STATE OF MICHIGAN

IN THE SUPREME COURT

MAJESTIC GOLF, LLC, a Michigan limited liability company,

Plaintiff/Counter-Defendant/Appellee,

v

LAKE WALDEN COUNTRY CLUB, INC., a Michigan Corporation,

Defendant/Counter-Plaintiff/Appellant.
_____/

Supreme Court No. 145988

Court of Appeals No. 300140

Livingston County Circuit Court No. 09-24146-CZ

LAKE WALDEN COUNTRY CLUB, INC.'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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Dated: May 23, 2013

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. The Court of Appeals held, in a published opinion following recent precedent of this Court, that a lease must be construed "as written," and the landlord may terminate even if the tenant's default is not material. Did the Court of Appeals err when it failed to construe "as written" **all** terms of the lease, so that the tenant was not in default, or genuine issues of material fact existed as to **whether** the tenant was actually in default?

The Court of Appeals answered "No."

The trial court did not answer this question.

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

II. In the alternative, assuming this Court wishes to narrow the scope of its recent precedents by holding that it is contrary to public policy to allow termination and forfeiture of a leasehold interest in real property for a default that is not material, did the Court of Appeals err by holding that a landlord may terminate a lease even if the tenant's default is not material?

The Court of Appeals answered "No."

The trial court answered "Yes."

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

JURISDICTION OF THE SUPREME COURT

This Court has jurisdiction pursuant to MCR 7.301(2), and granted leave to appeal on April 3, 2013. Defendant-Appellant Lake Walden Country Club, Inc. ("LWCC") appeals from the decision of the Court of Appeals dated July 10, 2012 (Apx 19a), and the Order of the Court of Appeals denying Appellant's Motion for Reconsideration or Rehearing dated August 30, 2012 (Apx 18a), which reversed the trial court's final judgment dated December 23, 2009 (Apx 39a) and order denying reconsideration dated March 30, 2010 (Apx 36a). The Court of Appeals had jurisdiction pursuant to MCR 7.203(A)(1) because the parties cross-appealed as a matter of right following a final judgment entered by the trial court on August 30, 2010 (Apx 34a).

INTRODUCTION

This action involves the parties' respective rights and obligations under a 25-year ground lease (the "Lease," Apx 49a) of land (the "Leased Premises") on which LWCC built and operates a 27-hole championship golf course and clubhouse (the "Golf Course"). Plaintiff-Appellee Majestic Golf, LLC ("Majestic"), is the landlord, and LWCC is the tenant. The relationship was peaceful and cooperative for more than 15 years, from 1992 to 2008. LWCC invested more than $6,000,000 to build the Golf Course, has paid rent to Majestic totaling more than $1,600,000, and has always been current on its rent and other material obligations under the Lease.

In 2003, LWCC and Majestic began discussing a merger pursuant to which LWCC would own 85% of the combined Golf Course and Leased Premises. This lawsuit came about after those negotiations became difficult and Majestic feared LWCC would exercise its Option to Purchase the Leased Premises. First, Majestic unilaterally sought to impose additional conditions on the Leased Premises that were not part of the Lease. Then, Majestic improperly purported to terminate the Lease when LWCC failed, within 30 days after Majestic's October 7, 2008 letter, to sign a draft "Consent to Easement" that would allow Majestic's affiliate to build a road across the Golf Course. If the termination was effective, it dispossessed LWCC of 10 years of its lease term, its Option to Purchase, 85% of the combined business, and the $6,000,000 investment it made to build and equip the Golf Course.

The trial court held that LWCC defaulted under its obligations when it failed to sign the Consent to Easement, but that the default was not "material," and thus the termination was ineffective. The Court of Appeals reversed in a published opinion, holding that under this Court's opinions in *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005) and *Wilkie v Auto–Owners Ins Co*, 469 Mich 41, 52, 62–63; 664 NW2d 776 (2003), unambiguous

contract terms must be "enforced as written." Thus, the Court of Appeals concluded, Majestic could properly terminate the lease whether or not LWCC's default was "material."

This analysis is a straightforward application of the *Wilkie* and *Rory* "as written" rule, but inexplicably, the Court of Appeals did not apply the "as written" rule to **ALL** sections of the contract, as *Wilkie* and *Rory* require. As a result, the Court of Appeals' analysis is incomplete and works an injustice for which we seek recourse in this Court. It is the heart of this appeal that **ALL** sections of the contract must be construed "as written" – including the sections requiring the landlord to give notice to the tenant, and the sections defining the tenant's obligations. In other words, both parties to a contract are entitled to the protection of *Wilkie* and *Rory*, not just one party. Specifically, the Court of Appeals failed to construe the Lease "as written" when it held that there were no genuine issues of material fact as to (1) whether Majestic mailed LWCC notice of the impending default by registered mail, return receipt requested, as required by Paragraphs 26 and 31 of the Lease; (2) whether Majestic's letter adequately put LWCC on notice of an impending default and gave it an opportunity to cure as required by Paragraph 26 of the Lease; (3) whether (assuming *arguendo* that the notice was otherwise sufficient), Majestic waived or withdrew it by words and conduct; and (4) whether Paragraph 22 of the Lease obligated LWCC to sign the Majestic's proposed consent to easement. If the Court of Appeals had construed these provisions "as written," and properly applied MCR 2.116(C)(10), it would have concluded either that LWCC was not in default, or that genuine issues of material fact remained that precluded summary disposition for Majestic.

This case is important because it gives the Court the opportunity to explain that it intended a full and robust application of *Wilkie* and *Rory* to all provisions of a contract, rather than a crabbed interpretation that would empower the courts to distort the intent of the parties by

construing only a selected portion of a contract "as written." This case also affords the Court an opportunity to explain the interplay between the requirement that contracts be construed "as written," traditional contract defenses including waiver and estoppel, and the standards for summary disposition. This Court should hold that LWCC was not in default and remand for entry of judgment for LWCC, or reverse the decision of the Court of Appeals and remand to the trial court to conduct a trial on the issues of material fact remaining under a proper application of *Wilkie*, *Rory* and MCR 2.116(C)(10).

In the alternative, should the Court wish to carve out an exception to *Wilkie* and *Rory* to hold that contracts providing for forfeiture of interests in real property for breach are contrary to public policy and unenforceable unless the breach is material, the Court certainly has the power to do so. If the Court so holds, it should reverse the decision of the Court of Appeals and reinstate the decision of the trial court on this issue.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. The Parties

LWCC is a Michigan corporation owned by 15 individual shareholders. See Affidavit of Richard A. Henderson, Oct. 7, 2009 ("Henderson Affidavit"), ¶ 3 (Apx 96a). The President of LWCC is Patrick Hayes ("Hayes"). See Affidavit of W. Frank Crouse ("Crouse Affidavit"), ¶ 8 (Apx 104a).

Majestic is a Michigan limited liability company. Majestic currently owns the property on which the Golf Course is located and which constitutes the "Leased Premises." The sole member of Majestic is a related entity, Waldenwoods Properties, LLC ("Waldenwoods"). Waldenwoods owns several hundred acres of land surrounding the Leased Premises. W. Frank Crouse ("Crouse")

is the Manager of both Majestic and Waldenwoods. Crouse Affidavit, ¶¶ 3-4 (Apx. 103a). All of this land "has been in the Crouse family for over 150 years."[1]

B. The Leased Premises and Golf Course

The Golf Course includes a 27-hole golf course and clubhouse built on approximately 342 acres of land. The Leased Premises are not a single contiguous parcel but, instead, consists of 27 irregularly-shaped "islands" of land, each containing a tee, a fairway and a green. These "islands" are connected by easements across property owned by Waldenwoods. See Henderson Affidavit, Oct. 7, 2009, ¶ 4, (Apx 96a); and drawing of the property from Integra Realty Appraisal (Apx 145a).

C. The Lease

Originally, Waldenwoods owned both the Leased Premises and the surrounding land. LWCC, as tenant, and Waldenwoods, as landlord, entered into the Lease on December 8, 1992. (Apx 49a).[2] Waldenwoods later transferred both the Leased Premises and the Lease to Majestic. See Crouse Affidavit, ¶¶ 4-5 (Apx 103a).

At the time the parties entered into the Lease, the Leased Premises and the surrounding property were undeveloped. Under the terms of the Lease, LWCC was required to build a 27-hole golf course, clubhouse and all related structures, **solely at its cost,** on the Leased Premises. Lease, ¶¶ 3 & 11 (Apx 50a, 58a). The 25-year term of the Lease began April 8, 1993, after LWCC made arrangements to borrow $1,050,000, obtained subscriptions from shareholders for more than $1,675,000, and obtained all governmental approvals necessary to commence construction of the Golf Course. Lease, ¶ 4, and First Amendment to Lease, ¶ 1 (Apx 50a, 82a).

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[1] Majestic's Brief on Appeal to the Court of Appeals, p. 6.

[2] The Appendix includes the Lease and its five amendments.

LWCC timely completed construction of the Golf Course in 1994, and since then has successfully operated the award-winning Golf Course under the assumed name of "The Majestic at Lake Walden." During this time, LWCC invested capital in building and equipping the Golf Course in excess of $6,000,000, and paid rent to Majestic totaling more than $1,600,000. As required by the Lease, LWCC has paid: (1) all property taxes; (2) all maintenance and repair costs; (3) all utility bills; and (4) all insurance costs. Lease, ¶¶ 7, 8, 10 & 13 (Apx 54a, 56a, 58a, 60a). LWCC's performance under the Lease has been exemplary, without a single late payment or notice of default of any kind. Henderson Affidavit, Oct. 7, 2009, ¶¶ 5-6 (Apx 96a).

When the Lease was signed in 1992, both parties anticipated that Waldenwoods would develop single-family homes on its property surrounding the Golf Course. See F. Crouse Letter Oct. 13, 2008, p. 2 (Apx 169a) (noting that residential development was part of the original 1991 plan). Just as the Golf Course increases the attractiveness of the lots around it, the homes would be an asset to the Golf Course by increasing play.[3] To date, however, despite the passage of nearly 20 years, Waldenwoods has not begun this contemplated development.

At the heart of the current dispute is Paragraph 22 of the Lease, which requires LWCC to "permit drainage and utility easements and road crossings to be developed" by the Landlord on the Leased Premises for the benefit of the development of Waldenwoods' surrounding property. Paragraph 22 provides in full:

> 22. LANDLORD'S EASEMENTS AND ROAD CROSSINGS. Tenant shall permit drainage and utility easements and road crossings to be developed by Landlord on the Premises as required to permit development to occur on Landlord's Other Real Estate. The easements and crossings shall be installed by Landlord

[3] LWCC thus had no motive to delay or obstruct development of the homes, contrary to Majestic's speculation. Even if there was support for this speculation, which there is not, it would be one more issue of fact that must be resolved at trial.

> at its expense but located in areas mutually agreeable. The utilities and roads shall be installed in such a manner as to ensure that the integrity of the golf course in [sic] preserved, leaving the golf course in equal or better condition.

Lease, ¶ 22 (Apx 68a). Majestic claims that LWCC breached this provision of the Lease when it failed timely to sign Majestic's proposed "consent to easement," and that the uncured breach allowed Majestic to terminate the Lease. Majestic submits that it did not breach this provision, as discussed below.

Also at issue in this lawsuit is whether Majestic complied with its obligations under Paragraphs 26 and 31 of the Lease to give LWCC notice of any impending default and an opportunity to cure.

Paragraph 26 requires Majestic to provide LWCC a written notice of default and 30 days to cure any default. Paragraph 26 provides, in relevant part:

> 26. DEFAULT. Each of the following events shall be a default hereunder by Tenant and a breach of this Lease.
>
> * * *
>
> D. If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance is required to be made by specific provision of this Lease, or if no such period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant, or if such performance cannot be reasonably had within such thirty (30) day period, Tenant shall not in good faith have commenced such performance within such thirty (30) day period and shall not diligently proceed therewith to completion;

Lease, ¶ 26(D) (Apx 70a). Majestic claims it complied with Paragraph 26(D). LWCC claims it did not – rendering Majestic's attempted declaration of breach invalid.

Paragraph 31 requires Majestic to send any notice to LWCC "by registered mail, . . . return receipt requested." Paragraph 31 provides in relevant part:

> 31. NOTICES. Whenever it is provided herein that notice, demand, request, or other communication shall or may be given to or served upon either of the parties by the other, and whenever either of the parties shall desire to give or serve upon the other any notice, demand, request, or other communication with respect hereto or with respect to the premises, each such notice, demand, request, or other communication shall be in writing and, any law or statute to the contrary notwithstanding, shall be effective for any purpose if given or served as follows:
>
> A. If by Landlord, by mailing the same to Tenant by **registered mail, postage prepaid, return receipt requested,** addressed to Tenant at 4662 Okemos Road, Okemos, Michigan 48864, or at such other address as Tenant may from time to time designate by notice given to Landlord by registered mail.

Lease, ¶ 31 (Apx 74a) (emphasis added). Majestic asserts that it gave LWCC notice in the form and manner that this section requires. LWCC contends that Majestic failed to do so.

Also relevant to this appeal is Paragraph 17 of the Lease, which grants LWCC the option to purchase the Golf Course (the "Option"). The Option became exercisable at any time during the final 10 years of the Lease term; specifically, at any time during the 10 years following April 8, 2008. The Option may be exercised only if Tenant is not in default of this Lease at the time of exercise. Lease, ¶ 17 (Apx 64a).

D. The Merger Negotiations

Majestic's purported default notice to LWCC, discussed below, must be considered in the context of the ongoing merger discussions between the parties, and Majestic's "mixed signals" to LWCC.

Beginning in March of 2003, representatives of LWCC and Majestic began discussing a merger of the two entities. Each party engaged legal counsel for the negotiations. LWCC engaged Richard Henderson, CPA, to act as its principal in the negotiations, and Patrick Reid as counsel.

Henderson Affidavit, Oct. 7, 2009, ¶¶ 8, 10, 17 (Apx 96a, 97a, 98a). Majestic retained Douglas Austin as its counsel. See D. Austin Letter, Nov. 24, 2008 (Apx 165a).

Discussions were conducted with the goal of merging the parties, giving LWCC an 85% ownership interest in the combined entity. See Draft Pre-Organization Agreement, ¶ 2 (Apx 191a); Henderson Affidavit, Oct. 7, 2009, ¶¶ 8-10 (Apx 96a – 97a). A merger had appeal to both parties since it would avoid LWCC's exercise of its Option and a potentially contentious valuation of the Property. See Lease, ¶¶ 17(D) and (H) (Apx 64a, 65a).

During the course of the merger negotiations, Majestic asked LWCC to consent to an easement that would allow Waldenwoods to build a roadway across the Golf Course. Majestic provided an initial draft of an "Easement Agreement" and consent form in April 2007 and revised the draft in November 2007. (Apx 321a). The parties had previously agreed to a number of easements across the Golf Course for roadways and walking paths. See Lease ¶ 23 (Apx 68a) and Second Amendment to Lease, dated April 8, 1993 (Apx 84a – 86a).

In December 2007, the first set of Merger Documents was drafted incorporating the Easement Agreement as one of the many documents to be delivered **upon the closing of the merger**. See P. Reid Letter, Dec. 11, 2008 (Apx 148a); see also Henderson Affidavit, Oct. 7, 2009, ¶ 11 (Apx 97a). The reference to the Easement Agreement as an exhibit to the merger document continued throughout all subsequent drafts of the merger document, **including the drafts from Majestic**. See F. Crouse Memo, Feb. 12, 2008, with "Marked-Up" Pre-Organization Agreement, ¶ 8A (Apx 189a, 195a). It made sense that the merger and the Easement Agreement would be negotiated at the same time, because depending on the form of the merger, the Leased Premises and the Lessor's interest might have been transferred to the same entity, so no Easement would be necessary.

Merger negotiations continued until November 2008. However, in February 2008, Majestic "jumped the gun" by recording a document entitled "Restrictions, Covenants and Grant of Rights" (the "Restrictions," Apx 203a)[4] with the Livingston County Register of Deeds, which misstated the parties' existing rights under the Lease.[5] See Henderson Affidavit, Oct. 7, 2009, ¶12 (Apx 97a). The parties also disagreed over the language of the proposed Easement Agreement.[6]

On October 7, 2008, Majestic sent a letter to LWCC enclosing its draft of the Easement Agreement and consent form, unchanged in any substantive way from its 2007 versions, and requesting LWCC's consent to the Easement Agreement. **The letter says nothing about a "default" or any consequences of failing to sign**. In its entirety, the letter says:

Waldenwoods Properties LLC
9840 Crouse Road
Howell, MI 48353
810-632-6135

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[4] The parties to the Restrictions were Majestic, as grantor, and Waldenwoods, as grantee. See *id.* LWCC had no involvement in the creation or execution of the Restrictions.

[5] For example, the Restrictions asserted (1) that Waldenwoods had an unqualified right to enter onto the Golf Course and cut trees that might obstruct views from future residential building sites on Waldenwoods' contiguous property; and (2) if LWCC bought the land and **third parties** operated snowmobiles on the Golf Course twice in a 30-day period, the land would revert back to Waldenwoods. *See* Restrictions dated Dec. 31, 2007, §§ 2B, 4(f), 4(g), 5 (Apx 203a, 205a, 208a, 209a, 211a). Nothing in the Lease gives Waldenwoods any of these rights. See Lease (Apx 49a); Henderson Affidavit, Oct. 7, 2009, ¶ 13 (Apx 97a).

[6] First, Majestic proposed that LWCC agree to an "exclusive" road easement and utility easements, which would have excluded LWCC from using the easements. Second, the proposed Easement Agreement failed to identify the size, design, specifications, or grade of the proposed road crossing or utilities. Third, the proposed Easement Agreement also allowed for construction and maintenance at times solely within the discretion of Waldenwoods/Majestic. (See Apx 322a – 323a).

October 7, 2008
Mr. Pat Hayes, President
Lake Walden Country Club, Inc.
4666 Okemos Road
Okemos, MI 48864

Dear Mr. Hayes,

I am writing on behalf of both Waldenwoods Properties, LLC and Majestic Golf, LLC to request that you execute the Consent portion of the enclosed Grant of Easement and return it to me for recording. As you will recall, Section 22 of the golf course lease obligates Lake Walden to permit road crossing easements when required by Waldenwoods for development of its adjoining land. Sometime ago Waldenwoods requested a crossing easement from Majestic Golf, which owns the golf course land. Majestic Golf approved the request, and on that basis a proposed easement between Majestic and Waldenwoods was sent to Lake Walden on April 26, 2007 for review and consent.

Following receipt and review of the document, you requested some changes. Those were made, and the document was resubmitted to golf course management with a request to execute the Consent. This occurred, I believe, late in 2007. Despite the request, the written Consent has not been received. Concurrence by Lake Walden is urgently required.

I am requesting that Lake Walden fulfill its obligation under the lease. Please sign and return the enclosed Consent within thirty (30) days.

/s/
W. Frank Crouse
Manager, Waldenwoods Properties, LLC and
Manager, Majestic Golf, LLC

(Apx 175a).

The next day, on October 8, 2008, this time by email, Majestic again requested that LWCC consent to its Easement Agreement, but **withdrew** or waived any claim for default or demand for cure by conceding that LWCC need not sign the consent unless "agreement cannot be reached" on the proposed merger:

> **If an agreement cannot be reached**, then we may be presented with a notice by LWCC of its intent to exercise the purchase option included in our lease. **Accordingly, we are providing the following attachments.**

F. Crouse Email, Oct. 8, 2008, p. 1 (Apx 173a) (emphasis added). The attachments to Mr. Crouse's October 8, 2008 email **included the draft Consent to Easement**. Again, this made sense because the ultimate form of the merger was still unknown, and the easement might never be needed.

In the same vein, on October 13, 2008, Majestic sent LWCC a lengthy letter in which it discussed "problems" with the parties' merger negotiations (specifically, LWCC's refusal to grant Waldenwoods the unfettered right to cut trees on the Golf Course) – without any mention of the Easement Agreement or any suggestion that time was ticking for LWCC to cure a "default." See F. Crouse Letter, Oct. 13, 2008 (Apx 168a).

E. Alleged Breach of Lease and Exercise of the Option to Purchase

Notwithstanding Majestic's "mixed signals" regarding its true goal in the merger negotiations, on November 24, 2008, Majestic, through its attorney, Douglas Austin, sent a letter to Mr. Hayes, LWCC's President, enclosing a form Notice to Quit – Termination of Tenancy asserting that LWCC must vacate the Golf Course by December 24, 2008. Mr. Austin advised that LWCC had defaulted under Paragraph 26(D) of the Lease by reason of its failure to sign and deliver the draft Consent to Easement Agreement following Mr. Crouse's letter of "October 6, 2008."[7] See D. Austin Letter, Nov. 24, 2008 and Notice to Quit (Apx 165a, 166a).

Counsel for LWCC, Patrick Reid, responded that there was no default under the Lease because: (1) the parties had agreed "the Road Easement would be part of the documents signed at the time of closing on the merger"; (2) the parties had not reached an agreement as to the terms of the Easement Agreement; and (3) Majestic had not provided LWCC with a 30-day notice to cure as

[7]The actual date of the letter is October 7, 2008. This Brief will refer to the letter by its correct date.

required by Paragraph 31 of the Lease. P. Reid Letter, Dec. 11, 2008 (Apx 148a). Mr. Reid also attached a revised draft of the Easement Agreement to which LWCC **would** agree. (Apx. 151a).

After that, Mr. Reid provided notice to Majestic and Mr. Crouse that LWCC exercised its Option to purchase the Leased Premised under paragraph 17 of the Lease. P. Reid Letter, Dec. 22, 2008 (Apx 147a).

F. Proceedings in the Trial Court

In response to LWCC's exercise of the Option, Majestic filed the present lawsuit in the Livingston County Circuit Court.[8] LWCC answered and filed a Counter-Complaint.[9] The parties filed cross-motions for summary disposition, which the trial court granted in part and denied in part.

In its written Opinion dated December 23, 2009, the trial court held that LWCC's failure to sign the Consent to the Easement Agreement within 30 days after the October 7, 2008 letter from Mr. Crouse to Mr. Hayes constituted a breach of the Lease. The trial court further held, however, that this breach was not material, and therefore Majestic could not validly terminate the Lease. Trial Ct Opinion, Dec. 23, 2009, pp 4-5 (Apx 42a – 43a).

The trial court further held (1) that LWCC had not validly exercised its Option because it was in default at the time of the attempted exercise, but (2) that "because the defendant's breach

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[8] In its First Amended Complaint, Majestic sought specific performance of the termination paragraph of the Lease (Count I); a declaration that LWCC's exercise of the Option was invalid (Count II); a stay of the appraisal requirement of the Lease (Count III); and a determination of the reasonable rental value for the alleged "holdover" (Count IV). Majestic also alleged breach of an implied covenant of good faith (Count V).

[9] LWCC's Counter-Complaint sought specific performance of the Option; and a declaration that the Lease was not terminated, that LWCC was not in breach of the Lease at the time it exercised the Option, and that the Restrictions are an invalid encumbrance upon the Property. LWCC's Answer to First Amended Complaint, Affirmative Defenses and Counterclaim (Apx 111a)

was not material, the option has not indefinitely lapsed" and therefore could be exercised again at a time when LWCC was not in default. *Id.*, pp 5-6, 10 (Apx. 43a – 44a).

Majestic filed a Motion for Reconsideration. The trial court denied the motion in a second written opinion, but with Majestic's concurrence dismissed its Count IV without prejudice. Trial Ct Opinion on Reconsideration, March 30, 2010, pp 1-3 (Apx 36a – 38a). On August 23, 2010, the trial court entered a stipulated order dismissing Count II of LWCC's counter-complaint (Apx. 34a), so that its orders became final and appealable.

G. Proceedings on Appeal

Majestic appealed to the Court of Appeals, and LWCC cross-appealed. In its "For Publication" Opinion dated July 10, 2012 ("COA Op," Apx 19a), the Court of Appeals reversed the trial court in substantial part.

First, the Court of Appeals affirmed the portion of the trial court opinion holding that LWCC breached the Lease. The Court of Appeals held that "according to the plain and unambiguous terms of [Paragraph 26 of] the Lease, plaintiff could 'cancel and terminate' the lease if defendant failed to comply with *any* obligation (with the exception of failure to pay rent) and that failure to perform continued for 30 days after defendant was formally notified, pursuant to Paragraph 31 of the Lease, of the failure to perform." COA Op p. 9 (Apx 27a, italics by the Court). Next, the Court of Appeals held that "there is no question of fact that the October 7, 2008 letter complied with the notice requirements of Paragraph 31 of the Lease. Therefore, to avoid defaulting according to the terms of the Lease, [LWCC] had 30 days from October 8, 2008, to cure its non-performance." *Id.* pp. 9-10 (Apx 27a – 28a). Since LWCC did not respond until

after this period had elapsed, the Court of Appeals held that "under the plain language of Paragraph 26, the default occurred on or about November 7, 2008." *Id.* p. 10 (Apx 28a).[10]

The Court of Appeals, however, reversed the portion of the trial court's opinion holding that the termination was ineffective because LWCC's default was not "material." The Court of Appeals noted that it had "not, in a published opinion, addressed the applicability of the material breach doctrine in circumstances where the contract at issue contains an express forfeiture clause." *Id.* p. 10 (Apx 28a). Distinguishing the equitable remedy of rescission from forfeiture, the Court of Appeals noted that "'rescission' terminates a contract and places the parties in their original position, even if restitution is necessary, and 'forfeiture' terminates a contact without restitution." *Id.* p. 11 (Apx 29a). Because this Court in *Wilkie*, *supra*, 469 Mich at 52, 62-63, and *Rory*, *supra*, 473 Mich at 470, held that "an unambiguous contract *must* be enforced as written unless it violates the law, is contrary to public policy, or is unenforceable under traditional contract defenses," the Court of Appeals concluded that trial court had – in effect – impermissibly "reformed" the Lease by inserting "material breach" into the default provision. COA Op, p. 11 (Apx 29a) (italics by the Court). Since, according to the Court of Appeals, LWCC failed to demonstrate that any "traditional" contract defense applied, the Court of Appeals reversed and held that the forfeiture was enforceable. *Id.* p. 12 (Apx 30a).

Finally, the Court of Appeals rejected the arguments raised in LWCC's cross-appeal. First, it construed Paragraph 22 of the Lease to require LWCC to sign the consent to the Road Easement unless LWCC objected to the location, and found no evidence that LWCC had

[10] The Court of Appeals declined to address LWCC's argument that Majestic breached the Lease first by recording the Restrictions, because LWCC did not "explain what covenant of the Lease plaintiff allegedly violated and does not provide any authority in support of why this alleged 'breach' prevents plaintiff from adhering to other aspects of the Lease." *Id.* p. 10 (Apx 28a).

objected on this basis. *Id.* pp. 13-14 (Apx 31a – 32a). Second, it found "no evidence that the parties intended to amend" the Lease to defer approval of the "Road Easement" until closing of the merger. *Id.* p. 14 (Apx 32a). Third, the Court of Appeals held that the "trial court properly concluded that the [October 7, 2008] letter satisfied the notice requirements of the Lease." *Id.* pp. 14-15 (Apx 32a – 33a). The Court of Appeals denied LWCC's motion for rehearing or reconsideration on August 30, 2012. (Apx 18a).

LWCC timely filed its application for leave to appeal to this Court pursuant to MCR 7.302(C)(2). This Court granted LWCC's application for leave to appeal on April 3, 2013.

ARGUMENT

I. STANDARD OF REVIEW

The present appeal is from an order granting summary disposition. This Court reviews *de novo* a trial court's grant or denial of summary disposition. *Brunsell v Zeeland*, 467 Mich 293, 295; 651 NW2d 388 (2002). The construction and interpretation of an unambiguous contract, and the threshold question of whether a contract is ambiguous, are questions of law which are decided in the first instance by the trial court, and are reviewed de novo on appeal. *Wilkie*, 469 Mich at 47-48; *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003); *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). In contrast, the interpretation of any ambiguities in a contract, and the question of whether a breach has occurred, are both questions of fact, which must be decided by the trier of fact See, *e.g.*, *Detroit v Porath,* 271 Mich 42, 49-51, 54-55; 260 NW 114 (1935); *State-William Partnership v Gale,* 169 Mich App 170, 176; 425 NW2d 756 (1988).

In granting summary disposition, the trial court cited both MCR 2.116(C)(8)[11] and MCR 2.116(C)(10). However, where, as here, a motion for summary disposition requires a court to consider evidence outside of the pleadings, the motion must be examined under MCR 2.116(C)(10). See, *e.g., Smith v Globe Life Ins Co*, 460 Mich 446, 454-55; 597 NW2d 28 (1999).

A motion under MCR 2.116(C)(10) may be granted only where no genuine issues of material fact remain for trial. See, *e.g.*, See *Maiden v Rozwood, supra*, 461 Mich at 120. In deciding a motion under MCR 2.116(C)(10), the trial court must consider affidavits, depositions, admissions, and other documentary evidence put forth by the parties in the light most favorable to the nonmoving party. *Maiden v Rozwood, supra*, 461 Mich at 120. "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Id.* at 121. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *West v General Motors*, 469 Mich 177; 665 NW2d 468 (2003).

II. THE COURT OF APPEALS CLEARLY ERRED WHEN IT FAILED TO APPLY THE *WILKIE* AND *RORY* DOCTRINE OF ENFORCING CONTRACTS "AS WRITTEN" TO THE ISSUES RAISED BY LWCC.

LWCC was in default of the Lease *only* if Frank Crouse's October 7, 2008 letter gave LWCC notice of an impending default and its opportunity to cure in the form and manner required by Paragraphs 26(D) and 31 of the Lease; *only* if Majestic did not waive that requirement or withdraw that notice; and *only* if Paragraph 22 of the Lease required LWCC to

[11] MCR 2.116(C)(8) tests the legal sufficiency of a complaint. See, *e.g.*, *Maiden v Rozwood*, 461 Mich 109, 119-20; 597 NW2d 817 (1999). All well-pleaded allegations are accepted as true and construed in a light most favorable to the non-movant, and summary disposition may be granted only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*; *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993); *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

sign appellee Majestic's proposed "Consent to Easement." In ruling on LWCC's defenses, the Court of Appeals failed to apply the "as written" standard that it applied to Paragraph 29 of the Lease, which allowed Majestic to terminate in the event of LWCC's default. The Court of Appeals opinion deviated sharply from this Court's precedents in *Wilkie,* 469 Mich at 52, 62–63; and *Rory,* 473 Mich at 703, and instead reverted to the rejected "reasonableness" doctrine. This case is important because it provides the Court an opportunity to emphasize the necessity of applying *Wilkie* and *Rory* to all provisions of a contract, not just to provisions favorable to one party, as well as an opportunity to clarify the interplay between the requirement that contracts be construed "as written," traditional contract defenses including waiver and estoppel, and the requirements for summary disposition.

When *Wilkie* and *Rory* are properly applied, it is apparent that LWCC was not obligated to sign Majestic's proposed Consent to Easement. In the alternative, genuine issues of material fact existed as to whether Mr. Crouse's October 7, 2008 letter was sent by registered mail, return receipt requested, as unambiguously required by Paragraph 31 of the lease. Fact issues also remained as to whether that letter unambiguously put LWCC on notice of an impending default and triggered LWCC's duty to cure as required by Paragraph 26(D) of the Lease. Finally, even assuming that the October 7 letter was sufficient on its face, genuine issues of material fact remained as to (i) whether Majestic's words and conduct either withdrew that notice or rendered it ambiguous, and (ii) whether LWCC satisfied its obligations under Paragraph 26(D) by continuing to negotiate the proposed road easement. These questions of fact made the entry of summary disposition for Majestic improper and unjust.

Reinforcing the validity of the *Wilkie* and *Rory* analysis to these issues is the settled principle that forfeitures are not favored in law or equity, and forfeiture provisions must be

strictly construed.[12] See, *e.g.*, *In re State Highway Commissioner*, 365 Mich 322, 331; 112 NW2d 573 (1961); *Hersey Gravel Co v Crescent Gravel Co*, 261 Mich 488, 492; 246 NW 194 (1933); *Smith v Independent Order of Foresters*, 245 Mich 128, 134; 222 NW 166 (1928); *Aniba v Burleson Sanitarium*, 229 Mich 118, 122; 200 NW 984 (1924).

In sum, the Court of Appeals erred when it applied *Wilkie* and *Rory* to some, but not all, of the lease provisions, and failed to appreciate the existence of genuine issues of material fact that precluded summary disposition on the remaining issues. The Court of Appeals opinion causes substantial injustice to LWCC by depriving it of 10 years of its Lease term, its $6,000,000 investment in the Golf Course, and its Option to purchase, and destroying its business.[13] The Court of Appeals' inconsistent approach would undermine this Court's pronouncement that contracts must be applied "as written," would allow courts to pick and choose between contract provisions, and would sow confusion regarding the proper approach to summary disposition in contract cases.

A. Genuine Issues of Material Fact Remain as to Whether Majestic Gave LWCC Notice as Required by Paragraphs 26(D) and 29 of the Lease.

Majestic contends it provided the notice required under Paragraphs 26(D) and 31 of the Lease (Apx 70a, 74a) by way of a letter dated October 7, 2008, from Frank Crouse to Pat Hayes,

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[12] Majestic itself cited this principle and some of these authorities to the Court of Appeals. *See* Majestic's Brief on Appeal, pp. 38-40.

[13] The Court of Appeals cites Mr. Crouse's affidavit for the proposition that "[a]ccording to Frank Crouse, a manager of both WPL and plaintiff, defendant recovered its investment in the Golf Property within the first six years." COA Opinion, p. 3 (Apx 21a). What Mr. Crouse actually said in his affidavit was, "At a meeting of the LLC [sic] board at which I was present, a statement was made by one of the shareholders that the original shareholder investment in LWCC had been recovered within the first 5 or 6 years of operation of the golf course." F. Crouse Affidavit ¶ 17 (Apx 108a). This statement is hearsay not within any exception to MRE 802, and as such was entitled to no consideration in ruling on a motion for summary disposition. See MCR 2.116(G)(6).

President of LWCC (Apx 175a, reproduced at pp. 9-10, supra). The Court of Appeals held that Majestic was entitled to summary disposition on this issue, and that LWCC forfeited all of its rights under the Lease by failing to sign the Consent to Easement within 30 days from that date. This decision was erroneous because genuine issues of fact remain as to (1) whether the October 7, 2008 letter complied with the requirement of Paragraph 31 that Majestic send any notice by registered mail, return receipt requested; (2) whether the October 7th letter complied with the requirement of Paragraph 26(D) that Majestic give LWCC notice of any impending default and an opportunity to cure; and (3) whether the October 8th and 13th communications withdrew or waived any purported claim of default on October 7th. Under the rationale of *Wilkie* and *Rory*, Majestic was required to comply strictly with the express terms of the Lease. Strict compliance was imperative because absent registered mail delivery, and absent language mentioning the consequences of noncompliance, the letter failed to put LWCC on notice that it faced forfeiture of its rights under the Lease for a minor and technical default.

In *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359; 817 NW2d 504 (2012), this Court applied *Rory* in holding that a contractual notice provision must be strictly enforced. In *DeFrain*, an insurance policy required the insured to provide the insurer notice in writing of an uninsured motorist claim within 30 days. The Court reversed the Court of Appeals decision, holding that "[i]n reading a prejudice requirement into the notice provision where none existed, the Court of Appeals disregarded controlling authority laid down by this Court and frustrated the parties' right to contract freely." *Id.* at 373.

In the present case, the trier of fact could readily conclude that October 7, 2008 letter, by its innocuous language, its use of ordinary mail, and the fact that it came as part of a blizzard of communications about the proposed merger, failed to advise LWCC that Majestic would declare

a forfeiture of the Lease if LWCC did not sign and return the proposed Consent to Easement within 30 days. Not only was the letter ambiguous on this point, but Majestic's other communications both before and after the letter told LWCC that Majestic was willing to wait until the conclusion of the merger negotiations for the Consent to Easement – which made sense because, depending on the form of the merger, the easement might not be needed at all. The parties had previously agreed to a number of easements across the Golf Course for roadways and walking paths, see Lease ¶ 23 (Apx 68a) and Second Amendment to Lease, dated April 8, 1993 (Apx 84a – 86a), so there was no reason for either side to expect any problem negotiating the easement when and if it was needed.

In other words, in the context of all of the facts, the trier of fact could conclude that Majestic's October 7, 2008 letter (whether intentionally or not) was a "stealth" notice that lulled LWCC into **inaction**, to the end that Majestic could (1) "trap door" LWCC into a purported default; (2) divest LWCC of its rights under the Lease; (3) hand Frank Crouse a $6,000,000 income-producing asset that he had not paid a penny for; and (4) attain Frank Crouse's fundamental desire of revoking LWCC's option to purchase and regaining control of the underlying real estate – a classic case of "seller's remorse." Given these facts, it is quite possible and, we believe, even likely, that the trier of fact would conclude that the letter of October 7th did not meet Majestic's obligations under Paragraphs 26 and 31 or trigger LWCC's duty to cure by signing the proffered consent to easement.

In particular, Paragraph 26(D) of the Lease provides that a default exists:

> If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed . . . and such non-performance shall continue for a period within which performance is required to be made by specific provision of this Lease, or if no such period is so provided for, a period of thirty (30) days **after notice thereof** by Landlord to Tenant, or if such

> performance cannot be reasonably had within such thirty (30) day period, Tenant shall not in good faith have commenced such performance within such thirty (30) day period and shall not diligently proceed therewith to completion.

Lease, ¶ 26(D) (Apx 70a) (emphasis added).

Paragraph 26(D) does not say how notice must be delivered to the Tenant. That term is supplied by Paragraph 31(B). The unambiguous language of Paragraph 31(B) provides that any "notice" required to be given under the Lease must be in writing and served by "**registered mail, postage prepaid, return receipt requested**." Lease, ¶ 31 (Apx 74a) (emphasis added). Service by registered mail was important not only to ensure that LWCC **received** the letter, but also because registered mail, return receipt requested is a "red flag" that would ensure LWCC understood the **significance** of the notice. Likewise, the language of any notice needed to be specific enough to put LWCC on notice of the gravity of the situation. Thus, LWCC's negotiator, Richard Henderson, swore in his affidavit that "Neither I nor any shareholder or representative of LWCC received a notice from Majestic that specifically declared a default as required by paragraph 26 of the Lease" before the notice to quit from Majestic's attorney dated Nov. 24, 2008. Henderson Affidavit, Oct. 7, 2009, ¶¶ 14, 16 (Apx 98a). The Court of Appeals erred because genuine issues of material fact remain both as to whether the notice was properly served on LWCC, and as to whether, in the context of the facts, it was substantively sufficient to put LWCC on notice. This Court should reverse and remand for trial.

1. Genuine Issues of Material Fact Remain as to Whether Majestic Gave LWCC Notice by Registered Mail, Return Receipt Requested.

There is a genuine issue of material fact as to whether the alleged 30-Day Notice of Default was served "registered mail, . . . return receipt requested," as unambiguously required by paragraph

31 of the Lease.[14] First, Mr. Crouse's October 7, 2008 letter (Apx 175a) makes **no reference to registered mail, return receipt requested,** contrary to the customary practice where a business letter is mailed by registered mail. In contrast, the November 24, 2008 termination notice from Majestic's attorney (which is typed in the same font and format, suggesting both were drafted by Majestic's attorneys), clearly states that it was sent "***By Registered Mail***" (Apx 165a) (bold and italics in original) – showing that Majestic and its attorneys well understood how to indicate the manner of mailing in a business letter.

Second, in his affidavit, Frank Crouse does **not** swear that he mailed the letter by "registered mail, return receipt requested," as required by Paragraph 31(B). Rather, he says equivocally that, "On October 8, 2008, I mailed to LWCC, consistent with the notice provisions contained in the Lease, a letter dated October 7, 2008 . . .." Crouse Affidavit, ¶ 17 (Apx 108a). The Court of Appeals acknowledges that Mr. Crouse's affidavit does not say how he mailed the letter, but skips over Majestic's failure to demonstrate that there was "no genuine issue of material fact," as required by MCR 2.116(C)(10), by bizarrely blaming that failure on defendant LWCC – the **respondent** to Majestic's motion for summary disposition. As the Court of Appeals said:

> Nothing in the record supports **defendant's** claim that the letter was not sent via registered mail. Defendant cites to the letter itself and cites to Crouse's affidavit as evidence of the letter not being sent via registered mail. However, the letter does not identify either way how it was mailed. And Crouse states in his affidavit that he mailed the letter "consistent with notice provisions contained in the Lease."

COA Op, p. 14 (Apx 32a) (emphasis added).

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[14] Contrary to Majestic's assertion, LWCC clearly preserved this argument for appellate review. Indeed, the Court of Appeals addresses this argument (albeit incorrectly) in its opinion. The Court of Appeals stated that "Defendant claims that the October 7, 2008, letter . . . was not sent via registered mail . . . ." COA Opinion, p. 14 (Apx 32a).

The Court of Appeals lost sight of the fact that as the moving party, **Majestic** had the burden of showing, by competent evidence, the existence of facts sufficient to support its claim that it sent the letter by registered mail, return receipt requested, and therefore had a right to terminate the Lease and impose a forfeiture on LWCC. See MCR 2.116(G)(3)(b), (6)[15]; *Smith v Globe Life Ins Co,* supra, 460 Mich at 455.

Interestingly, it appears the Court of Appeals understood the law correctly that the movant, Majestic, has this burden when they said:

> When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006).

COA Op, p. 8 (Apx 26a). Yet, having stated the rule properly, the Court of Appeals then proceeded to misapply it and put the burden on the nonmovant, LWCC.

The case law makes it clear that the contractual requirements for forfeiture must be strictly enforced, as discussed above. Mr. Crouse's affidavit was at best equivocal and at worst evasive as to the manner of mailing, and was insufficient to satisfy Majestic's burden on moving for summary disposition. See *Picard v Shapero*, 255 Mich 699; 239 NW 264 (1931) (affidavit stating notice of forfeiture was delivered was insufficient). And even assuming *arguendo* that Mr. Crouse's affidavit was sufficient to support Majestic's initial burden, Mr. Henderson's affidavit stating that LWCC "never received notice of any claim of default under the Lease" before the notice to quit dated November 24, 2008, was sufficient to put the matter in issue and create a genuine issue of

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[15] MCR 2.116(G)(6) provides: "Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on sub rule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion."

material fact for trial. Henderson Affidavit, Oct. 7, 2009, ¶¶ 14, 16 (Apx 98a); see MCR 2.116(G)(4). Accordingly, the trial court improperly granted summary disposition for Majestic on this issue, and the Court of Appeals erred when it affirmed.

As this Court held in *DeFrain*, reflecting a complete comprehension of the full import of *Wilkie* and *Rory*, LWCC had a right to receive the notice it bargained for as provided by the unambiguous terms of the contract. Actual notice or knowledge cannot trump the written terms of the contract. See *DeFrain*, 491 Mich at 373. This is not a new notion in our case law; even pre-*Wilkie* this Court held that the principal goal in contract construction is to give effect to the parties' intent and to construe the contractual language pursuant to its plain and ordinary meaning thus avoiding contrived constructions. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 591 NW2d 411 (1998). The court "must look for the intent of the parties in the words used in the instrument. This court does not have the right to make a different contract for the parties or to look to extrinsic evidence to determine the intent of the parties when the words used by them are clear and unambiguous and have a definite meaning." *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-07; 29 NW2d 832 (1947), quoting *Michigan Chandlier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941). "We will not create ambiguity where none exists." *Smith v Physicians Health Plan, Inc*, 444 Mich 743, 759, 514 NW2d 150 (1994).

In *Jelonek v Emergency Medicine Specialists, PC*, 2001 WL 988064 at *4 (Mich App Aug 28, 2001) (Apx 335a), the Court of Appeals considered a notice provision in a shareholders' agreement that was nearly identical to the provision in the present Lease. Although the agreement required notice "in writing, sent by **certified mail return receipt requested**," the defendants argued that the plaintiffs received "written notice" of their intent to transfer stock when plaintiffs received a handout at a shareholder meeting. *Id.* at *2, *4-5 (Apx 333a, 335a –

336a) (emphasis added; internal quotations removed). The court held that the explicit terms of the contract provided for written notice and at no point states that "actual notice or knowledge will supersede the written notice requirement." *Id.* Likewise, the court found no evidence that the plaintiffs had waived their right to notice. *Id.*, quoting *HJ Tucker and Associates, Inc v Allied Chucker and Engineering Co*, 234 Mich App 550, 564, 595 NW2d 176 (1999). In accord is *Hunter Square Office Bldg, LLC v Paragon Underwriters, Inc*, 2003 WL 21186651, *3-4 (Mich App May 20, 2003) (Apx 342a – 343a) (lease required notices to be delivered personally or by certified or registered mail).

LWCC was entitled to the same actual compliance with the notice provision in the present Lease that the Court accorded the insurer in *DeFrain*. Sending the letter via regular mail or email did not satisfy the unambiguous language of the contract. Nor was Mr. Crouse's equivocal affidavit stating that he mailed the letter "consistent with the notice provisions of the lease" sufficient to support summary disposition for Majestic. Genuine issues of material fact remain as to whether Majestic gave notice in the manner required by the Lease, and these issues must be resolved by the trier of fact.

2. Genuine Issues of Material Fact Remain as to Whether Majestic's October 7, 2008 Letter Was Substantively Sufficient to Put LWCC on Notice of an Impending Default.

Reversal is also required because there is a genuine issue of material fact as to whether Frank Crouse's October 7, 2008 letter (Apx 175a, reproduced at pp. 9-10, supra) was sufficient to put LWCC on notice, as required by Paragraph 26(D) of the Lease, that it faced termination and forfeiture of all of its rights under the Lease if failed to sign the proffered Consent to Lease Agreement within 30 days. On its face, the letter was at best ambiguous. And even if the letter might have been sufficient had it been the only communication between the parties, the fact is that it

came in the middle of a blizzard of contradictory communications from Majestic on the subject. This factual context made Majestic's intentions ambiguous, and left issues of fact that must be resolved by the trier of fact.

While Mr. Crouse's October 7, 2008 letter refers to Paragraph 22 of the Lease, it is devoid of any reference to "default," "breach," "termination," or "forfeiture," or even the relevant default provision of the Lease, Paragraph 26(D). Mr. Crouse merely asks LWCC to "[p]lease sign and return the enclosed Consent within 30 days" and states that, "[c]oncurrence by LWCC is urgently required." The letter does not say that the Lease requires LWCC to sign the Consent to Easement within 30 days. Nor does the letter suggest that any adverse consequences will occur if LWCC does not provide its consent to the "road crossing easement" within 30 days, much less identify the consequences.

There is a genuine issue of material fact as to whether the October 7, 2008 letter was sufficient to put LWCC on notice of the risk of default and forfeiture. The trier of fact could conclude that Mr. Crouse's letter – by its use of the ordinary mail and innocuous language – induced **inaction**, not action, and "set up" LWCC for the termination notice that followed.

Moreover, the letter does not stand alone; it is part of a series of contradictory communications from Majestic that indicate it did not expect LWCC to formally consent to the easement until the merger negotiations were completed. In December 2007, the first set of Merger Documents were drafted incorporating the Easement Agreement as one of the many documents to be delivered **upon the closing of the merger**. See P. Reid Letter, Dec. 11, 2008 (Apx 148a); see *also* Henderson Affidavit, Oct. 7, 2009, ¶ 11 (Apx 97a). The reference to the Easement Agreement as an exhibit to the merger document continued throughout all subsequent drafts of the merger document, **including the drafts from Majestic**. See F. Crouse Memo, Feb. 12, 2008 with

"Marked-Up" Pre-Organization Agreement, ¶ 8A (Apx 189a, 195a). This made sense because depending on the form of the merger, the Leased Premises and the Lessor's interest in the Lease might have been transferred to the same entity, so no Easement would be necessary. Accordingly, it was logical that the Easement be negotiated at the same time as the merger.

October 8, 2008, very next the day after Mr. Crouse's October 7, 2008 letter, Mr. Crouse again requested that LWCC agree to Majestic's draft Easement Agreement, but **acknowledged that he did not expect the consent to be signed unless "agreement cannot be reached" on the proposed merger**. See F. Crouse Email, Oct. 8, 2008, p. 1 (Apx 173a). And on October 13, 2008, Mr. Crouse sent LWCC a lengthy letter in which he discussed at length "problems" with the parties' merger negotiations (specifically, LWCC's refusal to grant Waldenwoods the unfettered right to cut trees on the Golf Course) – without any mention of the Easement Agreement. See F. Crouse Letter, Oct. 13, 2008 (Apx 168a). Even if Mr. Crouse's October 7, 2008 letter, standing alone, would not have been ambiguous, the factual context rendered it ambiguous and ineffective as the notice required by the Lease.

Citing no authority, the Court of Appeals reasons that LWCC was not entitled to more specific notice because nothing in the Lease requires it:

> Defendant's remaining claims of deficiencies are also without merit. The Lease does not require any written notice to contain any specific words, such as "notice" or "default." The letter referenced defendant's continuing obligation under Paragraph 22 of the Lease to provide the consent, explained that defendant has been delinquent for nearly a year, and established a 30–day time period to cure the defect. This 30–day time period matches the 30–day time period of Paragraph 26. Therefore, the trial court correctly concluded that the letter satisfied the notice requirements of the Lease.

COA Op, p. 15 (Apx 33a).

The Court of Appeals cites Paragraph 22, the easement provision; Paragraph 26, which deals with when conduct matures into a default; and Paragraph 31(A), which deals with the proper **procedure** for **mailing** a notice. Nothing in the Lease specifies the form or substance of notice that must be given to invoke a forfeiture – one way or the other. Thus, the Lease itself is ambiguous as to the form of notice required, and the October 7, 2008 letter is at best ambiguous and indeed could be considered withdrawn or waived by the emails of October 8th and the letter of October 13th. Certainly, an ambiguous, obscure misleading or withdrawn notice does not comply with the requirements of the Lease, whatever they may be.

Both the requirements of the lease and the adequacy of the notice are thus questions of fact that must be decided by the trier of fact in light of all of the circumstances. "The interpretation of a contract whose language is ambiguous is a question of fact for the jury to decide. When interpreting a contract whose language is ambiguous, the jury is to consider relevant extrinsic evidence." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 480; 663 NW2d 447 (2003). Contract provisions must be strictly construed against forfeiture. See cases cited at p. 17, *supra*. The "function of the notices is primarily to inform the purchaser that unless he cures the delinquency he faces court action." *Gruskin v Fisher*, 405 Mich 51, 59; 273 NW2d 893 (1979). Also see *Dow v State*, 396 Mich 192, 206-07; 240 NW2d 450 (1976) (the purpose of requiring notice of tax forfeiture is to actually inform the owner of the property interest of the impending proceedings); *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314-15 (1950) ("The notice must be of such nature as to convey the required information"); *Matter of Delex Management*, 155 BR 161, 165 n 7 (Bankr WD Mich 1993) (Apx 348a).

Majestic's October 7, 2008 letter does not advise LWCC that Majestic will declare LWCC's rights under the Lease forfeited and bring an eviction proceeding unless LWCC "cures" by signing

the draft Consent to Easement within 30 days. The trier of fact could conclude that the letter is deficient because it does not accomplish the primary function of notice: informing the recipient that he will face court action unless he cures. See *Gruskin*, 405 Mich at 59.

Genuine issues of material fact remained as to whether Majestic's letter complied with the lease and was sufficient to put LWCC on notice that it faced forfeiture if it did not sign the Consent to Easement within 30 days. The trial court erred when it granted summary disposition for Majestic on this issue, and the Court of Appeals erred when it affirmed.

B. Genuine Issues of Material Fact Remain as to Whether Majestic Deferred Any Requirement that LWCC Sign the Proffered Consent to Easement Until the Conclusion of the Merger Discussions.

Even if Paragraphs 22 of the Lease required LWCC to sign a consent to a "road crossing easement" (which it does not, as discussed in Part IIC, below), and even if Mr. Crouse's letter was a demand properly made in accord with Paragraph 26(D) (which it was not), genuine issues of material fact remain as to whether Majestic withdrew or waived this demand and deferred any such deadline by communicating to LWCC that the consent could be delivered as part of the closing documents for the anticipated merger of the parties. This was a major theme of LWCC's arguments in the trial court and the Court of Appeals, and both erred by failing to recognize the existence of genuine issues of material fact.

Merger negotiations between the parties began in 2003. Henderson Affidavit, ¶ 8 (Apx 96a). In 2007, during the course of the merger negotiations, Majestic made its first request for LWCC's consent to an Easement. As discussed above, the proposed Easement was from Majestic (which owned the Leased Premises) to Waldenwoods (which owned property contiguous to the Leased Premises) with LWCC's consent (because it had a lessee's interest in the Leased Premises). As noted above, depending on the form of the merger, the easement might

be unnecessary. Accordingly, it made sense that the Easement be negotiated at the same time as the merger. The conduct of the parties shows they agreed to time the discussions in just this manner.

Thus, the February 12, 2008 draft Pre-Organization Agreement, as revised by Majestic's Mr. Crouse and his counsel, provides for "Assignment of Golf Course Easement" **at the closing of the merger.** *Id.*, ¶ 13, C, iv, on page 9 (Apx 198a). On October 8, 2008, the day after Majestic allegedly sent its 30-day Default Notice under the Lease, Mr. Crouse sent an email reassuring LWCC of Majestic's desire to continue merger negotiations. The email attached the Easement Agreement and consent form, but stated that it need only be considered separate and apart from the merger if it a merger agreement "cannot be reached":

> We are approaching a critical decision point regarding proceeding with a merger with LWCC. . . .
>
> **If an agreement cannot be reached**, then we may be presented with a notice by LWCC of its intent to exercise the purchase option included in our lease. **Accordingly, we are providing the following attachments.**

F. Crouse Email, Oct. 8, 2008 (Apx 173a) (emphasis added). Mr. Crouse ended his email with the following paragraph inviting LWCC to continue the merger discussions:

> **We do not intend any of these items to be interpreted that we do not wish to successfully conclude a merger** – as you recall, it is WPL [Majestic] that has attempted to have this matter continue to receive consideration. **We are still hopeful that this process will be successful.**

Id. (emphasis in original). Thus, Mr. Crouse invited LWCC to continue merger negotiations, recognized that **should those negotiations fail**, LWCC would likely exercise its Option to purchase the Leased Premises, and advised that only **then** would LWCC be required to execute

the Consent to the Easement Agreement.[16] Mr. Crouse's October 8 email makes no mention of any demand that LWCC sign the Consent to Easement immediately and without regard to the merger negotiations.

On October 13, 2008, Mr. Crouse sent LWCC a lengthy letter discussing "problems" with the parties' merger negotiations (specifically, LWCC's refusal to grant Waldenwoods the unfettered right to cut trees on the Golf Course) – without any mention of the Consent to the Easement Agreement. (Apx 168a).

Taken together, this is evidence from which the trier of fact could conclude that Majestic's objective was not to receive an agreed-upon road easement, but rather to orchestrate a technical default so it could declare a forfeiture of the Lease.

Furthermore, Paragraph 26(D) of the Lease provides that where the tenant's "performance cannot reasonably be had within such 30 day period" after notice, a default occurs only if "Tenant shall not in good faith have **commenced** such performance within such thirty (30) day period and shall not diligently proceed therewith to completion." (Apx 22a). This portion of Paragraph 26(D), like the rest of the Lease, must be construed according to its terms under *Wilkie* and *Rory*. The parties had exchanged drafts of the Easement as part of the merger negotiations. Those negotiations – which included the terms of the Easement – were ongoing as of October 7, 2008, and could not reasonably be completed within 30 days after that because disputed issues remained. Indeed, the negotiations were ongoing at least until November 24, 2008, when Majestic's attorney sent the notice to quit. Genuine issues of material fact remain as to whether LWCC was diligently pursuing

[16] Waldenwoods' right to Easements would have survived LWCC's exercise of its Option and purchase of the Leased Premises. *See* Fifth Amendment to Lease, p 2, ¶ A(6) (Apx 91a).

those negotiations. The trial court erred by granting summary disposition for Majestic on this issue and the Court of Appeals erred by affirming.

Traditional contract defenses remain fully available under this Court's opinions in *Rory* and *Wilkie*. As the Court of Appeals recognized, traditional contract defenses include waiver and estoppel:

> As the *Rory* Court stated, "[o]nly recognized traditional contract defenses may be used to avoid the enforcement of [legal] contract provision[s]." *Rory*, 473 Mich at 470. Such defenses include duress, waiver, estoppel, fraud, and unconscionability. *Id.* at 470 n 23.

COA Op, p. 12 (Apx 30a). The Court of Appeals erred, however, when it held that such defenses have no application to this case.

Waiver and estoppel have clear application here, and questions of fact remained that precluded summary disposition. As applied to this case, the elements of equitable estoppel are (1) that Majestic's acts or representations induced LWCC to believe that Majestic wanted the consent to easement only when merger negotiations were concluded; (2) that LWCC justifiably relied on this belief, and (3) that LWCC was prejudiced as a result. See, e.g., *Morales v Auto-Owners Ins Co*, 458 Mich 288, 296-97; 582 NW2d 776 (1998). Similarly, this Court in *Quality Products* recognized that where "a course of conduct establishes by clear and convincing evidence that a contracting party . . . knowingly waived enforcement of [contract] terms, the requirement of mutual agreement has been satisfied" and the waiver is binding even in the face of an express contract provision barring waiver or oral amendment. 362 Mich at 373-74.

The existence of waiver and estoppel are questions of fact. See, e.g., *Cobbs v Fire Ass'n of Philadelphia*, 68 Mich 465, 465-66; 36 NW 788 (1888) (waiver); *Anderson v Sanders*, 14 Mich App 58, 61; 165 NW2d 290 (1968) (estoppel). LWCC affirmatively pleaded waiver and

estoppel,[17] and pointed the trial court and Court of Appeals to affirmative acts by Majestic that "knowingly waived" any right to demand LWCC's approval of a consent to easement as long as merger negotiations were ongoing. Those facts were more than sufficient to establish the existence of a genuine issue of material fact on the issues of waiver and estoppel.

There is a genuine issue of material fact as to whether Majestic, by its conduct, withdrew its notice of default and waived any demand for approval of the consent to the Easement Agreement so long as merger negotiations between the parties were continuing. The trial court erred when it granted summary disposition for Majestic on this issue, and the Court of Appeals clearly erred when it failed to reverse and remand.

C. Paragraph 22 of the Lease Did Not Obligate LWCC to Sign the Proffered Consent to Easement.

As explained above, there are genuine issues of material fact that exist for trial regarding whether Majestic properly notified LWCC of a default and opportunity to cure as required by Paragraphs 26 and 31 of the Lease, and whether Majestic waived or was estopped to assert that LWCC was in default. There remains, however, a simple way resolve this case: The unambiguous terms of Paragraph 22 of the Lease, "as written," did not obligate Majestic to sign the proffered Consent to Easement.

Both in the trial court and in the Court of Appeals, Majestic maintained that Paragraph 22 of the lease obligated LWCC to sign and return the proposed Consent to Easement within 30 days after Mr. Crouse's October 7, 2008 letter. Mr. Crouse's letter

[17] *See* LWCC's Answer to First Amended Complaint, Affirmative Defense No. 3, p. 21 (Apx 131a) ("Plaintiff['s] claims are barred by the doctrines of waiver and/or equitable estoppel"). LWCC also presented the relevant facts to the trial court and the Court of Appeals. The Court of Appeals is simply incorrect when it states that "the only recognized defense that could possibly be relied upon, based on defendant's pleadings, is the doctrine of unconscionability." COA Opinion, p. 12 (Apx 30a).

asserts that "Section 22 of the golf course lease obligates Lake Walden to **permit road crossing easements** when required by Waldenwoods for development of its adjoining land" (Apx 175a, reproduced at pp. 9-10, supra) (emphasis added), and then asks LWCC to "execute the Consent" approving a proposed written easement granted by Majestic (the property owner) to Waldenwoods. (*Id.*). When LWCC did not sign the Consent form, Majestic asserted LWCC was in default under the Lease, and purported to terminate the lease under Paragraph 26(D). (See Apx 165a).

Paragraph 22 of the Lease, "as written," does not obligate LWCC to execute a consent to an easement. Rather, Paragraph 22 provides only that "Tenant shall **permit drainage and utility easements** and **road crossings** to be **developed by** Landlord":

> 22. LANDLORD'S EASEMENTS AND ROAD CROSSINGS. Tenant shall **permit drainage and utility easements and road crossings to be developed by Landlord** on the Premises as required to permit development to occur on Landlord's Other Real Estate. The easements and crossings shall be installed by Landlord at its expense but located in areas mutually agreeable. The utilities and roads shall be installed in such a manner as to ensure that the integrity of the golf course in [sic] preserved, leaving the golf course in equal or better condition.

Lease, ¶ 22 (Apx 68a) (emphasis added). Contrary to Majestic's assertions, nothing in the plain language of Paragraph 22 required LWCC to sign and deliver a written consent to easement document.

Moreover, the plain language of Paragraph 22 makes no mention of a "road crossing easement" as demanded by Mr. Crouse. Paragraph 22 expressly mentions only "drainage and utility easements and road crossings." Mr. Crouse re-wrote the language of Paragraph 22 when he asserted that it obligated LWCC to sign a consent approving "road crossing easements."

Accordingly, the basis for the alleged default – LWCC's refusal to sign and deliver the proposed consent form approving the proposed "road crossing easement" – is not contained in Paragraph 22.[18] Since the October 7, 2008 letter demands LWCC do an act not required by the plain language of the Lease, and the alleged default described in the November 24, 2008 letter goes beyond LWCC's contractual obligations, there can be no default. The trial court and the Court of Appeals failed to apply the principles of *Wilkie* and *Rory* to this issue, and erroneously construed the plain language of Paragraph 22 of the Lease.

Also contrary to *Wilkie* and *Rory*, the Court of Appeals chose to enforce the first and second sentences of Paragraph 22 and disregard the third, which provides: "The utilities and roads shall be installed in such a manner as to ensure that the integrity of the golf course in [sic] preserved, leaving the golf course in equal or better condition." (Apx 68a). Majestic's November 2007 draft Easement Agreement (Apx 321a) simply identified a 66-foot wide easement for the proposed road crossing; it failed to identify the size, design, specifications or grade of the road to be constructed within that easement. This made it impossible for LWCC to determine if "the integrity of the golf course" would be preserved, thus "leaving the golf course in equal or better condition," as required by the third sentence of Paragraph 22. The Court of Appeals erred when it held that under Paragraph 22, "the only valid reason [for LWCC] to withhold consent to the Road Easement would have been the failure to agree on a location" for

[18] Majestic's brief to the Court of Appeals acknowledged that it did not request the consent to easement so that it could actually "develop" road crossings or utilities. Rather, Majestic asserts that it wanted the signed consent so it could attach the easement to an application to Hartland Township for zoning approval. See Majestic's Brief to the Court of Appeals, pp. 12-13. Majestic makes no claim that the Township would not have approved such an application **subject to** a future undertaking to obtain any necessary easements. See Hartland Township Zoning Ordinance, Article 33.

the Easement. COA Op, p. 13 (Apx 31a). At a minimum, the third sentence renders Paragraph 22 ambiguous as to what LWCC must approve, leaving questions to be resolved by the trier of fact both as to the meaning of the contract, see, *e.g., Klapp v United Ins Group Agency, supra*, 468 Mich at 453-54 ("It is well settled that the meaning of an ambiguous contract is a question of fact . . ."), and as to whether Majestic's proposal adequately protected the Golf Course.

This Court should reverse and remand for entry of judgment dismissing the complaint, instructing that *Wilkie* and *Rory* must be applied uniformly to all issues raised by a contract and that under the unambiguous terms of Paragraph 22 of the Lease, LWCC had no obligation to sign the proposed Consent to Easement. In the alternative, this Court should remand for trial as to the remaining issues of fact.

III. IN THE ALTERNATIVE, THIS COURT SHOULD HOLD THAT A LANDLORD MAY TERMINATE A LEASE OF REAL PROPERTY ONLY FOR THE TENANT'S MATERIAL DEFAULT

This Court is the steward of the common law of Michigan. See, e.g., *Velez v Tuma*, 492 Mich 1, 16; 821 NW2d 432 (2012). As such, the Court can modify the common law if it concludes that such a change is in the best interest of the jurisdiction. The Court of Appeals can participate in this authority, subject to Supreme Court supervision. The Court of Appeals recognized this, saying this case is jurisprudentially significant because that court "has not, in a published case, addressed the applicability of the material breach doctrine in circumstances where the contract at issue contains an express forfeiture clause." COA Op, p 10 (Apx 28a). More specifically, this case involves a lease of real property, a type of contract to which the common law, and certainly the statute law of Michigan, has long applied special rules. The Court of Appeals was deferential to this Supreme Court, which has in the last decade frequently held that contracts should be enforced as written. Yet if

this Court wishes to carve out an exception to *Wilkie* and its progeny by holding that Michigan public policy precludes forfeiture of a leasehold interest in real estate where the tenant's breach is not material, the Court certainly has that authority, just as the *Wilkie* Court had the authority to change the previously-existing common law.

As this Court recognized in *Rory*, a contract is not enforceable if it "violate[s] law or public policy." 473 Mich at 470. Such a conclusion, however, is not lightly reached. "[T]he determination of Michigan's public policy 'is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law.'" *Id.* at 470-71, quoting *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002).

Here, the applicable public policy is found in the statute law. The Legislature has repeatedly codified the law's abhorrence of forfeitures of interests in land. As the Court of Appeals observed, the legislature by statute provides that a land contract may only be deemed forfeited where there is a "material breach of the contract." MCL 600.5726, cited in COA Op, p. 3 (Apx 21a). MCL 600.5744(6) also creates a legal right in land contract vendees to redeem after judgment. Even if there is a material breach, the land contract vendee still has 15 days to cure the material breach before the land contract can be deemed forfeited. MCL 600.5728. Further, Chapter 57 of the Revised Judicature Act, MCL 600.5701 *et seq.*, governs summary proceedings to recover possession of land, including leased premises. See MCL 600.5701(c) and 600.5714. MCL 600.5744 allows a tenant to cure a monetary breach within 10 days **after** a judgment for possession, and a vendee to cure both monetary and "other material breaches of the executory contract for purchase of

the premises" within the same period. See MCL 600.5744(1), (4), (6).[19]

This case involves a commercial lease, not a land contract, and the alleged breach is not monetary, so neither statute directly applies. But the importance of both statutes is clear: they are definite expressions by the Legislature of a public policy that interests in land should not be forfeited for defaults that are not material.

Prior to *Wilkie*, this Court recognized the doctrine of "material breach" in other contexts. For example, it held that under the equitable doctrine of rescission, a party to a contract could rescind where the other party commits a "material" breach.[20] See, *e.g.*, *Walker & Co v Harrison*, 347 Mich 630, 634-35; 81 NW2d 352 (1957), citing RESTATEMENT CONTRACTS § 275; *Omnicom of Michigan v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997) ("In order to warrant rescission of a contract, there must be a material breach affecting a substantial or essential part of the contract"). Michigan courts have also held that a liquidated damages clause is enforceable only if it is reasonable. See, *e.g.*, *Moore v St Clair Co*, 120 Mich App 335, 340; 328

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[19] MCL 600.5744(6) provides: "When a judgment for possession is for nonpayment of money due under a tenancy or for nonpayment of money required to be paid under or any other material breach of an executory contract for purchase of the premises, the writ of restitution shall not issue if, within the time provided, the amount stated in the judgment, together with the taxed costs, is paid to the plaintiff and other material breaches of the executory contract for purchase of the premises are cured."

[20] *Wilkie* and *Rory* did not address rescission. The Court of Appeals noted that the present case involves forfeiture, not rescission, but acknowledged that forfeiture may be a **more drastic** remedy than rescission. "Forfeiture terminates an existing contract without restitution, while a rescission of a contract generally terminates it with restitution and restores the parties to their original status." COA Op pp. 10-11 (Apx 28a – 29a), quoting 17B CJS, Contracts, § 612, pp. 48-49. In the present case, as with many other commercial leases involving substantial tenant improvements, the lessor will receive the improvements at no cost when the lease is terminated.

NW2d 47 (1982).[21]

As is well understood by this Court, the courts of many other states have held that in light of the special status of real property at common law, a landlord may not declare a forfeiture of a real property lease for the tenant's trivial or immaterial breach, even where a lease provision allows termination for "any" breach. The decision of the Arizona Supreme Court in *Foundation Development Corp. v Loehmann's, Inc*, 163 Ariz 438; 788 P2d 1189 (1990) (Apx 356a) is instructive. The court construed a statute allowing a landlord to terminate a lease "when the tenant violates any provision of the lease." 788 P2d at 1193. First, the court noted that lease of real property involves a unique "interplay of property and contract law" that had its genesis in feudal England. 788 P2d at 1192. Second, the court noted that:

> Commercial tenants often make substantial investments for fixtures and improvements to the leasehold. They hire personnel and enter into agreements (often long term) to foster the continuation of their enterprise based on the expectation that they will be able to conduct their business for the term they leased the property. Sound public policy reasons militate in favor of assuring the stability of such economic relationships.

788 P2d at 1194. Third, the court noted that "permitting a forfeiture for any breach, no matter how trivial or technical" "would enable a landlord to obtain an undue advantage over his tenant." *Id.* Finally, the court noted that:

> [A]n overwhelming majority of courts has concluded, without reference to a specific statutory provision, that a lease may not be

[21] The Court of Appeals has also repeatedly held that one who commits the first substantial breach may not bring an action on the contract. See, *e.g.*, *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007); *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994); *Flamm v Scherer*, 40 Mich App 1, 8–9; 198 NW2d 702 (1972). In the present case, Majestic committed the first material breach of the Lease in February and October 2008, when it recorded Restrictions that were not authorized by the Lease. See pp. 8-9 and nn. 5-6, supra. The Court of Appeals erred when it disregarded this authority. See n. 10, supra.

> forfeited for a trivial or technical breach even where the parties have agreed that 'any breach' gives rise to the right of termination. . . . These courts note the sophistication and complexity of most business interactions and are concerned, therefore, that the possibilities for breach of a modern commercial lease are virtually limitless. In their view, the parties did not intend that very minor or technical failure to adhere to complicated lease provisions could cause forfeiture.

Id. at 1196.[22]

In *Takis, LLC v CD Morelock Properties, Inc*, 180 Ohio App 3d 243; 905 NE2d 204 (2008) (Apx 480a), the court held that:

> A forfeiture, or termination, clause in a lease must be strictly construed, and forfeiture should not be decreed in the absence of an express stipulation in the parties' lease agreement. . . . Even when such a provision is incorporated into the lease, equitable considerations may weigh against concluding that a lessee's conduct should result in forfeiture of a leasehold interest. "When a party raises an equitable defense, it is the responsibility of the court to weigh the equitable considerations before imposing a forfeiture." . . . The responsibility exists even when, as here, a party is in default of the lease.

905 NE2d at 209-10 (citations omitted).

Similarly, in *Entrepreneur, Ltd v Yasuna*, 498 A2d 1151 (DC 1985) (Apx 368a), the District of Columbia Court of Appeals, noting that forfeitures are "odious" and "looked on with disfavor," 498 A2d at 1160, 1161, held:

> "A breach by a tenant must be a violation of a substantial obligation to be enforceable by forfeiture," notwithstanding the inclusion in a lease of a clause purporting to permit termination in case of any breach.

498 A2d at 1151, quoting 2 M. FRIEDMAN ON LEASES § 16.2, at 840 (2d ed 1983).

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[22] *Citing* Annotation, Commercial Leases: Application of the Rule that Lease May be Canceled only for "Material" Breach, 54 ALR4th 595 (1987), and collecting cases in 788 P2d at 1196 n 10.

In *Collins v McKinney*, 871 NE2d 363 (Ind App 2007) (Apx 437a), the Indiana court held that "As a general rule, an express provision in a lease that allows the breach of a covenant that works a forfeiture of the agreement, is enforced if the breach is *material*." 871 NE2d at 371, *quoting Page Two, Inc v PC Mgmt, Inc*, 517 NE2d 103, 107 (Ind App 1987) (emphasis by the *Collins* court).[23] The decisions of many other state courts are in accord.[24] Many of these cases recognize that because forfeiture of a leasehold triggers the equitable remedy of ejectment, equitable defenses are available just as they would be in an action for rescission.

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[23] To determine whether a breach is "material," the Indiana courts use the five-factor approach from RESTATEMENT (SECOND) CONTRACTS, § 241 (1981): "In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that that party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." *See Collins v McKinney*, 871 NE2d at 375.

[24] *See, e.g., Tri-Wood Realty, Inc v Pro Par, Inc*, 373 So2d 297, 299-300 (Ala 1979) (Apx 379a); *Hendrickson v Freericks*, 620 P2d 205, 212 (Alaska 1980) (Apx 384a); *Keating v Preston*, 42 Cal App 2d 110, 118; 108 P2d 479 (1940) (Apx 392a); *Collins v Sears, Roebuck & Co*, 164 Conn 369, 382-83; 321 A2d 444 (1973) (Apx 401a); *Sabema Corp v Sunaid Food Products, Inc*, 309 So2d 620, 621 (Fla App 1975) (Apx 408a); *Food Pantry, Ltd v Waikiki Business Plaza, Inc*, 58 Haw 606, 612-14; 575 P2d 869 (1978) (Apx 410a); *Mountain Restaurant Corp v Park Center Mall Assoc*, 122 Idaho 261, 265; 833 P2d 119 (Idaho App 1992) (Apx 419a); *Ream v Yankee Park Homeowner's Ass'n, Inc*, 915 NE2d 536, 542-43 (Ind App 2010) (Apx 426a); *Beck v Trovato*, 260 Iowa 693, 697-98; 150 NW2d 657 (1967) (Apx 447a); *Kohn v Babb*, 204 Kan 245, 250-51; 461 P2d 775 (1969) (Apx 450a); *United Cigar Stores Co of America v Hollister*, 185 Minn 534, 536; 242 NW 3 (1932) (Apx 456a); *Johnny's, Inc v Njaka*, 450 NW2d 166, 168 (Minn App 1990) (Apx 458a); *UHS-Qualicare, Inc v Gulf Coast Community Hospital, Inc*, 525 So2d 746, 756 (Miss 1987) (Apx 461a); *Fifty States Mgt Corp v Pioneer Auto Parks, Inc*, 46 NY2d 573, 576-78; 389 NE2d 113 (1979) (Apx 475a); *Easton Theatres, Inc v Wells Fargo Land & Mortgage Co*, 265 Pa Super 334; 401 A2d 1333 (1979) (Apx 487a); *Thunderstik Lodge, Inc v Reuer*, 585 NW2d 819, 824 (SD 1998) (Apx 496a); *Champlain Oil Co v Trombley*, 144 Vt 291, 297; 476 A2d 536 (1984) (Apx 503a); *Bolling v King Coal Theatres, Inc*, 185 Va 991, 996; 41 SE2d 59 (1947) (Apx 506a); *In Re Murphy's Estate*, 191 Wash 180, 188; 71 P2d 6 (1937) (Apx 512a); *Cheyenne Mining & Uranium Co v Federal Resources Corp*, 694 P2d 65, 74 (Wyo 1985) (Apx 530a).

To be understood then is that if this Court wishes to hold narrow the scope of the common law created by *Wilkie* and its progeny by holding, as a matter of public policy, that a landlord may terminate a lease only where the tenant's default is material, there is ample support for this principle under both Michigan case law and the law of other jurisdictions.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Lake Walden Country Club, Inc. respectfully requests that this Court reverse the decision of the Court of Appeals and remand to the trial court for entry of a judgment for LWCC, or in the alternative for a trial on the remaining issues of material fact.

In the further alternative, if this Court should wish to carve out a common law public policy exception to *Wilkie* and *Rory*, it should hold that a lease of real property cannot be terminated for a default that is not material, reverse the Court of Appeals and reinstate the judgment of the trial court on that issue.

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