plan was intended by Ashland Oil and defendant school to be a contract exempting Jason from the YESA. The express terms of the plan make no reference to the YESA. Although plaintiffs have cited statutes and regulations to show that Jason's employment at the oil change center was inherently dangerous, this does not shed light on the issue whether the plan constituted an enforceable contract. Instead, if Jason's employment actually was hazardous, and thus illegal, this would only mean that defendant Booms issued Jason's work permit erroneously. See M.C.L. § 409.103(1); MSA 17.731(3)(1) and M.C.L. § 409.104(1); MSA 17.731(4)(1). In the absence of objective evidence to support their interpretation of the plan, plaintiffs' subjective understanding of the document is largely irrelevant. See *Marlo Beauty Supply, Inc v. Farmers Ins Group*, 227 Mich.App 309, 317; 575 NW2d 324 (1998).

Second, the fact that Jason was issued a work permit indicates, contrary to plaintiffs' position, that the YESA applied to his employment at the oil change center. MCL 409.104(1); MSA 17.731(4)(1) states, as pertinent, "a minor shall not be employed in an occupation regulated by this act until the person proposing to employ the minor procures from the minor and keeps on file at the place of employment a copy of the work permit or a temporary permit." Pursuant to M.C.L. § 409.118; MSA 17.731(18), the YESA completely exempts from its regulation the employment of a minor 14 years of age or older if a written agreement is entered into between the employer and *the school board*. Such a contract would necessarily divest the employer of the responsibility for obtaining a work permit to employ the exempted minor under the YESA. The fact that the parties sought and obtained a *work permit* for Jason Hesse--rather than entering into a written agreement between Ashland Oil and the school board-- indicates that the plan is not the kind of contract of exemption contemplated by M.C.L. § 409.118; MSA 17.731(18).

Accordingly, we find a complete absence of a bargained-for exchange of consideration between the parties. While plaintiffs argue that the parents "allow[ed] their son to be employed without the protections of the YESA, in exchange for Defendant's agreement to perform certain functions and duties which are set forth above under the [Work Study Plan]," they have failed to provide evidentiary support for their position that this was the mutual intent and agreed-upon exchange of the parties when they executed the work-study plan. Without supporting evidence, plaintiffs have attempted to show the existence of a valid contract merely based on their own, subjective view of the work-study plan. *Kamalnath, supra* at 548; *Marlo Beauty Supply, supra* at 317.

> FN5. MCL 409.103(1); MSA 17.731(3)(1) provides, in pertinent part: "A minor shall not be employed in, about, or in connection with an occupation that is hazardous or injurious to the minor's health or personal well-being or that is contrary to standards established under this act ...."

In any event, even if the plan constituted a valid contract between the parties, we would still conclude that the trial court erred by refusing to grant defendants' motion for summary disposition of plaintiffs' breach of contract claims, primarily because plaintiffs failed to submit evidence to establish a triable issue of fact regarding whether defendants actually breached the express terms of the alleged contract. For the sake of argument, we assume that the parents agreed to allow Jason to participate in defendants' work-study program and that Jason agreed to participate. Indeed, this is exactly what the plan, by its clear terms, indicates . [FN6] In turn, defendant school obligated itself to "designate a staff member to arrange for inschool [sic] consultations and advise the parties involved in this agreement" and to avoid interrupting the work-study plan "without consulting the student, employer, and work-study coordinator." [FN7] Plaintiffs have not submitted evidence to show that defendants failed to honor their obligations under the plan. The contract itself clearly named defendant Murphy as the "Coordinator" of the work-study plan. There is no indication that any of the parties ever requested him to "arrange for inschool consultations" or to give advice to "the parties involved in this agreement." Further, there is no indication that any of the defendants interrupted the agreement without consulting the proper parties according to the contract's clear terms. Thus, plaintiffs failed to establish a triable issue of fact with regard to whether a breach of the work- study plan occurred.

FN6. Plaintiffs have taken great pains to establish that the work- study plan was not just what it clearly purports to be, i.e., a plan pursuant to which Jason was enrolled in the school's work-study program. By advancing this argument, plaintiffs urge this Court to view the work-study plan as a valid, enforceable contract, yet one that is not controlled by its express terms. We will not accept plaintiffs' invitation. See *UAW-GM Human Resource Center v. KSL Recreation Corp*, 228 Mich.App 486, 491; 579 NW2d 411 (1998) (courts are not permitted "to look to extrinsic testimony to determine [contracting parties'] intent when the words used by them are clear and unambiguous and have a definite meaning" quoting *Sheldon- Seatz, Inc. v. Coles*, 319 Mich. 401, 406-407; 29 NW2d 832 (1947), in turn quoting *Michigan Chandelier Co v. Morse*, 297 Mich. 41, 49; 297 NW 64 (1941)); *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich.App 442, 449; 571 NW2d 548 (1997) ("Contractual language is to be given its plan and ordinary meaning ....").

FN7. The Schools also agreed that its "designee [would], at least once every 20 school days, visit the student and the student's supervisor to check attendance, evaluate the student's progress, and evaluate the placement in terms of the health, safety, and welfare of the student." However, this is not a valid, enforceable contractual term. According to 1999 AC, R 340.1733(m), "[t]he superintendent of the district shall designate a staff member to visit the [work-study student] and the [student]'s supervisor at the job site at least once every 20 school days to check attendance, evaluate the [student]'s progress, and evaluate the placement in terms of the health, safety, and welfare of the [student]." A pledge to undertake a preexisting statutory duty is not supported by adequate consideration. *General Aviation, Inc v Capital Region Airport Authority (On Remand)*, 224 Mich.App 710, 715; 569 NW2d 883 (1997).

***6** Plaintiffs base a great portion of their argument on the statement in the work-study plan, "This employment shall conform to all federal, state and local laws and regulations, including non-discrimination against any employee because of race, color, creed, handicap, or national origin." Plaintiffs argue that, with this language, defendants undertook the responsibility of policing Jason's employment to insure that it complied with safety regulations. However, this position ignores that this provision does not expressly charge a party to the contract with the obligation of ensuring that Jason's employment complied with existing safety regulations. Moreover, 1999 AC, R 340.1733(m) expressly obligated defendant Chippewa Valley Schools to "designate a staff member to visit [Jason] and [his] supervisor at the job site at least once every 20 school days to ... evaluate the placement in terms of [Jason's] health, safety, and welfare." Because the administrative rule already required the school to evaluate Jason's employment at the oil change center in terms of his "health, safety, and welfare," we conclude that whatever responsibility, if any, the "state and local laws and regulations" provision of the plan imposed on defendant school, this responsibility was included in the preexisting legal duty that defendant school

already owed Jason because he participated in the work-study program. A pledge to undertake a preexisting statutory duty is not supported by adequate consideration. *General Aviation, Inc v Capital Region Airport Authority (On Remand)*, 224 Mich.App 710, 715; 569 NW2d 883 (1997).

Accordingly, because plaintiffs have failed to show the existence of a valid, enforceable contract, and, in the alternative, have failed to show that any alleged contract was breached, the trial court erred in denying defendants' motion for summary disposition of plaintiffs' breach of contract claims.

Next, defendants Murphy and Booms argue that the trial court erred in denying their motions for summary disposition of plaintiffs' gross negligence claims under MCR 2.116(C)(7) and (C)(10). We agree.

MCR 2.116(C)(7) allows for summary disposition of a claim where, *inter alia*, "[t]he claim is barred because of ... immunity granted by law." When reviewing a motion under MCR 2.116(C)(7), this Court considers all documentary evidence submitted by the parties. *Codd v. Wayne County*, 210 Mich.App 133, 134; 537 NW2d 453 (1995). All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. To survive the motion, the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Id.* at 134-135.

MCL 691.1407(2); MSA 3.996(107)(2) provides, in pertinent part:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency ... is immune from tort liability for an injury to a person ... caused by the officer, employee, or member while in the course of employment or service ... if all of the following are met:
>
> ***7** (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Once a standard of conduct is established, the reasonableness of the actor's conduct under the standard generally is a question for the factfinder, not the court. *Jackson v. Saginaw County*, 458 Mich. 141, 146; 580 NW2d 870 (1998); *Tallman v. Markstrom*, 180 Mich.App 141, 144; 446 NW2d 618 (1989). However, if on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted. *Jackson, supra; Vermilya v. Dunham*, 195 Mich.App 79, 83; 489 NW2d 496 (1992).

First, as to defendant Booms, the trial court erred in denying summary disposition of plaintiffs' gross negligence claim because there is no evidence whatsoever to support the notion that Booms acted so recklessly as to demonstrate a substantial lack of concern for Jason's safety. As discussed, there is no support for plaintiffs' position that Booms was in any way contractually obligated to plaintiffs to supervise Jason or otherwise ensure his safety in the workplace. As the school official who authorized the issuance of Jason's work permit, Booms was required to issue the permit after examining and approving "[a] statement of intention to employ, signed by the prospective employer or by a person authorized by the prospective employer, setting forth the general nature of the occupation in which the employer intends to employ the minor, the hours during which the minor will be employed, the wages to be paid and other information the department of education, in cooperation with the department of labor, requires," and verifying Jason's age. MCL 409.105; MSA 17.731(5). Plaintiffs have failed to cite any authority indicating that the departments of education and labor expected Booms to further supervise the terms and conditions of Jason's employment. Pursuant to M.C.L. § 409.107(1)(b); MSA 17.731(7)(1)(b), Booms was authorized to revoke the permit if Jason's employment was "in violation of federal or state law or of a regulation or rule promulgated under federal or state law," but *only* if the department of labor informed her of the violation. There is no indication that Booms received such notice from the department of labor and chose to ignore it. See also M.C.L. § 109.121; MSA 17.731(21) ("The department of labor shall enforce [the YESA] and assist in the prosecution of this act."). In light of these considerations, the trial court erred in denying Booms' motion for summary disposition of plaintiffs' gross negligence claim. There is simply no evidence that Booms acted recklessly in issuing Jason's work permit.

***8** Likewise, plaintiffs failed to submit evidence to raise a triable issue of fact with regard to whether defendant Murphy's conduct was so reckless as to

demonstrate a substantial lack of concern for Jason's safety. As discussed, Murphy was responsible, at most, for visiting Jason's workplace every 20 school days and evaluating Jason's work-study placement in terms of his health, safety, and welfare. The evidence shows that Murphy visited the job site twice, at which times he did not notice anything unusual or unsafe about Jason's place of employment. This does not evidence reckless conduct. On the contrary, the evidence shows that Murphy *was* concerned for Jason's welfare and visited his place of employment to determine its fitness in terms of safety and health. Based on his observations, he had no reason to suspect the oil change center was hazardous or posed a threat to Jason's safety. While the evidence may support Murphy's mere negligence, it certainly does not indicate that he acted recklessly, with a substantial lack of concern for Jason's safety and health. Accordingly, we find that the trial court erred in denying Murphy's motion for summary disposition of plaintiffs' gross negligence claim.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

2001 WL 789540 (Mich.App.)

END OF DOCUMENT

Exhibit C

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Edward J. PODORSEK, Plaintiff-Appellant,
v.
LAWYERS TITLE INSURANCE CORP., Carol Stroupe, Barbara J. Stroupe, State Realty, Inc., d/b/a Century 21 State Realty, and Patricia E. Sprenger, Defendants-Appellees.

No. 241450.

Dec. 11, 2003.

Before: SCHUETTE, P.J., and CAVANAGH and WHITE, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 In this real estate case, plaintiff Edward Podorsek appeals as of right the trial court's grant of defendants' motions for summary disposition. We affirm.

I. FACTS

This case involves plaintiff's purchase of a parcel of vacant property in Frenchtown Township, Monroe County from the previous owners of the land, defendants Carol and Barbara Stroupe. Defendants Stroupe listed their property with defendant Patricia Sprenger who worked for defendant State Realty, Inc., d/b/a Century 21 State Realty ("Century 21").

In September 1999, plaintiff, who was in the market for vacant property upon which to construct a house, made an offer to purchase the property. Defendants Stroupe and plaintiff entered into a purchase agreement. Although not legally obligated to do so, defendants Stroupe gave plaintiff a seller's vacant land disclosure statement. This statement disclosed that there were no known easements on the property. Further, the statement indicated, "this statement is a disclosure of the condition of and information concerning the property known to the seller." It went on to state that it was not a warranty of any kind, nor should it be considered a substitute for an inspection or warranties that the purchaser might wish to obtain. Lastly, the disclosure statement read, "The following are representations made by solely the seller and are not the representations of the seller's agent."

The purchase agreement was executed on September 29, 1999. Plaintiff's agent drafted this agreement and it contained several contingency provisions including an independent investigation provision, a geological inspection provision and a traditional inspection provision. Plaintiff did not have the property inspected.

On October 29, 1999 defendants Stroupe and plaintiff closed the sale; defendants Stroupe conveyed a warranty deed to plaintiff and plaintiff paid defendants Stroupe $135,417. Defendant Lawyers Title Insurance Corporation issued a title insurance policy providing insurance coverage in the amount of $135,000. Plaintiff took possession of the property at closing.

Shortly after the closing, plaintiff had a conversation with one of his new neighbors. The neighbor informed plaintiff that he believed that a drain easement ran across the newly purchased property. The neighbor stated that the drain was called "Gerrick Drain" and that the Monroe County drain commission held an easement for the drain and for a portion of the property on each side of the drain for maintenance purposes. Plaintiff then contacted the Monroe County drain commission, where an employee verified that a drain easement had been established on the property in 1919. A survey of the drain conducted in 1919 contained a provision that a strip of land on each side of the drain shall be taken for convenience in digging and deposit excavations. The length of this strip of land is unclear, however, because the document says either six feet or six rods, with the words "rods" and "feet" having been typed on top of one another. A rod is equal to 16 1/2 feet.

*2 It is undisputed that defendants Stroupe never disclosed the existence of this drain easement to plaintiff, nor was the drain easement noted on the

title survey. When plaintiff learned of the existence of the drain easement, he contacted defendants Stroupe, Lawyers Title Insurance Corporation, Century 21, and Sprenger, all of whom denied any knowledge of the existence of the drain or the easement. Defendant Lawyers Title Insurance Corporation denied coverage of the claim, citing paragraph three of the title insurance policy, which listed exceptions from coverage. Specifically, it stated that the policy holder was not insured against loss, costs, attorney fees and expenses resulting from easements or claims of easements not shown by the public records and existing water, mineral, oil and exploration rights.

Plaintiff brought suit against defendants Stroupe, Lawyers Title Insurance Corporation, Century 21, and Sprenger seeking damages relating to the easement. Plaintiff alleged two counts against defendants Stroupe, Century 21 and Sprenger. Count I alleged fraudulent misrepresentation based upon defendants' failure to disclose or nondisclosure. Count II alleged innocent misrepresentation based upon statements contained in the seller's vacant land disclosure statement. Plaintiff alleged the third count, for breach of contract, against defendant Lawyers Title Insurance Corporation. At the conclusion of discovery, defendants brought separate motions for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). In three separate opinions, the trial court granted each of defendants' motions for summary disposition.

With regard to defendants Century 21 and Sprenger, the trial court determined that these defendants had never made a material representation to plaintiff, which is a necessary element of fraudulent misrepresentation. Further, it found that plaintiff cannot rely on the Michigan Occupational Code to support a private cause of action. Finally, the trial court found that plaintiff had failed to plead the necessary element of privity of contract with regard to the innocent misrepresentation claim. As a result, the trial court granted this motion for summary disposition.

With regard to defendants Stroupe, the trial court determined that the record did not reflect that defendants Stroupe intended plaintiff to rely on the seller's disclosure statement. Furthermore, the trial court noted that the statement specifically warned plaintiff that he should obtain professional advice and inspections of the property. Additionally, the trial court found that plaintiff had failed to establish the elements of innocent misrepresentation and that a reasonable juror could not conclude that plaintiff relied on the representations made in the seller's disclosure statement.

With regard to defendant Lawyers Title Insurance Corporation, the trial court opined that plaintiff failed to demonstrate an easement shown by public records. The trial court noted that the title insurance policy specifically did not cover easements not shown by public records. Further the policy defined public records as, "title records that give constructive notice of matters affecting your title--according to the state law where land is located." The trial court relied on *Peaslee v. Saginaw Cty Drain Commr*, 365 Mich. 338; 112 NW2d 562 (1961), which held that a filing at the county drain commissioner's office did not serve as constructive notice. The *Peaslee* Court concluded that an easement is a conveyance of an interest in land that must be recorded with the local register of deeds (which was not done in this case). The trial court concluded that defendant Lawyers Title Insurance Corporation appropriately denied coverage under the clear terms of the policy issued to plaintiff. Plaintiff now appeals all three decisions as of right.

II. STANDARD OF REVIEW

*3 The trial court relied on both MCR 2.116(C)(8) and MCR 2.116(C)(10) when it granted defendants' motions for summary disposition. Summary disposition of all or part of a claim or defense may be granted when:

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337; 572 NW2d 201 (1998). The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *American Community Mutual Ins Co v Comm'r of Ins*, 195 Mich.App 351, 362; 491 NW2d 597 (1992).

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie- Gamester v. City of Berkley*, 461 Mich. 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer*

v. *City of Center Line*, 242 Mich.App 560, 574; 619 NW2d 182 (2000).

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v. Ameribank*, 468 Mich. 557, 561; 656 NW2d 175 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v. Auto-Owners Ins*, 458 Mich. 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence which had been presented to the trial court at the time the motion was decided. *Peña v. Ingham County Road Comm*, 255 Mich.App 299, 313 n 4; 660 NW2d 351 (2003).

Summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8), *Horace v. City of Pontiac*, 456 Mich. 744, 749; 575 NW2d 762 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Beaudrie v. Henderson*, 465 Mich. 124, 129; 631 NW2d 308 (2001). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 NW2d 817 (1999). A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Beaty v. Hertzberg & Golden, PC*, 456 Mich. 247, 253; 571 NW2d 716 (1997).

III. DEFENDANTS CENTURY 21 AND SPRENGER

Plaintiff argues that the trial court erred in granting defendants Century 21 and Sprenger's motion for summary disposition with regard to fraudulent misrepresentation because, in addition to being the seller of the property, defendant Barbara Stroupe was a real estate agent employed by defendants Century 21 and Sprenger's. We disagree.

***4** A claim for fraud or fraudulent misrepresentation, as outlined in *M & D, Inc v. McConkey*, 231 Mich.App 22, 27; 585 NW2d 33 (1998), requires:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; [FN1] and (6) the plaintiff suffered damage.
>
> FN1. Additionally, *Novak v. Nationwide Mut Ins Co*, 235 Mich.App 675, 689-691; 599 NW2d 546 (1999), modifies this fifth element, requiring the reliance to be reasonable.

In the present case, plaintiff has failed to set forth any evidence that defendants Century 21 and Sprenger made "material representations" as required to establish a prima facie case of fraud. In fact, when asked, "So what representations did they (Century 21 and Sprenger) make regarding this property, if any?" Plaintiff replied, "I don't know." Furthermore, plaintiff admitted that his lawsuit against defendants Century 21 and Sprenger was based upon, "an omission of material fact." Plaintiff asserts that because defendant Barbara Stroupe worked for defendants Century 21 and Sprenger, her signature on the seller's disclosure statement constituted a material representation on the part of defendants Century 21 and Sprenger. This argument is without merit. The seller's disclosure statement explicitly states "the following are representations made by solely the seller and are not the representations of the seller's agent." When she signed the seller's disclosure statement, defendant Barbara Stroupe was signing as the seller of the property and not as an employee of defendants Century 21 and Sprenger. The trial court correctly determined that plaintiff had failed to satisfy the element of material representation as required to establish a prima facie case of fraudulent misrepresentation.

Next, plaintiff argues that the trial court erred in granting defendants Century 21 and Sprenger's motion for summary disposition with regard to innocent misrepresentation because privity of contract is not required is not requried. We disagree.

The elements of innocent misrepresentation are: False and fraudulent misrepresentations made by one party to another (1) in a transaction between them, (2) any representation which are false in fact, (3) and actually deceive the other (4) are relied on by him to his damage are actionable, irrespective of whether the person making them acted in good faith in making them, (5) where the loss of the party deceived inures to the benefit of the other. *Phillips v. General Adjustment Bureau*, 12 Mich.App 16, 20; 162 NW2d

301 (1968).

In addition, our Supreme Court, in *United States Fidelity and Guaranty Co v Black*, 412 Mich. 99, 120; 313 NW2d 77 (1981), stated that the rule of innocent misrepresentation only applies to parties in privity of contract. Here, plaintiff did not establish that he was in privity of contract with defendants Century 21 and Sprenger. In fact, plaintiff acknowledges in his amended complaint and in his deposition that defendants Century 21 and Sprenger were not his agents. Therefore, the trial court did not err in granting defendants Century 21 and Sprenger's motion for summary disposition on the issue of innocent misrepresentation where defendants Century 21 and Sprenger were not in privity of contract with plaintiff.

IV. DEFENDANTS STROUPE

*5 Plaintiff argues that the trial court erred in granting defendants Stroupes' motion for summary disposition with regard to fraudulent misrepresentation because genuine issues of material fact exist on whether defendants Stroupe knew or should have known that an easement existed and on whether plaintiff relied on the seller's disclosure statement. We disagree.

Here, the trial court found that plaintiff had failed to establish an element of fraudulent misrepresentation; namely that defendant intended plaintiff to rely on the representation. *Jaffa, supra* at 640-641. The seller's disclosure statement specifically stated that it was not based on expertise, was not a warranty and should not be a substitution for an inspection of the property. In fact, the statement warns, "purchaser should obtain professional advice and inspections of the property to determine the condition of the property." This language clearly indicates that defendants Stroupe did not intend for plaintiff to rely on the seller's disclosure statement and that they actually encouraged plaintiff to obtain an outside inspection of the property. The trial court did not err in concluding that plaintiff failed to establish that defendants Stroupe intended for plaintiff to rely on the seller's disclosure statement.

Next, plaintiff argues that the trial court erred in granting defendants Stroupe's motion for summary disposition with regard to innocent misrepresentation because. We disagree.

A claim of innocent misrepresentation is shown if a party detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *M & D, Inc, supra*, at 27. There is no need to prove a fraudulent purpose or an intent by the defendant that the misrepresentation be acted on by the plaintiff; however, it must be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inured to the benefit of the party making the misrepresentation. *Id.* at 28.

In the present case, the seller's disclosure statement provided that it was "a disclosure of the condition and information concerning the property, known to the seller." Further, it stated, "the seller discloses the following information with the knowledge that even though this is not a warranty, the seller hereby specifically makes the following representations based upon the seller's knowledge at the signing of the document." The plain language of this statement indicates that it is a representation of the seller's knowledge of the property in question, not a representation of the actual status of the property. The statement specifically instructs the buyer to obtain an outside inspection. Thus, the trial court correctly determined that plaintiff failed to demonstrate that he relied on the representations contained in the disclosure.

V. DEFENDANT LAWYERS TITLE INSURANCE CORPORATION

*6 Plaintiff argues that the trial court erred in granting defendant Lawyers Title Insurance Corporation's motion for summary disposition on plaintiff's breach of contract claim because the insurance policy only excludes coverage of easements not shown by public records." Plaintiff argues that a filing of the easement in the office of the county drain commissioner fits within the definition of "public records" found within the insurance policy. We disagree.

The title insurance contract clearly states that easements not shown by public records are not insured against loss. Further, the contract defines "public records" as "title records that give constructive notice of matters affecting your title-according to the state law where the land is located." A trial court may grant summary disposition against a breach of contract claim as a matter of law where the terms of the contract are plain and unambiguous, and subject to only one reasonable interpretation. *Conagra, Inc v. Farmers State Bank*, 237 Mich.App 109, 132; 602 NW2d 390 (1999).

Plaintiff argues that the drain easement was filed in the office of the drain commissioner and that such a filing should be considered a "public record" pursuant to the contract. Plaintiff asserts that MCL 280.6 does not require that drain easements established before 1952 be recorded at the register of deeds. Defendant Lawyers Title Insurance Corporation argues that in order to give constructive notice of the easement, the drain easement should have been filed with the register of deeds in the county where the property is located.

This Court addressed the issue of notice and the recording of a drain easement in *Allen v. Bay Co Drain Comm'r*, 10 Mich.App 731; 160 NW2d 346 (1968). In *Allen, supra* at 732, the defendant drain commission obtained an easement for drain purposes from the owners of property in 1917. The easement was recorded at the drain commissioner's office, but was not recorded in the register of deeds office. *Id.* The plaintiffs subsequently purchased the property and filed an action to enjoin the defendant from constructing a new drain and to quiet title. *Id.* at 733. This Court held that an easement that is "not recorded with the register of deeds office is void against subsequent purchasers in good faith." *Id.* at 733-734. This Court determined that the trial court did not clearly err in finding that the plaintiffs did not have actual or constructive notice of the portion of the easement at issue and affirmed the trial court's determination that the easement was void against the plaintiffs. *Id.*

Thus, this Court has previously determined that a drain easement filed in a drain commissioner's office, rather than with the register of deeds, did not provide constructive or actual notice of the easement. Therefore, the trial court did not err in concluding that the drain easement filed in the drain commissioner's office did not provide constructive notice of the easement in the present case. The plain language of the title insurance policy indicates that easements not shown by public records (defined by the contract as "title records that give constructive notice of matters affecting your title") are not insured against loss.

*7 Affirmed.

WHITE, J. (concurring).

WHITE, J.

I join in the affirmance. Century 21 and Sprenger made no representations, either directly or through Stroupe as its purported agent. Although there was evidence that Barbara Stroupe may have known of the drain from an isolated comment at a zoning board of appeals meeting, plaintiff failed to show that he relied on the disclosure statement in determining whether there were any easements that might affect the value of, or his ability to build on, the property. With respect to Lawyers Title Insurance Company, the record failed to establish that there was, in fact, an easement or right-of-way on file at the office of the Monroe County Drain Commission or Register of Deeds.

2003 WL 22928819 (Mich.App.)

END OF DOCUMENT

Exhibit D

Court of Appeals of Michigan.

LOPICCOLO HOMES, INC.,
Plaintiff/Counterdefendant-Appellant,
v.
GRAND/SAKWA OF BROOKLANE and Grand/Sakwa Properties, Inc., a/k/a Grand Old Property Company, Inc.,
Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellees,
and
Salvatore LOPICCOLO, Third-Party Defendant.
LOPICCOLO HOMES, INC.,
Plaintiff/Counterdefendant,
v.
GRAND/SAKWA OF BROOKLANE and Grand/Sakwa Properties, Inc., a/k/a Grand Old Property Company, Inc.,
Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellees,
and
Salvatore LOPICCOLO, Third-Party Defendant-Appellant.
No. 241386, 244800.

Dec. 23, 2003.

Before: SAAD, P.J., and MARKEY and METER, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 These consolidated appeals arise out of a contract dispute. In Docket No. 244800, third-party defendant Salvatore LoPiccolo (Salvatore) appeals by delayed leave granted the March 4, 2002, order granting partial summary disposition in favor of appellees, Grand/Sakwa of Brooklane (Brooklane) and Grand/Sakwa Properties, Inc. (Sakwa, Inc.). In Docket No. 241386, counterdefendant LoPiccolo Homes, Inc. (LoPiccolo, Inc.), appeals as of right from the trial court's April 26, 2002, final judgment, following a bench trial. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

Brooklane owned property in Northville Township that was platted for residential development as the Brooklane Ridge Subdivision. The property was subject to deed restrictions recorded as "Declaration of Restrictions" with the Wayne County Register of Deeds. The declaration included various provisions for building use restrictions, architectural control, preserving woodlands and wetlands, establishing a subdivision association composed of lot owners, and enforcement. In 1998, Brooklane entered into an option agreement with LoPiccolo Inc. for fifty-nine lots in the Brooklane Ridge Subdivision. The agreement set forth various obligations owed by the parties both before and after the exercise of the option. As part of the option agreement, Salvatore LoPiccolo and Sakwa Inc. guaranteed certain obligations owed by LoPiccolo Inc. and Brooklane, respectively. LoPiccolo Inc. exercised the option to purchase the lots, but a number of disputes later arose between the parties with regard to their obligations under the Declaration of Restrictions and option agreement.

In June 1999, LoPiccolo Inc. filed this action in the Oakland Circuit Court against Brooklane and its guarantor, Sakwa Inc. (hereafter, collectively, "appellees"), and sought declaratory relief and damages for breach of contract. After venue was transferred to Wayne Circuit Court, appellees filed a countercomplaint against LoPiccolo Inc. and a third-party complaint against LoPiccolo Inc.'s guarantor, Salvatore LoPiccolo (hereafter, collectively, "appellants"). Appellees asked for injunctive relief, specific performance, and damages under the Declaration of Restrictions and option agreement.

The trial court resolved most of the parties' disputes by summary disposition and awarded $69,000 to appellees based on appellants' failure to comply with soil erosion requirements under the option agreement. The trial court also conducted a bench trial on appellees' claims for damages to curbs and gutters in the subdivision and for attorney fees and costs allegedly owed by appellants under the Declaration of Restrictions and option agreement. The trial court

ruled that appellees failed to prove their claim for damages to curbs and gutters, but it awarded appellees $78,000 for attorney fees and costs.

II. Analysis
A. Summary Disposition

*2 Appellants challenge the trial court's award of $69,000 to appellees on summary disposition. We review the trial court's grant of summary disposition de novo to determine if appellees were entitled to judgment as a matter of law. *Veenstra v. Washtenaw Country Club*, 466 Mich. 155, 159; 645 NW2d 643 (2002); *Maiden v. Rozwood*, 461 Mich. 109, 118; 597 NW2d 817 (1999). [FN1]

FN1. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden, supra* at 120. The motion must specifically identify the issues as to which the movant believes that there is no genuine issue of material fact. MCR 2.116(G)(4); *Maiden, supra* at 120. The movant has the initial burden of supporting its position with affidavits, depositions, admissions, or other documentary proofs. *Quinto v. Cross & Peters Co*, 451 Mich. 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to set forth specific facts showing a genuine issue of material fact for trial. MCR 2.116(G)(4). *Quinto, supra* at 362.

We affirm the trial court's ruling that appellants are liable for corrective measures required because of appellants' failure to comply with the soil erosion requirements in the option agreement. The facts and arguments set forth by appellants in their response to the motion for summary disposition concern the soil erosion requirements in the option agreement. [FN2] The "Optionee's Responsibilities" provision in Article XVII(D) of the agreement states: [FN3]

FN2. Contrary to appellants' claim on appeal, the trial court did not find a violation of the "Soils Clause" in the option agreement which addresses the suitability of soil for basement construction. Rather, the trial court's ruling was based on appellants' own breach of soil erosion obligations under the option agreement. Because appellants have not shown the relevancy of the "Soils Clause" to their liability for the soil erosion requirements, we decline to consider the "Soils Clause" further. We need not address an issue given only cursory treatment in an appellant's brief. *Eldred v. Ziny*, 246 Mich.App 142, 150; 631 NW2d 748 (2001). Nor do we consider appellants' cursory position that their duties under Article XVII never commenced because appellees were negligent and dilatory in exercising obligations under Article XI of the option agreement. See MCR 2.116(G)(4); see also *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich.App 94, 110; 593 NW2d 595 (1999) (this Court will not review a case on a different theory from which it was tried).

FN3. We note that appellants raised additional arguments in their motion for reconsideration, but do not address that motion on appeal. Hence, we will deem any issue concerning that motion abandoned on appeal. *Prince v. MacDonald*, 237 Mich.App 186, 197; 602 NW2d 834 (1999).

> Optionee shall have the following responsibilities with respect to each and every lot which Optionee has acquired pursuant to this Option Agreement, which responsibilities shall survive closing and delivery of any instrument of conveyance:
>
> * * *
>
> D. The parties acknowledge that initially Optionor shall be required to comply at its expense with any soil erosion permits from the County. After Optionor has so complied with any such permits, and Optionee has entered into this Option, it shall then be Optionee's responsibility to protect and maintain all soil erosion installations made by Optionor on each lot subject to this Option. Optionee shall have a limited license to go upon the land to comply with the aforegoing. Optionee shall reimburse Optionor at Closing for the amount of soil erosion bonds paid for by Optionor and which are on deposit with Wayne County for the number of lots acquired by Optionee.

The other soil erosion provision, Article XI(B), Installation of Improvements, provides, in pertinent part:

> Optionee shall be responsible for finish grading of all lots following Closing as to the same. It shall further be the responsibility of Optionee to obtain all necessary permits and implement all necessary construction practices as required by the Township or other governmental body having jurisdiction

thereof with respect to soil erosion and in compliance with Act 347, the Sedimentation and Erosion Control Act as to each lot subject to this Option.... Optionee shall indemnify, defend and save Optionor harmless from all claims, costs and damages which result from Optionee's violation of the aforegoing, including reimbursement to Optionor of all reasonable attorney fees incurred.... [FN4]

> FN4. The cited act, 1972 PA 347, was repealed by 1995 PA 60, before the date of the option agreement, but is now contained in Part 91 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.9101 *et seq.* Under Part 91 of the NREPA, a "person shall not maintain or undertake a land use or earth change governed by this part or the rules or governed by an applicable local ordinance, except in accordance with this part and the rules or with the applicable local ordinance and *pursuant to a permit* approved by the appropriate county or local enforcing agency" (emphasis added). MCL 324.9112(1). Further, a "person who owns land on which an earth change has been made that may result in or contribute to soil erosion or sedimentation of the waters of the state shall implement and maintain soil erosion and sedimentation control measures that will effectively reduce soil erosion...." MCL 324.9116.

We reject appellants' claim that Article XII(D) establishes a condition precedent to their soil erosion obligations under Article XI(B). Because the option agreement is unambiguous, its meaning can be determined in a summary disposition proceeding under MCR 2.116(C)(10). *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich.App 360, 363; 480 NW2d 275 (1991). Parties to a contract may render the contract divisible as to specific items of performance. *Lansing v. Lansing Twp*, 356 Mich. 641, 647-648; 97 NW2d 804 (1959). Whether a particular provision of a contract is a condition precedent to performance depends on whether there is a fact or event that the parties intend must take place before there is a right to performance. *Mikonczyk v. Detroit Newspaper, Inc*, 238 Mich.App 347, 350; 605 NW2d 360 (1999).

*3 Here, Article XVII(D), Optionee's Responsibilities, cannot be reasonably interpreted as establishing a condition precedent to Article XI(B), Installation of Improvements, because it does not state a fact or event that must occur before appellants have a duty to "obtain all necessary permits and implement all necessary construction practices as required by the Township or other governmental body having jurisdiction thereof with respect to soil erosion and in compliance with Act 347, the Sedimentation and Erosion Control Act...." Rather, Article XI(B) is clearly intended to address appellants' responsibilities following closing, while Article XVII(D) establishes responsibilities triggered when the option agreement was entered.

Article XVII(D) is reasonably construed only as prohibiting appellees from charging appellants for the expense, with the exception of bond reimbursement, of their initial compliance with the soil erosion permit. Article XVII(D) unambiguously shifts the responsibility to protect and maintain appellees' soil erosion installations to appellants "[a]fter Optionor has so complied with any such permits, and Optionee has entered into this Option." The critical event for determining if appellants owed a duty of performance under Article XVII(D), therefore, is appellees' completion of a soil erosion installation pursuant to the permit. Regarding which party might be liable for expenses, the critical consideration under Article XVII(D) is whether expenses were incurred by appellees to fulfill initial compliance requirements under the soil erosion permit (appellees' responsibility), or the failure to protect and maintain a soil erosion installation (appellants' responsibility).

The material question, therefore, is not whether Article XVII(D) establishes a condition precedent to Article XI(B), but whether appellees were asking appellants to reimburse them for preexisting conditions relating to their initial compliance, contrary to Article XVII(D). Because the record reflects that appellees sought damages related to appellants' own soil erosion obligations under the option agreement, we hold that appellants failed to establish any genuine issue of material fact regarding their liability. Appellants did not support their proposition that they could avoid their soil erosion obligations based on an unfulfilled condition precedent to their performance.

Further, we hold that appellees submitted sufficient documentary evidence to support their claimed damages. Evidence established appellants' violation of the soil erosion requirements and appellees' unrebutted documentary evidence established the amount of costs incurred. MCR 2.116(G)(4) provides, in pertinent part, that, "an adverse party

may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." Here, appellees filed an affidavit setting forth that the amount of expenses it incurred was $69,000 for appellants' failure to take corrective measures to prevent soil erosion. Appellants filed no affidavit or admissible evidence to counter this fact. Consequently, the trial court properly found no genuine issue of material fact existed as to this amount.

B. Attorney Fees

*4 Appellants also challenge the trial court's award of attorney fees and costs. "This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." MCR 2.613(C); *Alan Custom Home, Inc v. Krol*, 256 Mich.App 505, 512; 667 NW2d 505 (2003).

In general, a "party claiming the right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a prima facie case and to avoid a directed verdict." *Zeeland Farm Services, Inc v. JBL Enterprises, Inc*, 219 Mich.App 190, 196; 555 NW2d 733 (1996). Contract provisions providing for attorney fees are construed as containing this reasonableness standard to avoid violating public policy. *In re Estate of Howath*, 108 Mich.App 8, 12; 310 NW2d 255 (1981). But as with other contractual provisions,

> in interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we construe and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. [*Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich. 362, 375; 666 NW2d 251 (2003).]

Here, the trial court correctly accepted appellants' stipulation of fact regarding the reasonableness of the hourly rates and hours claimed by appellees. *Staff v. Johnson*, 242 Mich.App 521, 535; 619 NW2d 57 (2000). The trial court also correctly took judicial notice of facts that were capable of accurate and ready determination from its own records. MRE 201; *In re Thurston*, 226 Mich.App 205, 216 n 10; 574 NW2d 374 (1997), rev'd on other grounds 459 Mich. 923 (1998). But the trial court erred by failing to consider that appellees did not prevail on all claims that they pursued or defended against in this action. Specifically, the trial court erred by not taking into account that appellants succeeded in recovering an award of $23,167.72, on their claim for advertising reimbursement, and that appellees failed to recover on their claim for damages to curbs and gutters.

Appellants did not stipulate that the full amount of attorney fees and costs requested by appellees were recoverable under the option agreement or *Declaration of Restrictions*. Therefore, without evidence that appellees prevailed on all claims and defenses, the trial court's determination that no additional proofs were needed on the issue of attorney fees was erroneous. Even if reasonable, appellees nonetheless had the burden of proving that their requested attorney fees and costs were recoverable under specific contractual provisions of the option agreement or Declaration of Restrictions.

Because the trial court erroneously determined that further proofs were not necessary, we vacate the judgment of $78,000, and remand for further proceedings to establish the amount of attorney fees and costs and whether they are recoverable under specific provisions of the option agreement or Declaration of Restrictions.

*5 Affirmed in part, vacated in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

2003 WL 23018549 (Mich.App.)

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