STATE OF MICHIGAN

IN THE SUPREME COURT

KATHRYN L. KIRCHER, Individually
and as Trustee of the Kathryn L.
Kircher Revocable Living Trust Agreement
dated December 19, 1984, as Amended
and Restated,

Plaintiff-Appellee,

v

BOYNE USA, INC., a Michigan corporation,
and **STEPHEN KIRCHER**, Individually and as
Trustee of the Stephen M. Kircher Revocable
Living Trust Agreement dated October 10, 1982,
as Amended and Restated,

Defendants-Appellants,

and

JOHN E. KIRCHER, individually and as
Trustee of the John E. Kircher Revocable
Living Trust Agreement dated December 12, 1976,
as Amended and Restated, **and AMY KIRCHER**
WRIGHT,

Defendants.

Supreme Court Docket No. 166459
COA: 360821
Emmet Circuit Court: 20-107011-CK

BRIEF OF *AMICUS CURIAE* THE BUSINESS LAW SECTION OF THE STATE BAR OF MICHIGAN

RECEIVED by MSC 10/30/2024 11:50:29 AM

TABLE OF CONTENTS

Page No.

INDEX OF AUTHORITIES

Cases

Rules

QUESTIONS PRESENTED

1. Does the implied covenant of good faith and fair dealing apply only as an interpretive tool to understand the express terms of a contract?

   The trial court did not directly answer.

   The Court of Appeals answered "yes."

   Amicus curiae answers "yes."

2. Did the plaintiff state a valid claim for breach of contract based on the defendants entering into the 2018 real estate transaction that significantly added to the debt of defendant Boyne USA, Inc.?

   The trial court answered "yes."

   The Court of Appeals answered "no."

   Amicus curiae answers "no."

3. Did the plaintiff state a valid claim for breach of contract based on the defendants' refusal to negotiate an alternative formula to calculate the redemption price of the plaintiff's shares?

   The trial court answered "yes."

   The Court of Appeals answered "yes."

   Amicus curiae answers "no."

RECEIVED by MSC 10/30/2024 11:50:29 AM

BASIS OF JURISDICTION

Amicus curiae agrees that the issues raised by this appeal "involve a legal principle of major significance to the state's jurisprudence" and are therefore worthy of this Court's consideration under MCR 7.305(B)(3).

STANDARD OF REVIEW

Amicus curiae agrees with Defendants-Appellants' Application for Leave that this Court reviews *de novo* a trial court's ruling on a motion for summary disposition.

INTEREST OF AMICUS CURIAE

The Business Law Section of the State Bar of Michigan files this brief *amicus curiae* pursuant to the Court's invitation as set forth in its Order of April 12, 2024.

REQUIRED STATEMENT AND REPORT OF *AMICUS CURIAE* REGARDING POSITION TAKEN

The Business Law Section of the State Bar of Michigan (the "Section") files this brief *amicus curiae* pursuant to the Court's invitation set forth in its Order of April 12, 2024.

The Business Law Section is a section of the State Bar of Michigan whose members join voluntarily based on common professional interest. It does not speak for the State Bar of Michigan. The positions expressed in this brief are those of the Business Law Section only and are not the position of the State Bar of Michigan. The State Bar of Michigan has not been requested by the Section to take a position on, and has not taken a position on, the matters addressed in this brief.

The Section is not the State Bar of Michigan and does not speak for the State Bar but is a group of members of the State Bar who voluntarily choose to join the Section based on common professional interest in business law matters. The purposes of the Section include the study of laws and administrative procedures pertaining to business law, the promotion of the fair and just administration of business law, and the education of members of the State Bar of Michigan and the public on issues of business law through publications, meetings, conferences, and other forums including the filing of *amicus curiae* briefs.

The Section currently has approximately 3,400 members of the State Bar who have voluntarily joined the Section. The affairs of the Section are governed by an elected council per the Section's bylaws. The positions taken in this brief are within the jurisdiction of the Section and were formally adopted by a vote of the Council at and after discussion at its meeting in conformance with the Section's bylaws on October 25, 2024, at which a quorum was present. The Council consists of 15 members. 11 Council members voted in favor of the positions that are presented in this amicus brief, 3 abstained, 0 voted against and 1 did not participate.

FACTS

The facts are thoroughly stated by the parties.[1] Briefly, in 2014, the parties entered into a 2014 Settlement Agreement, allowing Plaintiff-Appellee Kathryn Kircher, a shareholder of Defendant-Appellant Boyne USA, Inc., to elect to redeem certain of her shares of stock annually. The price of each share was to be determined through a formula based on the prior year's financial statements as follows:

> Plaintiff's Redemption Price: Plaintiff's Redemption Price shall be calculated using the following formula: [6.5 times an Average of EBITDA] minus the Total Company Debt multiplied by 80% and then divided by the total number of outstanding shares to obtain a per share price.

The 2014 Agreement further provided that:

> Beginning in 2018 and each year thereafter, Plaintiff may redeem Plaintiff's shares not to exceed $150,000 in value as determined in accordance with Paragraph 2(c) unless otherwise agreed by the Parties and until such time as Plaintiff has redeemed all of her shares.

In 2016, Plaintiff sued Boyne and Stephen Kircher for an alleged breach of the 2014 Settlement Agreement, claiming Boyne did not provide redemptions for 2015 and 2016. Plaintiff's claims were dismissed, and the circuit court held she was not entitled to a redemption for 2015 or 2016. Following that litigation, the parties entered into a second settlement agreement (the "2019 Agreement").

In the 2019 Agreement, the parties agreed to redemptions for 2015, 2016, 2017, 2018, and 2019 and stated a strike price for each year except 2019, which was marked "TBD"

[1]As required by MCR 7.312(H)(4), *Amicus* states that no counsel for a party to this action authored the brief in whole or in part, and that no counsel for a party, no party itself, nor any other person made a monetary contribution intended to fund the preparation or submission of the brief.

because Boyne had not yet released its 2018 audited financial statement from which the 2019 formula share price would be determined. The parties agreed that for 2019, the redemption price was to be calculated pursuant to the 2014 Agreement. Material portions of the 2019 Agreement were embodied in a stipulated order dated May 15, 2019.

In the meantime, allegedly unbeknownst to Plaintiff, in 2018 Boyne purchased approximately $300,000,000 in previously leased assets, borrowing approximately $300,000,000 to complete the transaction. The transaction increased both the company's assets and its debt, but only the debt affected the purchase price calculation under the formula from the 2014 Agreement. It caused the price calculation for the 2019 redemption to result in a negative value.

In 2020, Plaintiff sued Boyne and members of the Kircher family (defendants will be referred to as "Boyne"). Plaintiff alleged one count for breach of the 2014 Agreement, a count each for reformation of the 2014 and 2019 Agreements, one count of injunctive relief regarding the 2019 Agreement, and one count of declaratory relief regarding the 2019 Agreement.

Boyne moved for summary disposition pursuant to MCR 2.116(C)(7) & (C)(8), seeking dismissal of the Complaint in its entirety. The trial court denied the motion. Boyne sought leave but limited the issues to whether the trial court erred by not granting summary disposition of Plaintiff's breach of contract claim. The Court of Appeals granted leave, limiting "the issues on appeal to those raised in the application…." Court of Appeals Order dated October 3, 2022.

The Court of Appeals held that Plaintiff could not sustain a claim for breach of contract for entering into the 2018 real estate transaction, because "[t]he 2014 settlement does not contain any specifications or restrictions on Boyne USA's ability to take on debt" and "as to the increased debt, there is no underlying contractual term to which the implied duty of good faith and fair dealing applies." *Kircher v Boyne USA, Inc*, ____ NW3d ___, 2023 WL 7238820, at *3 n7 (Mich Ct App, Nov 2, 2023). However, the Court of Appeals also held that Plaintiff had stated a claim for breach of contract, premised on a breach of the duty of good faith and fair dealing, because Boyne refused to "consider" an alternative method to the formula, based on the phrase "unless otherwise agreed by the Parties." Since the appeal was limited to Count I of the Complaint (breach of contract), the issues of reformation, injunctive relief and declaratory relief remain pending in the trial court.

ARGUMENT

1. **The implied covenant of good faith and fair dealing applies only as an interpretive tool to understand the express terms of a contract.**

Michigan law is clear: there is no independent claim regarding the implied covenant of good faith and fair dealing. The "obligation of good faith is not an independent duty." *Gorman v American Honda Motor Co*, 302 Mich App 113, 133; 839 NW2d 223 (2013). "It has no life of its own that may be enforced by an independent cause of action." *Id*. Rather, "it is a modifier" "by which contractual obligations or other statutory duties are to be measured and judged." *Id*. *E.g.*, *Bank of America, NA v Fidelity Nat Title Ins Co*, 316 Mich App 480, 501; 892 NW2d 467 (2016); *Fodale v Waste Mgt of Mich*, Inc, 271 Mich App 11, 35; 718 NW2d 827 (2006).

The implied covenant is only applicable where the "contract makes the manner of its performance a matter of its own discretion." *E.g. Burkhardt v City National Bank*, 57 Mich App 649, 652; 226 NW2d 678 (1975). This is the long-standing rule in Michigan (Westlaw shows this headnote in *Burkhardt* has been cited 113 times). A claim of lack of good faith cannot "override an express provision in a contract." *Eastway & Blevins Agency v Citizens Ins Co*, 206 Mich App 299, 303; 520 NW2d 640 (1994). Thus, the implied covenant applies only as an interpretive tool to understand the express terms of a contract where one party has discretion. As the Court of Appeals correctly stated: "the agreement does not leave anything to defendants' discretion regarding the share price." *Kircher, supra,* at *3 n7.

The Court asked *Amicus* to consider *In re Vylene Enterprises*, *Inc*, 90 F3d 1472, 1477 (9th Cir 1996) (applying California law). *Vylene* does not square with Michigan law. Michigan law imposes an obligation of good faith and fair dealing when one party has discretion as to the operation of an express term of the contract. The *Vylene* court, however, imposed the covenant where both parties had discretion: the contract in that case could be extended "on terms and conditions to be negotiated…." *Id*. at 1476. The *Vylene* court held that where one party made a proposal which the other party rejected as "commercially unreasonable," *id*. at 1477, the proposing party "fail[ed] to negotiate in good faith." *Id*.

But where both parties have discretion and cannot agree, there simply has been no meeting of the minds and no contract has been created. *E.g.*, *Kamalnath v Mercy Memorial Hospital*, 194 Mich App 543, 548; 487 NW 2nd 499 (1992).

The parties to this case agree that the principles of *Gorman*, not *Vylene*, apply. As Plaintiff stated in her Supplemental Brief at 16: "The decision in *Vylene* reads in new rights and obligations in the *Vylene* contract which is not what the Plaintiff is requesting in this case." Boyne agrees: "Both parties agree that *Vylene* conflicts with Michigan law. Plaintiff does not ask the Court to abandon Michigan's historical approach in favor of *Vylene*, let alone offer any persuasive reason for the Court to do so." Boyne's Supplemental Brief at 1.

2. **Plaintiff failed to state a claim for breach of contract based on Defendant Boyne entering into the 2018 real estate transaction.**

The 2014 Agreement did not restrict Defendant Boyne's ability to increase the company's debt. The subsequent effect of such an increase on the 2014 Agreement does not mean the transaction was a breach of that agreement, i.e., there is no promise that was allegedly broken.

Plaintiff argues the implied covenant applies because the 2014 Agreement gave "the Defendants the discretion to incur debt," Plaintiff's Response to Defendants' Application at 20, even though Plaintiff acknowledges "there is no express provision in the 2014 Agreement that expressly prohibits the cause for the breach, *i.e.*, Boyne US incurring debt…." Plaintiff's Supplemental Brief at 23. But the contract did not confer on Boyne the discretion to incur debt. It simply does not address the issue. In order for the covenant to apply, there must first be an express provision of the contract conferring discretion on a party. Here, there is no such express provision. If the covenant could be imposed in these circumstances, it would create an independent cause of action, which is contrary to long-standing Michigan law.

The agreed share price formula is explicit and does not involve discretion. It is "6.5 times an Average of EBITDA minus the Total Company Debt multiplied by 80% and then divided by the total number of outstanding shares." As stated by the Court of Appeals, there is "no underlying contractual term to which the implied duty of good faith and fair dealing applies." *Kircher, supra,* at *3 n7.

Looking behind the formula (the express terms of the contract) as Plaintiff suggests, steps into areas which this Court has regularly rejected and should reject. For example, the Court regularly states and restates that the "freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture…." *Rory v Continental Ins Co*, 473 Mich 457, 479; 703 NW2d 23 (2005).

> Courts do not make contracts for parties. Parties have great freedom to choose to contract with each other, to choose not to do so, or to choose an intermediate course that binds them in some ways and leaves each free in other ways.

Bloomfield Estates Improvement Assn v City of Birmingham, 479 Mich 206, 212; 737 NW2d 670 (2007).

> Because the parties have freely set forth their rights and obligations toward each other in their contract, when resolving a contractual dispute, "society is not motivated to do what is fair or just in some abstract sense, but rather seeks to divine and enforce

> the justifiable expectations of the parties as determined from the language of their contract."

Id. at 213 (citations omitted).

This Court has rejected the "approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly [because it] is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003); *See also Franchino v Franchino*, 263 Mich App 172, 187-88; 687 NW2d 620 (2004) (declining to adopt "reasonable expectation" approach in determining the protection of shareholder interests under MCL 450.1489); *Rory, supra,* at 470 (an unambiguous contractual provision shall be enforced as written, regardless of reasonableness, unless the provision would violate law or public policy).

3. **Plaintiff failed to state a claim for breach of contract based on Defendant Boyne's refusal to negotiate an alternative formula.**

Plaintiff has not stated a claim for breach because the 2014 Agreement did not obligate the parties to negotiate an alternative to the formula for redemption. As such, Defendant Boyne's failure to negotiate an alternative formula is not a breach of the agreement.

The Court of Appeals incorrectly concluded that Plaintiff's "reasonable expectations" had been frustrated. *Wilkie, supra* at 51("This approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law….").

The phrase "unless otherwise agreed by the parties" simply states the longstanding principle that parties to a contract always retain the right to change it. *E.g., Quality Products* *and Concepts v Nagel Precision*, 469 Mich 362, 364; 666 NW2d 251 (2003) ("We hold that parties to a contract are free to mutually waive or modify their contract…."). Or, as this Court quoted Williston: "Whenever two men contract, no limitation self-imposed can destroy their power to contract again." *Id*. at 372. The 2014 Agreement imposes no obligation on either party to do anything let alone to agree to a new contract with undefined terms.

A "contract requires mutual assent or a meeting of the minds on all the essential terms." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006). While a contract to make a contract is enforceable if all essential terms are identified, *Opdyke Inv Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982), material terms which are left "to be negotiated in the future" render the writing unenforceable. *Id*. For example, where a writing to pay royalties for the manufacture of pumps and transmissions did not identify the products covered, the term of the deal, and the amount to be paid, there was no contract. *Benedek v Mechanical Products*, 314 Mich 494; 22 NW2d 901 (1946). On the other hand, where the parties described the land to be sold, the parties were identified, and the price was stated, a contract was created. *E.g., Zurcher v Herveat*, 238 Mich App 267, 336-37; 605 NW2d 329 (1999). So too where a letter of intent for the sale of two television stations identified the parties, the assets to be sold, the consideration, the schedule for payment, the handling of the accounts receivable, the rights and remedies of each party upon breach, and the mutual termination rights of the parties. *Heritage Broadcasting Co v Wilson Communications*, 170 Mich App 812, 819; 428 NW2d 784 (1988).

Here, there are no terms describing how an alternative price or valuation formula for Plaintiff's shares would be determined. All of the terms require negotiation. There is nothing in the 2014 Agreement that identifies and defines *any* essential term related to a possible new agreement. The parties simply acknowledged that amendment to the 2014 Agreement was possible.

The language relied on by the Court of Appeals – "unless otherwise agreed by the parties" – merely restates a fundamental principle of contract law. Every contract is subject to subsequent *mutual* agreement to do something different, even if not expressly stated. The parties had no greater ability to modify their contract because they included that language, and would have had no lesser ability had they omitted it. The contract did not confer on Boyne the right or ability to unilaterally adjust the formula, and therefore the Court of Appeals' application of the duty of good faith and fair dealing is misplaced.

CONCLUSION

This case arrives in this Court following denial of a motion for summary disposition before any discovery on one count of breach of contract where other counts remain unaddressed. *Amicus* answers the Court's questions on this limited record that *Gorman* should control, Plaintiff failed to state a claim on her breach of contract count related to the 2018 real estate transaction and Plaintiff failed to state a claim for Boyne's refusal to negotiate an alternative formula to calculate the redemption price of Plaintiff's shares.

Based on the procedural posture of this case, even though this may mean Plaintiff is without a contract remedy, it does not necessarily mean Plaintiff is without a potential equitable remedy. Plaintiff pleaded two counts of reformation – one to reform the 2014 Agreement and one to reform the 2019 Agreement. The trial court denied the motion to dismiss those counts. The Court of Appeals did not grant leave related to those counts or decide them. They are not at issue in this appeal.

Regardless of the outcome in this appeal, it appears the claims for reformation will continue to be litigated in the trial court. Plaintiff is seeking reformation of the 2014 and 2019 Agreements based on allegations of mistake and fraud with respect to the timing of Boyne's delivery of 2018 financial information to her and Boyne's redemption of her entire Boyne share block. She will have the opportunity to pursue these claims in the trial court.

Dated: October 30, 2024

Douglas L. Toering, Chair
Commercial Litigation Committee
Business Law Section of the
State Bar of Michigan

Respectfully Submitted,

/s/ William H. Horton
William H. Horton (P31567)

Ian Williamson (P65056)
Justin G. Klimko (P31619)
Douglas L. Toering (P34329)
Marguerite Donahue (P40758)
Michael Khoury (P34413)
Jennifer Consiglio (P68496)
John Schuring (P69996)

Attorneys for *Amicus Curiae*
Business Law Section of the
State Bar of Michigan

CERTIFICATE OF COMPLIANCE

This document complied with the word limit of the Michigan Supreme Court, excluding the parts of the document exempted by its Administrative Order: (a) this document contains 2,867 words. This document complies with the typeface requirements and type-style requirements: this document has been prepared in proportionally spaced face using Microsoft Word in Futura Lt Bt 12 point.

/s/ William H. Horton
William H. Horton (P31567)
Ian Williamson (P65056)
Justin G. Klimko (P31619)
Douglas L. Toering (P34329)
Marguerite Donahue (P40758)
Michael Khoury (P34413)
Jennifer Consiglio (P68496
John Schuring (P69996)

Attorneys for Amicus Curiae
Business Law Section of the
State Bar of Michigan

CERTIFICATE OF SERVICE

On October 30, 2024, I electronically filed this document through the Michigan Supreme Court MiFILE TrueFiling System, which will send notice of electronic filing to the attorneys/parties of record.

/s/ William H. Horton
William H. Horton (P31567)
Ian Williamson (P65056)
Justin G. Klimko (P31619)
Douglas L. Toering (P34329)
Marguerite Donahue (P40758)
Michael Khoury (P34413)
Jennifer Consiglio (P68496
John Schuring (P69996)

Attorneys for Amicus Curiae
Business Law Section of the
State Bar of Michigan