

ORIGINAL

STATE OF MICHIGAN
IN THE SUPREME COURT

GLENN S. MORRIS,

Plaintiff/Appellee,

v

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C, a professional limited liability company, and DAVID W. CHARRON,

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY, L.L.C.,

Appellant.

Supreme Court Docket No. 149631

Court of Appeals No. 315007

Lower Court Case No. 09-01878-CB

Circuit Judge Christopher P. Yates

MORRIS, SCHNOOR & GREMEL
PROPERTIES, L.L.C.,

Plaintiff/Appellee,

v

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C, a professional limited liability company, and DAVID W. CHARRON,

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY, L.L.C.,

Appellant.

Supreme Court Docket No. 149632

Court of Appeals No. 315702

Lower Court Case No. 09-11842-CB

Circuit Judge Christopher P. Yates

ORAL ARGUMENT REQUESTED

GLENN S. MORRIS,

Plaintiff/Appellee,

v

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C, a professional limited liability company, and DAVID W. CHARRON,

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY, L.L.C.,

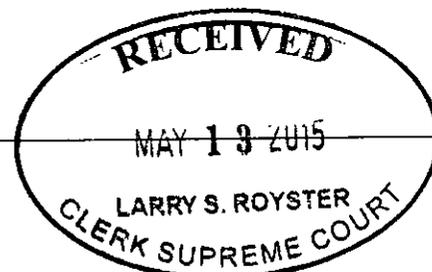
Appellant.

Supreme Court Docket No. 149633

Court of Appeals No. 315742

Lower Court Case No. 09-01878-CB

Circuit Judge Christopher P. Yates



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PLAINTIFFS-POTENTIAL APPELLEES GLENN S. MORRIS AND MORRIS, SCHNOOR & GREMEL PROPERTIES, LLC'S SUPPLEMENTAL OPPOSING BRIEF TO POTENTIAL APPELLANT NEW YORK PRIVATE INSURANCE, LLC'S APPLICATION FOR LEAVE TO APPEAL

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**COUNTER-STATEMENT IDENTIFYING THE JUDGMENT APPEALED FROM
AND THE RELIEF SOUGHT**

This case comes before this Court by way of Potential Appellant New York Private Insurance Agency, LLC's ("NYPIA") ill-supported Application for Leave to Appeal. After a 22 day bench trial, on March 26, 2013, the Final Judgments in these two related cases were entered by Judge Yates, the Business Court Judge of the Kent County Circuit Court, in favor of Plaintiffs/Potential Appellees Glenn S Morris and Morris, Schnoor & Gremel Properties, L.L.C. (collectively, "Morris Plaintiffs" and individually "Morris" and "MSG Properties") and against Appellant NYPIA. Potential Appellant NYPIA filed its Claim of Appeal of these Judgments. After extensive briefing and oral arguments, the Court of Appeals in a 59 page well-reasoned Opinion affirmed the Circuit Court's Findings of Fact, Conclusions of Law and Final Judgments on May 29, 2014. (May 29, 2014 Court of Appeals Opinion, Ex. 1 to the Morris Potential Appellees' Answer to the Application). On July 9, 2014, NYPIA filed its Application For Leave To Appeal with this Court. (See NYPIA's July 9, 2014 Application For Leave To Appeal). On April 1, 2015, this Court exercised the procedure for an abbreviated hearing on the Application requesting the parties to submit briefs by May 13, 2015.

Potential Appellees Morris and MSG Properties respectfully request that this Court deny NYPIA's Application For Leave To Appeal because NYPIA has failed to show sufficient grounds for an appeal to this Court as required under Michigan Court Rule ("MCR") 7.302(B) and because both the Circuit Court and Court of Appeals have properly decided the issues before them after an exhaustive analysis of both the facts and the law.¹

¹ Alternatively, this Court should "take the action" set forth in Section C of this Supplemental Brief and order joinder of NYPIA itself under MCR 2.207 or remand to the lower courts with instructions to do so.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. **WHETHER POTENTIAL APPELLANT NYPIA'S APPLICATION FOR LEAVE TO APPEAL PRESENTS SUFFICIENT GROUNDS FOR APPEAL UNDER MCR 7.302(B) WHERE THE DECISION BELOW IS NOT CLEARLY ERRONEOUS AND WILL NOT CAUSE MATERIAL INJUSTICE, DOES NOT INVOLVE LEGAL/EQUITABLE PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE, AND DOES NOT INVOLVE ANY REAL CASE CONFLICT?**

Potential Morris Appellees say: "NO."

Potential Appellant NYPIA says: "YES."

This issue was not before the Circuit Court or the Court of Appeals.

- II. **SINCE POTENTIAL APPELLANT NYPIA A) RECEIVED A MEANINGFUL OPPORTUNITY TO BE HEARD ON WHETHER IT ACTED IN GOOD FAITH AND TOOK FOR VALUE UNDER UFTA'S CLAWBACK REMEDY PROVISIONS, AND B) IS UNABLE TO SHOW ANY ACTUAL PREJUDICE AS A RESULT OF ANY CLAIMED DEFECT IN NOTICE, DID BOTH THE CIRCUIT COURT AND COURT OF APPEALS ERR IN CONCLUDING THAT NYPIA WAS NOT DEPRIVED OF DUE PROCESS?**

Plaintiffs/Potential Appellees Morris and MSG Properties say: "NO."

The Kent County Circuit Court and Court of Appeals said: "NO."

Potential Appellant NYPIA apparently says: "YES."

- III. **SINCE NYPIA'S FILING OF A MOTION FOR RECONSIDERATION CURED ANY SUPPOSED NOTICE ISSUE THAT NYPIA MAY RAISE, DID THE COURT OF APPEALS ERR IN CONCLUDING THAT NO DUE PROCESS VIOLATION REQUIRING REVERSAL WAS PRESENT?**

Plaintiffs/Potential Appellees Morris and MSG Properties say: "NO."

The Kent County Circuit Court and Court of Appeals said: "NO."

Potential Appellant NYPIA apparently says: "YES."

- IV. **SINCE THE COURT OF APPEALS PROPERLY CONCLUDED THAT NYPIA FAILED TO TIMELY RAISE ANY ARGUMENT UNDER MCR 2.205 AND MOREOVER NYPIA FULLY PARTICIPATED IN THE UFTA PROCEEDINGS, DID THE COURT OF APPEALS COMMIT ERROR IN REJECTING NYPIA'S MCR 2.205 ARGUMENTS?**

Plaintiffs/Potential Appellees Morris and MSG Properties say: "NO."

The Kent County Circuit Court and Court of Appeals said: "NO."

Potential Appellant NYPIA apparently says: "YES."

- V. **IN THE EVENT THIS COURT CONCLUDES THAT NYPIA MIGHT HAVE BEEN PREJUDICED AND THE LOWER COURTS CLEARLY ERRED IN ANY MANNER ON THE PARTY ISSUE, SHOULD THIS COURT EXERCISE ITS AUTHORITY UNDER MCR 2.207 AND THE COMMON LAW TO REJOIN NYPIA AS A PARTY DEFENDANT OR ORDER THIS REJOINDER TO BE PERFORMED ON REMAND?**

Plaintiffs/Potential Appellees Morris and MSG Properties say: "YES."

The Kent County Circuit Court and Court of Appeals did not need to consider this question in light of their holdings.

Potential Appellant NYPIA apparently says: "NO."

- VI. **IN THE EVENT THAT THIS COURT WERE TO CONCLUDE THAT NYPIA MIGHT HAVE BEEN PREJUDICED AND THE LOWER COURTS ERRED IN ANY MANNER ON THE PARTY ISSUE SUCH THAT A REVERSAL IS APPROPRIATE, SHOULD THIS COURT ORDER A REMAND FOR THE SUPPLEMENTATION OF THE RECORD WHICH WOULD CURE ANY ALLEGED PREJUDICE?**

Plaintiffs/Potential Appellees Morris and MSG Properties say: "YES."

The Kent County Circuit Court and Court of Appeals did not need to consider this question in light of their holdings.

Potential Appellant NYPIA apparently says: "NO."

I. COUNTER-STATEMENT OF FACTS

A. INTRODUCTION

These two related cases arise out of a fraudulent transfer of all of the assets of Morris, Schnoor & Gremel, Inc. ("MSG") perpetrated in large part by Potential Appellant New York Private Insurance, LLC ("NYPIA") and its principal, Guy Hiestand ("Hiestand"), in which all of the assets of MSG were eventually transferred to NYPIA, an entity created by MSG's accountant, Guy Hiestand ("Hiestand"), for the expressed purpose of receiving the assets fraudulently transferred so as to avoid the claims by Plaintiffs in the other related case 07-06441-CR. In this Supplemental Brief's Facts Section, the Morris Parties set forth NYPIA and its principal, Guy Hiestand's, extensive bad faith involvement in the fraudulent transfer.² The Morris Parties also set forth how both the Circuit Court and then the Court of Appeals carefully considered and then exhaustively reviewed the evidence and law under the very unique facts of this case, ultimately concluding that Potential Appellant NYPIA and its principal so actively participated in the fraudulent transfer that they received all of the assets of Morris, Schnoor & Gremel, Inc. ("MSG") in bad faith and for little to no consideration. In light of this extensive consideration by the Circuit Court and then exhaustive review by the Court of Appeals of the very unique facts of this case, the Morris Parties submit that this Court should deny NYPIA's Application in its entirety.

B. FACTUAL AND PROCEDURAL BACKGROUND

From the beginning of the story of this case, both Hiestand and then NYPIA, as an entity created by Hiestand, have been at the epicenter of the meetings, machinations, and actual execution of the plan to defraud the Morris Parties such that they are **not** good faith transferees nor did they take for value when they received 100% of the assets of the Morris, Schnoor & Gremel Insurance Agency in November of 2008.

² For a fuller recitation of the very complicated underlying facts of the case, see the Plaintiffs-Potential Appellees Glenn S. Morris and Morris, Schnoor & Gremel Properties, L.L.C.'s ("Morris Parties") August 4, 2014 Opposing Brief To Potential Appellant New York Private Insurance, LLC's Application For Leave To Appeal which is expressly reincorporated herein.

As the trial testimony and admitted deposition testimony demonstrate, Guy Hiestand, NYPIA's Principal, was a participant from the outset in a small advisory council ("Council") which was created to come up with various strategies for Judd Schnoor, MSG's other owner, to cut Glenn Morris out of MSG and transfer all of the assets out of MSG so that the Morris Parties would be unable to recover any value. (See July 14, 2010 Hiestand Deposition at pp. 203-205; August 11, 2011 Trial Transcript, Young at p. 161; March 17, 2008 Schnoor Deposition at pp. 98-99; and July 14, 2008 Larimore Deposition at p. 26.) Shortly after creation of this Council, as chronicled in detail in the Facts Section of the Morris Parties' Answer to NYPIA's Application, the Council, including Hiestand, came up with various strategies to "screw Glenn Morris" and siphon away the value and assets of MSG. (See The Morris Parties' Facts Section of their August 4, 2014 Answer to NYPIA's Application, at pp. 3-5) (setting forth some of these various Council schemes, including the so-called TIA2K Plan in which Hiestand actively participated and which became the model for the later transfer of the MSG assets to NYPIA). While this Council scheming was occurring, Judd Schnoor, MSG's Principal, stopped making payments on the \$2.3 million promissory note the Court had ordered Schnoor to pay Morris when it ordered Morris to sell his half of the interest in MSG to Schnoor in April of 2008 even though the Circuit Court had refused to sanction such a non-payment. (See Circuit Court's December 27, 2012 Findings of Fact, at p. 5).

Before Schnoor ceased payments on the note, the Council had determined to give Schnoor an alleged security interest in all of the assets of MSG, even though there is no evidence that any actual funds were advanced by Schnoor to support this security interest. (See Plaintiffs' Trial Ex. 133, 171, and 182 (documenting this alleged security interest)). (See Circuit Court's December 27, 2012 Findings, at pp. 5-6). On May 22, 2008, with Schnoor in solid control of MSG, the Council followed the TIA2K plan and determined to also create for Charron, as MSG's attorney, an alleged security interest in all the assets of MSG purportedly for future attorney fees. (See Plaintiffs' Trial Exhibit 250). (See Circuit Court's December 27, 2012 Findings, at pp. 6-8). Because Schnoor stopped paying on the \$2.3 million obligation to the

Morris Parties, Morris obtained a court order directing Schnoor to resume making payments on the promissory note. (See July 24, 2008 Circuit Court Order.) Despite this Circuit Court Order, Schnoor still refused to make the ordered payments so, on August 20, 2008, the Circuit Court commenced a hearing to determine whether Schnoor should be held in civil contempt for failing to comply with the Circuit Court Order. (See Circuit Court's December 27, 2012 Findings, at p. 5). In this multi-day contempt hearing, the value of MSG was a key issue as to whether Schnoor could make the Court-ordered payments. Thus, Hiestand, as Schnoor's personal accountant and MSG's accountant, was present in the courtroom to actively assist Schnoor in the civil contempt defense. In fact, Hiestand was involved in the preparation of many of the contempt hearing exhibits used by Schnoor to establish the value of MSG. Moreover, when Schnoor became confused as to some of the valuation questions on the stand, the record reflects that Schnoor met with Hiestand over one of the hearing breaks to be educated on the financial documents. (See September 2, 2008 Judd Schnoor Contempt Hearing Transcript at p. 132.) Schnoor and Hiestand presented the value of the MSG assets as \$3,273,005 **net of the** Court ordered \$2.5 million debt to Morris; an amount (gross value of more than \$5.75 million) which greatly exceeded the amount Hiestand and NYPIA "paid" for these same assets just a few months later. (See Plaintiffs' Trial Ex. 328.)

While Schnoor told the Court he lacked the financial ability to pay, the real story involves a far more strategic basis for not paying. As Charron stated in April 2008 to the Council, "There are things we really need to do before MSG does not make the next payment on the Morris note." (See Plaintiffs' Trial Ex. 235; 4/25/08 email.) By June 2008, the Council, including Hiestand, had everything in place to "screw Glenn." The plan devised by the Council was given the operative term "**nuclear option**." (See, e.g. Plaintiffs' Trial

Ex. 363; 10/17/08 email.)³ By September 2008, when the Council realized they could not negotiate away the claims of Morris to be paid from the Court ordered sale of his interest in MSG and a damage remedy seemed probable in the contempt hearing, a Council meeting was held to coordinate the "nuclear option." (See Plaintiffs' Trial Ex. 330; 9/24/08 email.) (See also July 14, 200 Deposition of Guy Hiestand) (in which Hiestand admits that he participated in Council meetings in September, October, and November of 2008 with Judd Schnoor).

Around the same time, Hiestand aggressively worked behind the scenes to transfer the assets of MSG to a friendly buyer to make sure that the Morris Parties would get nothing. As originally contemplated by the Council, it was intended that Schnoor would foreclose on his own alleged lien and sell all the assets of MSG to a newly created company owned by his son, Josh Schnoor, and others. (See Plaintiffs' Trial Ex. 303 (email sent by Charron to Schnoor in which Charron referred to the payment of \$14,000 by Schnoor as a "down payment on an asset sale if needed" and presaging a transaction in which Schnoor could "conduct a UCC sale of your lien against all of the assets of MSG to the new company.")) (See also Plaintiffs' Trial Ex. 310). However, because the Circuit Court had issued a "no asset transfer" Order on August 22, 2008, it was apparently concluded that Schnoor himself should not transfer all of the assets and that, instead, Charron's alleged security interest would be used to transfer the MSG assets for little or no value to a "friendly buyer". Hiestand, acting for Schnoor, then began to seek out possible "friendly buyers" for the MSG assets. (See September 15, 2009 Deposition of Guy Hiestand, at pp. 76-78; February 23, 2011 Deposition of Guy Hiestand, at pp. 35-38).⁴ Hiestand admitted he was the person responsible for

³ Hiestand has admitted that the "nuclear option" was directed at the Morris Parties and involved the alleged creation and foreclosure of a supposed security interest which would result in all of the assets of MSG being transferred to a friend of Judd Schnoor so that Schnoor and his family could be involved in the business after the transfer. (See, e.g., July 14, 2010 Deposition of Guy Hiestand, at pp. 207-209, 219-220, 223, 232-233, 250).

⁴ In his testimony, Hiestand described what he meant by the "friendly buyer" concept. As Hiestand testified:

Q. The assumption was they were going to stay?

performing all of the investigation and contacting the various potential friendly buyers. See *Id.* Hiestand also admitted that the beauty of this "friendly buyer" process would be that the promissory note debts to Glenn and Jim Morris and MSG Properties would be rendered uncollectable and Schnoor would still be involved. (July 14, 2010 Hiestand Deposition at pp. 208, 209, 217; February 23, 2011 Hiestand Deposition at pp. 91-92.) Thus, Hiestand himself initially contacted Young, one of Schnoor's long-time friends and business associates to be the buyer. Ultimately, Young advised Hiestand that he would not "screw Glenn". (See August 11, 2011 Trial Transcript, Dave Young at p. 223.) Despite the urging of Hiestand and the assurance by Charron that he would defend Young in the probable fraudulent transfer claims that would be filed if the assets were all transferred for little or no value, Young steadfastly refused.⁵ (See Plaintiffs' Trial Ex. 307, 343, 346, 349, 355-357, 359.) In addition to refusing, Young has testified that he pointedly told Hiestand that the Charron dictated "price" was way too low and would almost certainly be the subject of

A. The assumption I had is that I had seen the letter that Dave Charron had given Judd before he was going to call the assets saying find a friendly buyer if you want to continue. So --

Q. You were a friendly buyer?

A. I think Judd figured I would be a more friendly buyer -- well, actually, I think he thought Dave would be a good friendly buyer.

Q. If Dave didn't work, you were going to be the friendly buyer?

A. Well, then somebody else. I had no anticipation of getting that involved.

Q. But I understand, though, at the point that you did get involved in the form of New York Private Insurance, you acquired all the assets, you acquired the assets you stated without the benefit of a noncompete from either Judd or Josh.

Right?

A. Yes.

July 14, 2010 Deposition Testimony of Hiestand, at p. 172). Hiestand further testified that under the "friendly buyer" concept, the goal was to attempt to wipeout the debts owed to the Morris Parties and where Schnoor and his family would stay involved and continue to have jobs after the "transfer". (See July 14, 2010 Deposition of Guy Hiestand, at pp. 203-205, 217-220, 232-233). It is worth noting that the Hiestand Deposition Transcripts along with the other deposition transcripts referenced herein were admitted at trial as evidence.

⁵ Charron advised Young that C&H would give the buying entity "a discount" on the obligation once "the smoke cleared." (See Plaintiffs' Trial Ex. 359; 10/16/08 email.)

litigation.⁶ (See August 11, 2011 Trial Transcript, Young at p. 222.) (See also July 14, 2010 Deposition of Guy Hiestand, at p. 266) (admitting that Young may have told him that the price was "too low" and would result in litigation). However, these comments did not cause Hiestand to reconsider the fraudulent transfer of MSG's assets and dissuade him from continuing bad faith participation in the fraudulent transfer.

Instead, after this rejection, Hiestand then immediately came up with an alternative friendly buyer to participate in and complete the fraudulent transfer of MSG's assets by forming NYPIA which further demonstrate that NYPIA was **not** a good faith transferee for value. At that point, NYPIA's principal, Hiestand not only continued his intimate and active involvement in the fraudulent transfer process which demonstrates a lack of good faith but became the key actor of the fraudulent transfer when he decided that he would be the perfect "friendly buyer." As a result, NYPIA was secretly created with Hiestand and his client and friend William Woodworth ("Woodworth") serving as the sole NYPIA owners. (See Plaintiffs' Trial Ex. 395.) However, as the Circuit Court determined at trial, NYPIA "was created and controlled in substantial part by Guy Hiestand." (See December 27, 2012 Circuit Court Opinion at p. 12). **Moreover, and not surprisingly, the Circuit Court also found that NYPIA and Hiestand fit the "friendly buyer" concept to a "T". (See December 27, 2012 Circuit Court Findings of Fact, at pp. 6, 7).** On the same date NYPIA was created, the trigger was pulled on the "nuclear option" transferring 100 percent of the assets of MSG which C&H had seized on October 18, 2008, valued at over \$2.7 million, net of the \$2.3 Morris debt, in exchange for \$100,000 cash and an unsecured and non-personally guaranteed note for another \$295,000. (See *Id.*, at p. 7, 22-23 and footnote 8, as well as record evidence cited thereon). This note, true to Charron's word to the friendly buyer comment back in September, when the Council was

⁶ The Bank would be paid off as secured creditors, (See Plaintiffs' Trial Ex. 398), leaving Morris and those associated with him high and dry. Indeed, the asset purchase agreement of November 7, 2008, between C&H and NYPIA laid out this very transaction, (see Plaintiffs' Trial Ex. 397), and the bill of sale signed on November 21, 2008, memorialized the transaction in which C&H sold all of the assets of MSG to NYPIA for \$395,000. (See Plaintiffs' Trial Ex. 415). NYPIA paid C&H approximately \$100,000 in cash, (see Plaintiffs' Trial Ex. 418), and gave C&H a promissory note for \$295,000. (See Plaintiffs' Trial Ex. 416.) This was then discounted by Charron after the transfer by \$100,000.

deciding on a strategy, was then discounted by \$100,000 and paid off once the agency contingency payments were received by NYPIA in February 2009.⁷ (See Plaintiffs' Trial Ex. 359.) Thus, as this evidence demonstrates, both Hiestand and NYPIA were intimately involved in the planning, execution, and actual transfer of all of MSG's assets for little or no value to NYPIA which graphically demonstrates that they did not take the MSG assets in good faith and for fair value.

Even though there was a Circuit Court Order in place which specifically precluded the transfer of MSG's assets without the Circuit Court's approval, the alleged "transfer" in November of 2008 was not disclosed to the Circuit Court or counsel for Morris at the time by Hiestand and NYPIA or any of the other alleged transfer participants like Attorney Charron. (See Circuit Court's December 27, 2012 Contempt Opinion, at p. 7 and December 27, 2012 Findings of Fact, at p. 11). Moreover, neither Hiestand nor NYPIA sought the Circuit Court's approval for the transfer of the assets. Instead, as discussed below, NYPIA and Hiestand did everything in their power to hide the full details and extent of the fraudulent transfer from the Morris Parties for as long as possible which further demonstrates NYPIA's lack of good faith.

Consistent with NYPIA's overall bad faith strategy to secretly participate in the fraudulent transfer of MSG's assets and then do its best to prevent the true scope and details of the fraudulent transfer from being uncovered, Guy Hiestand, NYPIA's principal immediately after the **secret** transfer had occurred in November of 2008, set-up a "jaundiced" bad faith strategy to create a thrust-upon conflict of interest to try and disqualify Miller Canfield, the Morris Parties' counsel, from representing the Morris Parties if the then

⁷ The insurance company contingency payments were historically paid to MSG in the first part of every year and could be worth as much as \$500,000 in any given year. The right to receive these payments was one of the assets transferred to NYPIA as a part of the alleged "sale." The \$100,000 was purportedly obtained by borrowing from the MSG credit line.

secret NYPIA transfer were ever subsequently discovered.⁸ Specifically, Guy Hiestand and NYPIA came up with the strategy to have Hiestand, as NYPIA's principal, go to another office of Miller Canfield other than its Grand Rapids' office (i.e. its Kalamazoo office) and retain an unrelated Miller Canfield attorney to prepare a very minor lease document in order to be prepared to try to disqualify Miller Canfield in the future from representing the Morris Parties against NYPIA as the transferee of the secret fraudulent transfer, should the transfer ever be discovered. Thus, while solely knowing about the secret "purchase" of MSG's assets and the acquisition of the Morris suit, as well as Attorney Stek and Miller Canfield's representation of the Morris Parties, Guy Hiestand and NYPIA cold-called the Kalamazoo office of Miller Canfield to retain the Firm to prepare a lease for space at 170 Marcel in Rockford, Michigan. (See February 26, 2009 Hearing Transcript, at pp. 53-55) (which is part of the consolidated appeal record in the Court of Appeals). At no point during their brief interaction with the Kalamazoo office did Guy Hiestand or anyone else at NYPIA ever disclose that NYPIA had secretly "purchased" the assets of MSG. (See February 26, 2009 Evidentiary Hearing Transcript, at p. 31-32) (wherein Hiestand admits that he did not disclose to Miller Canfield's attorneys in Kalamazoo that NYPIA had purchased assets that were part of the Glenn Morris case being litigated by Miller Canfield as counsel for Morris). (See also July 9, 2009 Circuit Court Opinion in the 2007 Case, at pp. 3, 5) (holding for the same). Moreover, Guy Hiestand never disclosed that NYPIA had secretly "purchased" a claim adverse to a party (i.e., Morris) that Miller Canfield had long represented. (See, e.g., *Id.* and February 26, 2009 Evidentiary Hearing Transcript, at p. 29). Finally, even Guy Hiestand admitted that he did not disclose to Miller Canfield in Kalamazoo that he had knowledge of, involvement in,

⁸ Because of Miller Canfield's extensive participation in the underlying case which had been extensively litigated for multiple years which Guy Hiestand also attended and actively participated in, Hiestand certainly knew and recognized that Miller Canfield had an unique knowledge of the very complicated facts and circumstances of the underlying case that any subsequent counsel could not easily or likely ever duplicate. Thus, if NYPIA were to be able to disqualify Miller Canfield based on an alleged conflict of interest, it was a fair assumption that a subsequent counsel would not likely duplicate Miller Canfield's knowledge of the unique and incredibly complicated factual background of the case and thus would be unlikely able to assist the Morris Parties in undoing the fraudulent transfer.

and a relationship to the lawsuit in which Miller Canfield was representing Glenn Morris and Morris Insurance Agency against Morris, Schnoor and Gremel. (See February 26, 2009 Evidentiary Hearing Transcript, at p. 31).

Once the transfer was eventually discovered by the Morris Parties and consistent with NYPIA's clear strategy to hide their fraud, Hiestand and NYPIA moved to disqualify Miller Canfield from representing Morris in any further proceedings involving NYPIA. In response, Miller Canfield filed a Court-ordered post-hearing response brief in both the original 2007 companion case and one of the 2009 cases involving NYPIA (i.e. the 09-01878-CB case). (See Miller Canfield's March 27, 2009 Response Brief to New York Private Insurance's Disqualification Motion). After hearing oral argument and reviewing the Parties' Post-Hearing Briefing, the Court rejected NYPIA's attempts to continue to cover up its fraud participation by disqualifying Miller Canfield. As the Court stated in rejecting NYPIA's "jaundiced" attempt to cover up its fraud:

This is a classic case where a motion for disqualification must be viewed with an especially jaundiced eye.

...

The Court is especially suspicious of NYPI, and especially sympathetic to the plight of both Miller Canfield and the plaintiffs in this case, for several reasons. First, NYPI sought representation from Miller Canfield almost immediately after it acquired MSG (including the interest of MSG in this litigation), but NYPI never disclosed its interest in MSG to Miller Canfield. Second, although NYPI sought representation concerning a matter arising in the Grand Rapids area, NYPI chose to go to Miller Canfield's Kalamazoo office, rather than its Grand Rapids office where Attorney Stek works, to seek legal assistance. Third, Miller Canfield ended its representation of NYPI before the conflict-of-interest issues was even raised in the above-captioned case. Fourth, the sale of MSG to NYPI was accomplished in direct violation of the Court's order and in a manner designed to hide the transaction from the plaintiffs, their counsel Miller Canfield, and even from the Court.

...

In sum, disqualification of Miller Canfield is simply not an appropriate remedy in this case.

(See Circuit Court's July 9, 2009 Opinion and Order Rejecting NYPIA's Disqualification Motion, at pp. 4-5) (emphasis added). Thus, through this disqualification effort, NYPIA and Hiestand continued their active bad faith participation in the fraudulent transfer and the post-transfer process to protect it from being uncovered.

Not surprisingly, in light of a) the secret nature of the transfer of all of the assets of MSG to NYPIA for little or no value, b) Hiestand's control of NYPIA, and c) the Schnoor family's continued key involvement with NYPIA after the transfer, Morris and MSG Properties both concluded that the alleged transfer bore the classic framework of a fraudulent transfer⁹ and was also a blatant violation of the Circuit Court's August 22, 2008 "no asset transfer" order. As a result, both Morris and MSG Properties filed suit, alleging that NYPIA, Charron, C&H, and MSG were liable for violations of the UFTA, conversion, a commercially unreasonable sale under Article IX, and common law fraud.¹⁰ (See Glenn Morris' Complaint in Case No. 09-01878-CB and MSG Properties' Complaint in Case No. 09-11842-CB). Eventually, after a series of summary disposition hearings, the Circuit Court dismissed NYPIA from any direct liability for an alleged direct UFTA violation but within weeks expressed to counsel for NYPIA that in so doing the NYPIA/MSG assets were still potentially subject to enforcement remedies including a UFTA clawback remedy should the Circuit Court determine that first C&H and then NYPIA were found to **not** "be good faith transferees who took for value". (See March 19, 2010 Hearing Transcript.) In that hearing in these UFTA cases at which NYPIA legal counsel attended even though the direct claims against it had been dismissed, the Circuit Court highlighted that the dismissal of the direct claims previously alleged against NYPIA did not mean that the Circuit Court could not later determine that the assets of NYPIA should be the subject of remedies for a

⁹ The Circuit Court after 22 days of trial agreed that the transfer was a classic fraudulent transfer in violation of Michigan's version of the Uniform Fraudulent Transfer Act. (See December 27, 2012 Opinion, at p. 10)(chronicling why it was a classic fraudulent transfer and bore numerous badges of fraud).

¹⁰ Morris also filed a motion for an order to show cause why parties should not be held in contempt against all of the same parties including NYPIA in the original case in which the no transfer order had been issued which the Circuit Court eventually granted.

UFTA violation including the imposition of liens and possible clawback judgments. (See March 19, 2010 Hearing Transcript; See also May 28, 2010 Hearing Transcript at p. 11.) Indeed, in the course of the hearing, NYPIA's counsel declared that since NYPIA and its assets were still exposed to possible clawback remedies even after the direct claims had been dismissed, that he would consider filing a motion for summary disposition on behalf of NYPIA on the remedy risks and would be filing Affirmative Defenses to the claims that the NYPIA assets remained exposed to a possible remedy judgment. (See March 19, 2010 Hearing Transcript at p. 73-75.) **On April 14, 2010, NYPIA in fact filed Affirmative Defenses in these cases responding to the claims that their assets remained subject to remedy enforcement and asserting that it took the assets in good faith and for value. (See April 14, 2010 Affirmative Defenses).** Moreover, despite expressly indicating on the record that NYPIA might eventually file a motion to have the equitable clawback remedy against NYPIA dismissed, (presumably once discovery was completed), NYPIA did not ever file any such motion.

Subsequent to the Circuit Court's decision to allow discovery on both the UFTA clawback remedy issues and the Contempt issues, NYPIA was a significant part of the discovery process that followed. NYPIA's two principals, Hiestand and Woodworth, were deposed along with many of its employees like Fett, Schnoor, and Josh Schnoor, as well as its alleged expert on valuation, Vereecke. (See Proofs of Service for Deposition Notices and Deposition Transcripts admitted at Trial for Hiestand, Woodworth, Fett, Schnoor, Vereecke, and Josh Schnoor, and others as well as Notices of Hearings and proceedings all provided to NYPIA.) In addition to this deposition discovery, and because of the Defendants' repeated failure to produce emails which were relevant to the fraudulent transfers, the Circuit Court ultimately ordered a court appointed forensic computer expert inspection of NYPIA's computer system which produced many of the key emails regarding the transfers in this case. (See May 26, 2010 Order Regarding Computer Inspection). NYPIA legal counsel participated in these discovery proceedings.

As the extensive discovery involving NYPIA was concluding, on December 23, 2010, the Circuit Court issued a Notice to Appear for Trial to NYPIA and its counsel in both of the 2009 UFTA cases. (See Circuit Court's December 27, 2010 Notice to Appear for Trial to Attorney David Gerling, counsel for NYPIA, in 09-01878-CD Case). As these Notices which were directed to NYPIA and its Counsel, David Gerling, state: **YOU ARE HEREBY ORDERED TO APPEAR IN THE ABOVE ENTITLED CAUSE FOR A NON-JURY TRIAL – CIVIL ON MAY 9, 2011 AT 9:00 A.M.** (See *Id.*) Thus, these express trial notices to NYPIA provide it with further notice of the UFTA clawback remedies would be addressed at trial.

After NYPIA had received the Notice and Order to Appear for Trial in the two 2009 cases, the Circuit Court then held a lengthy twenty-two (22) day bench trial in which it critically considered the UFTA claims and defenses, including NYPIA's affirmative defense that it allegedly was a good faith transferee for value, as well as the conjoined civil contempt claims in the 2007 case.¹¹ In the opening statements held a month before the first witnesses were called, the Morris Appellees openly articulated the claim that ultimately a remedy judgment should be entered against NYPIA as the subsequent transferee of the fraudulently transferred assets since they had not taken in good faith or for value. (See June 28, 2011 Trial Transcript at pp. 116-125) NYPIA in their opening arguments disputed these claims. (See, e.g. June 30, 2011 Trial Transcript at p. 31.)

During the course of the twenty-two (22) day trial, the Circuit Court heard from numerous witnesses produced by NYPIA, Charron, C&H and the Morris Potential Appellees. (See Trial Transcripts of numerous fact witnesses from both sides over the twenty-two (22) day trial). **In particular, the Circuit Court received testimony from NYPIA's two principals, Woodworth and Hiestand, NYPIA's bookkeeper**

¹¹ The two UFTA cases and the contempt charges in the dissolution case were all tried together because all three matters involved the same operative facts, same parties and similar legal issues. (See NYPIA's December 9, 2009 Brief in Opposition to Order to Show Cause for Contempt) (where NYPIA stated that Morris' "claims in the 2009 litigation...could provide Morris with the same relief he now seeks through contempt proceedings...)

Laura Fett ("Fett"), NYPIA's former bookkeeper Tina Dickerman ("Dickerman"), NYPIA's bankers Michael Hay ("Hay") and Ed Ryan ("Ryan"), other NYPIA employees like Josh Schnoor, Judd Schnoor, Tyler Velting ("Velting"), and even the alleged "seller" of the assets, Charron, Dave Young and others. NYPIA counsel was present for each witness' testimony and was afforded a full opportunity to cross examine or direct examine the witness, which opportunity counsel utilized to the fullest. (See the Trial Transcript of the twenty-two (22) days of Trial). NYPIA also produced their own valuation expert witness, Thomas Vereecke ("Vereecke"), to testify to the value of the assets transferred in a further attempt to argue to the Circuit Court that NYPIA was allegedly a bona fide purchaser and supposedly took in good faith and for value. (See October 5, 2011 Trial Transcript, Testimony of Vereecke at p. 52, et seq.; October 10, 2011 Trial Transcript.) NYPIA also cross-examined at length the Morris Appellees' valuation expert, Wayne Walkotten. (See October 3, 2011 and October 5, 2011 Trial Transcripts.) Throughout the lengthy trial, NYPIA attempted to portray the fraudulent transfer to NYPIA as somehow being an "above board", arm's length, bona fide transaction. (See, e.g., also December 27, 2012 Circuit Court Opinion at p. 21)(noting that the "issue of MSG's value was front and center at trial"). In addition, hundreds of trial exhibits which totaled thousands of pages were admitted into evidence and NYPIA was afforded the opportunity to voir dire and object to every exhibit offered, which opportunity it exercised during the trial. (See the Various Hundreds of Trial Exhibits).

After the proofs, the Circuit Court asked for closing arguments and afforded the parties and NYPIA an opportunity to submit written briefs on any issues they wished to address. However, the Judge alerted everyone involved, including NYPIA, that the first main issue he wanted to make sure everyone addressed in closings was the appropriateness of entering a clawback remedy against NYPIA. (See October 19, 2011 Trial Transcript at p. 153.) In closing arguments held a month or so later with NYPIA counsel attending and participating, and consistent with the Circuit Court's request, that the clawback remedy and evidence relating to it be addressed by the Morris Parties and NYPIA, the Morris Parties reviewed the overwhelming

evidence of NYPIA's participation in the fraudulent transfer by receiving all of the assets for little to no value, and asked the Court to determine that the transfers were in violation of UFTA and that a clawback remedy against NYPIA should be entered. (See December 1, 2011 Trial Transcript at 105-110, 155.)

On December 27, 2012, the Circuit Court issued a twenty-four (24) page written Findings of Fact and Conclusions of Law ("Findings and Conclusions"). (See December 27, 2012 Finding of Facts, Conclusion of Law, and Verdicts) ("December 27, 2012 Opinion"). See *Id.* As a component of its Opinions in the three cases, the Circuit Court noted that it had two potential avenues to impose liability on NYPIA: through the clawback remedy basis or through a contempt finding against NYPIA for the violation of the Court's No Asset Transfer Order. (See December 12, 2012 Opinion and Order Setting Forth Findings of Civil Contempt in the 2007 case and December 12, 2012 Findings of Fact and Conclusions of Law in the 2009 cases) (discussing these two options). However, the Circuit Court noted that in its Opinions that, at trial, for the first time, Hiestand testified that while he attended each of the hearings where the no transfer order was discussed, he just happened to have missed the portion of the hearings during which the "no transfer" order was actually discussed even though other witnesses testified that Hiestand was indeed present at these times. (See, e.g., December 12, 2012 Contempt Opinion, at pp. 8, 20). Because of this testimony, the Circuit Court concluded that while it **"harbor[ed] suspicions that Mr. Hiestand knew of the ["No Asset Transfer] Order,"** it could not find by the very stringent clear and convincing evidence standard that Hiestand knew about the Order. See *Id.* (emphasis added). As a result, the Circuit Court concluded that rather than holding NYPIA in contempt, that the UFTA clawback was more appropriate to deal with NYPIA for its bad faith actions relating to the fraudulent transfers in which NYPIA received all of the assets of MSG for little to no real value. Thus, in its Findings of Fact and Conclusions of Law, the Circuit Court exhaustively considered the extensive evidence which showed that NYPIA did not act in good faith when it received all of the MSG assets for little to no value, such that it was **not** a good faith transferee who took for value. (See e.g. December 27, 2012 Findings of Fact and Conclusions of Law, at pp. 7-8, 12,

16, 19-24). In particular, the Circuit Court carefully reviewed the twenty-two (22) days of trial testimony and the hundreds of exhibits offered and then set forth in some detail many of the major pieces of evidence which demonstrated that NYPIA was not a good faith transferee for value. (See *Id.*, at pp. 19-24). Moreover, as an express component of this exhaustive and careful review of the twenty-two days of trial, the Circuit Court expressly found as a matter of fact that NYPIA was not a good faith transferee for value. (See *Id.*) Since NYPIA was not a good faith transferee for value, the Circuit Court concluded that a clawback remedy was appropriate against NYPIA and that awards in favor of both Morris and MSG Properties should enter. (See December 27, 2012 Circuit Court Opinion, at pp. 23 and 24).

On January 16, 2013, NYPIA filed a post-trial Motion for Reconsideration in which NYPIA argued that entering a clawback remedy against NYPIA denied it Due Process. (See January 16, 2013 Motion for Reconsideration). The Circuit Court denied this Motion for Reconsideration in a well-written Opinion issued on February 5, 2013. (See February 5, 2013 Opinion). As the Circuit Court noted, no Due Process violation was present since NYPIA was provided notice of the claim for a clawback remedy and had both an opportunity to be heard and in fact was actually heard as an active trial participant. (See *Id.*, at p. 2). On March 26, 2013, the Circuit Court entered its Final Judgments in the two cases, including a Money Judgment in the amount of \$1,495,234.04 in favor of Appellee MSG Properties against Appellant NYPIA and a Money Judgment in the amount of \$67,541.81 in favor of Appellee Morris against Appellant NYPIA. (See Final Judgments Dated March 26, 2013). On April 10, 2013, NYPIA filed Claims of Appeal from the Circuit Court's Final Judgments. (See NYPIA's Claim of Appeal).¹²

After receiving this extensive briefing and hearing oral argument, on May 29, 2014, the Court of Appeals issued an extensive and well-reasoned fifty-nine (59) page Opinion rejecting NYPIA's arguments in

¹² On appeal, because of the overlap between them, the Court of Appeals then consolidated the 2007 Show Cause for Contempt case with the two 2009 UFTA cases as well as received extensive briefing from both NYPIA and the Morris Parties. (See Court of Appeals Consolidation Order and the respective Court of Appeals Briefing).

their entirety. (See May 29, 2014 Court of Appeals Opinion). Importantly, for purposes of NYPIA's present Application, the Court of Appeals in its Opinion examined in great detail the various alleged Due Process arguments which NYPIA is again asserting in its Application and rejected them in their entirety. (See May 29, 2014 Opinion, at pp. 25-30). As an initial matter, the Court of Appeals noted that "Due Process is a flexible concept, the essence of which requires fundamental fairness." See *id* at p. 25. After noting this flexibility, the Court of Appeals further stated that:

"Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). "The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence."

See *id* at pp. 25-26. After setting forth this well-established legal framework for examining Due Process claims, the Court of Appeals rightfully concluded that there was no Due Process violation present. As the Court stated:

NYPIA was not deprived of due process. NYPIA appeared and participated in the hearings pertaining to the imposition of a restraining order of the profit-sharing distributions, and its concerns were specifically addressed by the trial court. Counsel for NYPIA called witnesses for this proceeding. Morris filed a motion with the trial court seeking to designate NYPIA as a real party in interest regarding MSG's counterclaims in the 2007 action, or alternatively to be named as a counterplaintiff.

NYPIA participated in various discovery motions and expressed concerns regarding the impact of the litigation on NYPIA.

On more than one occasion, NYPIA appeared in the trial court and sought clarification of its role in the litigation as it progressed. While acknowledging NYPIA's non-party status, the trial court indicated that the "clawback" provision of the UFTA had the potential to impact NYPIA. The trial court expressed hesitancy in definitively stating that NYPIA was out of the proceedings. NYPIA continued, through summary disposition motions, to challenge its liability under the UFTA. The trial court specifically recognized the necessity of inclusion of NYPIA and the provision of notice as matters proceeded to trial. NYPIA subsequently received a notice of a pretrial scheduling conference. NYPIA participated in pretrial hearings...

NYPIA was a full and involved participant during the 23 days of trial that ensued, calling and cross-examining witnesses, making opening and closing arguments, and providing a trial brief. In addition to contesting any liability due to lack of notice in the 2007 case, NYPIA also argued its status as a good faith transferee as preclusive of any determination of its involvement in a fraudulent transfer of MSG's assets. NYPIA was also integrally involved in several post judgment proceedings through the filing of objections and in seeking reconsideration of the trial court's ruling.

Further, the substance of the trial and various proceedings focused on (a) the knowledge of and violation of the order precluding the transfer of MSG's assets, and (b) the purposeful and fraudulent activities engaged in to consummate the asset transfer and avoid obligations to Morris and MSG Properties. NYPIA's defense included arguments that it had no knowledge of the injunctive order and that it could not be liable under the UFTA because it was a good faith transferee for value. While its trial brief focused on the contempt proceedings, NYPIA acknowledged having "submitted prior pleadings involved in the 2009 and the instant cases and incorporates herein the factual matters and legal arguments set forth." In addition, NYPIA's counsel often led cross-examination of the witnesses and conducted the direct examination of Vereecke to determine the valuation of MSG's assets at the time of transfer to NYPIA. Such testimony directly pertains to the validity of whether the transfer was for value and is irrelevant with regard to the existence of notice of the injunctive order.

While there is certainly confusion in the lower court record about the precise role and status of NYPIA during the course of the proceedings, the trial court did indicate the importance of NYPIA's participation and explained its position regarding possible remedies under the UFTA, including a clawback provision, which could establish the liability of NYPIA. NYPIA was a fully engaged participant in a multitude of hearings before, during, and after trial, involving the briefing and argument of issues pertaining to the claims of fraud. The arguments and evidence proffered by NYPIA encompassed both lack of knowledge of the injunctive order and its status as a good faith transferee for value of the assets. As such, the requirements of due process were met.

(See *id* at pp. 26-27). Thus, the Court of Appeals carefully examined the Due Process arguments which are again being raised by NYPIA and rejected them in their entirety. Moreover, the Court of Appeals further held that alternatively any purported deficiencies in supposed notice were cured by NYPIA's filing of a post-trial Motion for Reconsideration. (See *id* at pp. 27-28).¹³

¹³ As a component of its well-reasoned Opinion, the Court of Appeals also rejected NYPIA's meritless joinder argument under MCR 2.205. (See May 29, 2014 Opinion, at pp. 28-30)(rejecting this ill-supported argument both on the merits and based on NYPIA's untimely assertion of it).

Despite the Court of Appeals' well-reasoned affirmance of the Circuit Court's Judgments Against Potential Appellant NYPIA, NYPIA filed its Application For Leave To Appeal with this Court on July 9, 2014. Since a) none of the alleged grounds claimed in the Application merit this Court's review, and b) in light of the careful and exhaustive consideration of NYPIA's arguments and the unique egregious bad faith facts of this case, Morris and MSG Properties filed their Answer in opposition to NYPIA's ill-supported and meritless Application. (See the Morris Parties' Answer to NYPIA's Application).

In mid-January of this year and even through Potential Appellant NYPIA was responsible for filing a complete set of transcripts from the Circuit Court, the Clerk of the Court contacted counsel for Potential Appellees Morris and MSG Properties to request a copy of the Circuit Court's March 19, 2010 Hearing Transcript. This was immediately provided to this Court. On April 1, 2015, this Court entered an Order directing the Clerk to set this matter for oral argument on "whether to grant the application or take other action" as well as ordering the parties to file supplemental briefs. (See this Court's April 1, 2015 Order). However, unlike other MOAA Orders, this Order did not provide any further briefing guidance or set forth the specific issues upon which the Court wished further supplemental briefing. *See Id.* As a result, the Morris Potential Appellees have assumed in this Supplemental Brief that this Court would like further briefing on the issues raised by and relating to the March 19, 2010 Circuit Court Transcript which this Court specifically requested as well as why this Court should deny the Application after oral argument. Thus, as discussed above in the Fact's section and below in the Law and Argument section, this Supplemental Brief sets forth the extensive review and consideration which both the Circuit Court and Court of Appeals undertook in this very factually unique matter. Moreover, it addresses why any supposed questions relating to notice and due process relating to the March 19, 2010 Transcript were more than adequately addressed

by the Circuit Court and then the Court of Appeals in an exhaustive fifty-nine (59) page unpublished Opinion.¹⁴

When read in light of this comprehensive and new consideration by the both the Circuit Court and the Court of Appeals of the extensive trial record as well as NYPIA's various arguments, the Morris Parties file this Supplemental Brief showing that this matter does not warrant further review and requesting that this Court deny the NYPIA Application in its entirety.

II. LAW AND ARGUMENT

A. THIS COURT SHOULD DENY NYPIA'S APPLICATION FOR LEAVE TO APPEAL BECAUSE NYPIA HAS FAILED TO DEMONSTRATE SUFFICIENT GROUNDS FOR AN APPEAL TO THIS COURT AS REQUIRED UNDER MCR 7.302(B).

Despite its affirmative obligation to show that at least one of the grounds set forth in MCR 7.302(B) are satisfied, Potential Appellant NYPIA does not cite to, let alone, discuss this Court Rule in its Application. Perhaps that is because none of the listed bases set forth in MCR 7.302(B) are present in this case. First, both the Circuit Court and the Court of Appeals decisions are well-reasoned and correct. NYPIA is unable to show under MCR 7.302(B)(5) that the decisions were somehow "clearly erroneous and will cause material injustice." Moreover, NYPIA is unable to show that the Court of Appeals' decisions in any way conflict with another decision of this Court or the Court of Appeals as required under MCR 7.302(B)(5). Third, NYPIA is unable to show that any legal principles of major significance to the state's jurisprudence are present in its Application as required under MCR 7.302(B)(3). Both the Circuit Court and the Court of Appeals (in its well-reasoned Opinion) correctly applied well-established equitable and legal principles which have long existed in Michigan jurisprudence. Since these principles are well-established, there is

¹⁴ Based on the Court's direction about potentially "tak[ing] other action" in the event that this Court concludes that some type of error were to have occurred and that NYPIA was prejudiced by this alleged error, this Supplemental Brief also addresses how this Court could address any such error either directly under MCR 2.207 or via remand to the lower courts with the direction to either rejoin NYPIA as a party defendant or to allow NYPIA to supplement the record.

present no legal issue of any major significance to the state's jurisprudence in this case.¹⁵ Since NYPIA has failed discuss, let alone, demonstrate sufficient grounds for granting an Application to this Court under MCR 7.302(B), this Court should deny NYPIA's Application For Leave To Appeal in its entirety.

B. NYPIA WAS NOT DEPRIVED OF ANY DUE PROCESS RIGHTS.

1. Standard Of Review In The Event That The Application Were To Be Granted.

While the legal aspects of NYPIA's Due Process contentions are reviewed *de novo*, any alleged procedural errors are reviewed on an actual prejudice/harmless error basis.¹⁶ See, e.g., *In re Rood*, 483 Mich 73, 93; 763 NW2d 587 (2009); *Department of Community Health v Risch*, 274 Mich App 365, 379; 733 NW2d 403 (2007) (alleged hearing violations resulted in harmless error); *People v Truong*, 218 Mich App 325, 332-333, fn 2; 553 NW2d 692 (1996) (a party must show actual prejudice); *Feaster v Portage Public Schools*, 210 Mich App 643, 655-656; 534 NW2d 242 (1995), *overruled on other grounds*, 451 Mich 351 (1996) (because alleged procedural errors "would not have altered the outcome", no violation of Due Process was present); *People v Mack*, 2004 WL 959998, *2 (Mich Ct App May 4, 2004) (Ex. 2 to the Morris Potential Appellees' Answer to the Application) (prejudice to the defense must be shown to establish a Due Process deprivation); *Bay Home Medical & Rehab, Inc v Department of Treasury*, 2005 WL 658828, *1 (Mich Ct App March 22, 2005) (Ex. 3 to the Morris Potential Appellees' Answer) ("mere violation of a procedural rule does not constitute a Due Process error" if the error is harmless); *Wetsman v Fraser*, 2012 WL 4210413, *8 (Mich Ct App Sept 20, 2012) (Ex. 4 to the Morris Potential Appellees' Answer) (the whole record must be examined in a Due Process context); *In The Matter Of KEG and AG*, 2012 WL 1192746, fn 3 (Mich Ct App April 10, 2012) (Ex. 5 to the Morris Potential Appellees' Answer) (Due Process claim cannot

¹⁵ The other listed grounds of MCR 7.302(B) are also clearly not implicated in any manner by this case. First, there is no legislative act involved in this case, MCR 7.302(B)(1). Moreover, since neither the state nor a state actor is in any way being sued, MCR 7.302(B)(2) is also not implicated in any manner.

¹⁶ See, e.g., *Midland Cogeneration Venture v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011); *Harvey v State of Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003); and *Dorman v Township of Clinton*, 269 Mich App 638, 644; 714 NW2d 350 (2006).

be maintained without showing actual prejudicial impact). See also MCR 2.613(A). In addressing whether a Due Process deprivation is present, a reviewing court should consider that Due Process is a very flexible concept and take into consideration the particular circumstances of each case. See, e.g., *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993); *In The Matter of DCH*, 2010 WL 3239113, *2 (Mich Ct App August 17, 2010) (Ex. 6 to the Morris Potential Appellees' Answer); *Woods v Federal Home Loan Bank Board*, 826 F2d 1400, 1410-1411 (5th Cir 1987). Finally, in addressing whether a Due Process deprivation is present, a court must be mindful not to exalt "form" over "substance" and that "the purpose of procedural Due Process is to discover the truth." *Rozman v Elliott*, 335 F Supp 1086, 1104 (D Neb 1971).

As a general rule, interpretation of a court rule is a question of law which is reviewed *de novo*. See, e.g., *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004) and *Marketos v American Employers Insurance Co*, 469 Mich 407, 412; 633 NW2d 371 (2001). However, even if an alleged court rule error and violation is claimed, to show a deprivation of Due Process a party must still show actual prejudice and that substantial justice requires reversal. See, e.g., MCR 2.613(A); *People v Bell*, 209 Mich App 273, 275-277; 530 NW2d 167 (1995); and *People v Harris*, 2002 WL 31947939, *3 (Mich App December 3, 2002) (unpublished) (attached as Ex. 1 to this Supplemental Brief).

2. NYPIA Was Not Deprived Of Due Process Because It Received Notice That A Remedy Could Be Enforced Against It, Had A Meaningful Opportunity To Be Heard On The Issues And Claims And Is Unable To Show Any Actual Prejudice.

NYPIA contends that the Circuit Court deprived it of Due Process rights under the Michigan and United States Constitutions when it entered the clawback remedy against the transferred assets by way of a money judgment against NYPIA even though the direct UFTA liability claim against NYPIA had been dismissed. This contention is without merit. First, as both the Court of Appeals and the Circuit Court noted, NYPIA had an extensive opportunity to be heard on the clawback remedy issues even after the direct claims were dismissed, and, in fact, actively litigated the claims that its assets remained subject to a possible clawback remedy throughout the 22 days of trial. Second, NYPIA was given repeated notice

before, during, and after the trial that a clawback remedy of some sort might be imposed against it or its assets. Third, even if NYPIA had an arguable Due Process claim, the fact that NYPIA was afforded the opportunity to file a motion for reconsideration cured any supposed procedural defects. Fourth, and critically, NYPIA did not meet its burden of showing actual prejudice as a result of any alleged lack of notice or opportunity to be heard. Since NYPIA did not meet its burden of showing any actual prejudice from any supposed Due Process issue, NYPIA's Application should be denied. For these reasons which are discussed more thoroughly below, this Court should deny NYPIA's Application in its entirety and should conclude that the Court of Appeals properly affirmed the Circuit Court's decision.

a. NYPIA Had A More Than Adequate Opportunity To Be Heard.

NYPIA's main argument to this Court is that in the proceedings below it did not have an adequate opportunity to be heard on the UFTA clawback remedy issues. (See, e.g., NYPIA's Application). However, NYPIA not only had an adequate opportunity to be heard as required under well-established precedent,¹⁷ NYPIA actively and directly did participate in the Circuit Court proceedings regarding the asset clawback remedy and thus no Due Process deprivation is present. (See the Arguments in the Morris Potential Appellees' Answer, at pp. 20-24) (setting forth his meaningful active opportunity to be heard argument and case law reporting it as well as the careful review of this alleged issue by both the Circuit Court and the Court of Appeals).^{18 19} (See also Ex. 10 to the Morris Potential Appellees' Answer, December 27, 2012 Findings at p. 16 and fn 13). (See May 29, 2014 Court of Appeals Opinion, at pp. 25-27). **In particular, the Circuit Court expressly found that Due Process was satisfied with regard to imposing a**

¹⁷ See, e.g., *Bay Home supra and Hicks v Ottewell*, 174 Mich App 750, 757-758; 436 NW2d 453 (1989); and other similar precedent set forth in the Morris Potential Appellees' Answer, at footnote 18 (all holding that the "touchstone of any Due Process challenge is the opportunity to be heard").

¹⁸ For the ease and convenience of this Court and consistent with the Court's April 1, 2015 Order, the Morris Potential Appellees do not restate this argument and instead expressly reincorporate it herein.

¹⁹ As discussed below in section b. of this Response Brief, from the outset it was clear the Plaintiffs were requesting a clawback form of remedy under UFTA against NYPIA as the subsequent transferee of all the MSG assets.

clawback remedy since it provided NYPIA with “notice and an opportunity to be heard” on these issues and that “NYPIA fully participated in the trial.” *Id.*, at fn 13 (emphasis added). (See also Ex. 10, Circuit Court’s February 5, 2013 Order Denying Motion for Reconsideration of Holding, at p. 2) (emphasis added). The Court of Appeals also examined NYPIA’s assertion that it somehow did not have an alleged adequate opportunity to be heard on the UFTA clawback remedy, and expressly rejected this claim. (See May 29, 2014 Court of Appeals Opinion, at p. 27). After noting that “Due Process is a flexible concept” in civil cases, the Court of Appeals then examined NYPIA’s contention in light of the actual record. After carefully scrutinizing the **voluminous** record, the Court of Appeals found that NYPIA not only had an opportunity to be heard on the UFTA clawback remedy, but was in fact actually heard on that issue since NYPIA actively litigated the UFTA clawback remedy. (See May 29, 2014 Court of Appeals Opinion, at pp. 27). Moreover, both the Circuit Court and Court of Appeals determinations that NYPIA was given an opportunity to be heard and in fact was heard on the UFTA clawback remedy are amply supported by the trial record. (See the Morris Potential Appellees’ Answer, at pp. 21-24) (setting forth this voluminous support in the trial record which more than amply demonstrates that NYPIA not only was given the opportunity to be heard, but was in fact heard on the UFTA clawback remedy and actively litigated this issue by calling its own witnesses, cross-examining witnesses and offering the testimony of its own expert on valuation, .Thomas Vereecke, to attack Morris’ UFTA position).^{20 21} In light of this, it is clear that both the Circuit Court and the Court of Appeals correctly determined that NYPIA did not suffer from any alleged Due Process violation. As a result, this Court should deny NYPIA’s alleged Due Process arguments set forth in its Application in their entirety based on this opportunity to be heard.

²⁰ In light of all the evidence presented on these issues, it is hardly surprising that the Findings of Facts and Conclusions of Law expressly stated: “The issue of MSG’s value was front and center at trial.” (See December 27, 2012 Circuit Court Opinion at p. 21).

²¹ In fact, Vereecke’s valuation was so central to NYPIA at trial that Vereecke’s opinions were one of NYPIA’s three main arguments set forth in its trial brief. (See NYPIA’s July 25, 2011 Trial Brief, at pp. 12-14). Moreover, Mr. Vereecke was used to support its defense that it was a bona fide purchaser who took for value and in good faith.

b. NYPIA Received More Than Adequate Notice For Due Process Purposes In This Case.

In its Application, NYPIA also argues that somehow it was not given notice that a clawback remedy might be imposed by the Court before it was actually imposed by the Court. (See NYPIA's Application).²² NYPIA's contention that it did not receive notice that the assets it received through the fraudulent transfer would potentially be remedy clawed (taken) back or that a money judgment for the true value of the assets might enter as a UFTA remedy,²³ is unsupported. The Circuit Court has twice examined and rejected this claim. (See December 27, 2012 Findings at p. 16 and fn 13); (See February 5, 2013 Order at p. 2).²⁴ As

²² In light of this Court's January 2015 request for the forwarding of the March 19, 2010 Hearing Transcript which in part helps provide notice to NYPIA of the UFTA asset clawback against it and which was requested right before supplemental briefing was ordered, the Morris Potential Appellees assume that this Court wishes the Morris Potential Appellees to address in greater detail the various aspects of notice which NYPIA was provided prior to the clawback remedy being imposed against it, including the March 19, 2010 hearing.

²³ Under Michigan's version of the UFTA, a trial court has express authority via a so-called "clawback" remedy to void a fraudulent transfer to a subsequent transferee who did not take in good faith and for value. See e.g. MCL 566.221. Moreover, a trial court is given the authority to lien, take back, or enter a money judgment for the true value of the fraudulently transferred assets once it is determined that a fraudulent transfer was present and neither the first transferee (i.e., C&H) nor the subsequent transferee (i.e., NYPIA) took in good faith and for value. See *id.*

²⁴ The Court of Appeals agreed with the Circuit Court that NYPIA was given sufficient notice of the clawback remedy being argued against NYPIA and its' assets. (See, e.g., May 29, 2014 Court of Appeals Opinion, at pp. 26-27). As the Court of Appeals stated:

On more than one occasion, NYPIA appeared in the trial court and sought clarification of its role in the litigation as it progressed. While acknowledging NYPIA's non-party status, the trial court indicated that the "clawback" provision of the UFTA had the potential to impact NYPIA. The trial court expressed hesitancy in definitively stating that NYPIA was out of the proceedings. NYPIA continued, through summary disposition motions, to challenge its liability under the UFTA. The trial court specifically recognized the necessity of inclusion of NYPIA and the provision of notice as matters proceeded to trial. NYPIA subsequently received a notice of a pretrial scheduling conference. NYPIA participated in pretrial hearings.

While there is certainly confusion in the lower court record about the precise role and status of NYPIA during the course of the proceedings, the trial court did indicate the importance of NYPIA's participation and explained its position regarding possible remedies under the UFTA, including a clawback provision, which could establish the liability of NYPIA. NYPIA was a fully engaged participant in a multitude of hearings before, during, and after trial, involving the briefing and argument of issues pertaining to the claims of

these various opinions make clear, the record amply supports the Circuit Court's determination that NYPIA was on notice from the outset of these cases that it faced a possible clawback remedy of some sort. (See *id.*) NYPIA acknowledged even before the direct claims against it were dismissed, it knew it faced the possibility of some form of clawback remedy if it was found to not have acted in good faith in as a transferee of fraudulently transferred assets. (See NYPIA's June 11, 2009 Summary Disposition Brief at p. 6) (requesting that NYPIA be dismissed on the direct claims but then noting that **"even assuming lack of good faith on New York's behalf, that Morris is a secured party or lien holder on the assets New York purchased from MSG."**) Thus, even in its very first summary disposition brief, NYPIA expressly acknowledged to the Circuit Court that it was on notice that it was and **still would be potentially subject to a clawback remedy** even if the direct claims were dismissed if (a) it was found to be a subsequent transferee who did not take in good faith or for value, and (b) its immediate transferor (C&H) too was subsequently found to not be a good faith transferee. Moreover, even after the direct claims against NYPIA were dismissed, NYPIA was repeatedly put on notice that the ongoing proceedings could still result in a remedy against NYPIA pursuant to the remedy provisions of UFTA. On March 17, 2010, Morris filed what was termed Plaintiff's Brief in Response to Motion for Protective Order which was served on counsel for NYPIA and C&H. This was **after** the direct claims against NYPIA had already been dismissed. (See Plaintiff's March 17, 2010 Brief).²⁵ The brief reiterated that, even though NYPIA had been dismissed as a party against whom direct liability claims had been asserted, NYPIA or its assets remained subject to a clawback remedy since it did not take the assets' in good faith. (See *id.* at pp. 13-14). The Circuit Court

fraud. The arguments and evidence proffered by NYPIA encompassed both lack of knowledge of the injunctive order and its status as a good faith transferee for value of the assets. As such, the requirements of due process were met.

See id.

²⁵ As even a cursory review of this Response Brief demonstrates, it was filed to prevent the artificial limiting of discovery to exclude discovery relating to these UFTA remedies, including the clawback remedy.

then held a lengthy hearing at which counsel for NYPIA was not only present, but at which NYPIA's counsel actively and extensively participated. (See March 19, 2010 Hearing Transcript). During the course of this hearing, NYPIA, the Plaintiffs, and the Circuit Court discussed that while NYPIA had been dismissed as a party on the direct claims, NYPIA still remained subject to a possible clawback remedy against it or its assets if it were shown that the transfers were fraudulent and the transferees (i.e., C&H and NYPIA) took the assets without good faith. (See *Id.* at pp. 25-26, 31-36, 51-58, 71-74). In addition, the Circuit Court stated that it intended to have discovery conducted on the underlying transfers and the elements of the clawback claims: i.e. good faith and the value of the MSG assets at the time of transfer. (*Id.* at pp. 51-54) (noting that discovery would be conducted on all aspects of the case, including NYPIA's alleged affirmative defense of being a supposed "good faith transferee for value").²⁶ The Circuit Court also stated that it would try both the underlying fraudulent transfer components as well as the clawback issues like NYPIA's supposed "good faith" in one trial proceeding. (*Id.* at p. 54). As the Circuit Court stated:

"[W]hat I want to do is set a discovery deadline, get discovery finished, and then try whatever needs to be tried and be done with all this. I mean I know you don't want to be in court for two more years."

(See *id.* at p. 54) (emphasis added). (See *id.*, at pp. 74-75) (noting that his "goal was to get these cases closed" and indicating that is why it set the cases' parameters regarding discovery and trial on the clawback remedy in the manner that it did). Thus, at this hearing, the Circuit Court gave even further notice to NYPIA that it faced potential clawback remedies. Counsel for NYPIA even indicated that NYPIA might eventually

²⁶ Subsequent to the Circuit Court's decision to allow discovery on all of these elements, NYPIA was a significant part of the discovery process which followed. NYPIA's two principals, Hiestand and Woodworth, were deposed along with many of its employees like Fett, Schnoor, and Josh Schnoor, as well as its alleged expert on valuation, Vereecke. (See Proofs of Service for Deposition Notices for Hiestand, Woodworth, Fett, Schnoor, Vereecke, and Josh Schnoor, and others as well as Notices of Hearings and proceedings all provided to NYPIA.) In addition to this deposition discovery, and because of the Defendants' repeated failure to produce emails which were relevant to the fraudulent transfers, the Circuit Court ultimately ordered a court appointed forensic computer expert inspection of NYPIA's computer system which produced many of the key emails regarding the transfers in this case. (See May 26, 2010 Order Regarding Computer Inspection).

file a motion to have the equitable clawback remedy against NYPIA dismissed, presumably once discovery was completed. (See *id.*, at pp. 73-75). However, NYPIA did not file any such motion despite indicating it would.

NYPIA's own pleadings after it was dismissed on the direct claims, further demonstrate that NYPIA absolutely knew that it was still subject to potential clawback remedies. In response to the filing of Amended Complaints by Morris and MSG Properties authorized by the Circuit Court in the March 19, 2010 Hearing and after the direct claims against NYPIA had been dismissed, NYPIA filed what it termed its Affirmative Defenses asserting its factual and legal defenses to the asserted clawback claims:

Now comes, New York, Defendant, by its attorney, David C. Gerling, P.C., and pursuant to MCR 2.111(F), asserts the following affirmative defenses **as to Plaintiff's claims of recovery of New York's property in the above cause.**

(See NYPIA's April 14, 2010 Affirmative Defenses) (emphasis added.) In these Affirmative Defenses, NYPIA alleged that clawback remedies should not enter against it because "it acted in good faith". (See *id.* at p. 3). Thus, through these affirmative defenses, NYPIA further demonstrated it knew the case continued to litigate the clawback remedy claims.

After the extensive discovery involving NYPIA was concluded on December 23, 2010, the Circuit Court issued a Notice to Appear for Trial to NYPIA and its counsel in both of the 2009 UFTA cases. (See Circuit Court's December 27, 2010 Notice to Appear for Trial to David Gerling, counsel for NYPIA, in 09-01878-CD Case). As these Notices which were directed to NYPIA and its Counsel, David Gerling, state: YOU ARE HEREBY ORDERED TO APPEAR IN THE ABOVE ENTITLED CAUSE FOR A NON-JURY TRIAL – CIVIL ON MAY 9, 2011 AT 9:00 A.M. (See *Id.*) Thus, these express trial notices to NYPIA provide it with further notice of the UFTA clawback being potentially imposed on it.

NYPIA's notice that it faced potential clawback remedies continued at trial itself. During opening statements, counsel for Morris and MSG Properties again declared that they were seeking clawback

remedies against NYPIA and its assets if the Circuit Court found that fraudulent transfers were present. (See June 28, 2011 Trial Transcript, at pp. 120-127).²⁷ Not surprisingly, over the next 22 trial days, whether NYPIA was a bona fide purchaser taking in good faith and for value in an arms-length transaction was front and center in the cases. (See December 27, 2012 Circuit Court Opinion at p. 21) (stating that “[t]he issue of MSG’s value was front and center at trial.”)²⁸ (See also 12/1/2011 Closing Statement of NYPIA, at pp. 141-151) (NYPIA’s counsel summarizes the alleged “evidence” which he claimed showed NYPIA was a bona fide purchaser for value who took in good faith.) Immediately following the close of proofs, all counsel, including counsel for NYPIA, engaged in a lengthy discussion with the Circuit Court on “four great unanswered questions” that the Circuit Court asked be the focus of closing statements. (See October 19, 2011 Hearing Transcript at p. 153.) In particular, the Circuit Court stated that “Number One” was the extent to which he could reach back/clawback the assets of NYPIA as a remedy under the facts of the cases and the law. *Id.* Given the clear direction, counsel for Morris and MSG Properties in closing addressed the type of clawback remedies that the Circuit Court should employ and how the evidence showed that NYPIA did not take in good faith and for value. (See December 1, 2011 Trial Transcript, at pp. 105-110, 155). Counsel for NYPIA then argued to the contrary in his closing statements. (See December 1, 2011 Trial Transcript at pp. 121-122.) The record below demonstrates that NYPIA repeatedly received notice that the current proceedings could well result in the Circuit Court imposing a clawback remedy

²⁷ NYPIA’s counsel, in his opening statement hinted at his recognition about the applicability of a clawback remedy and the Circuit Court discussed with him that in the event NYPIA could show it acted in good faith and was a bona fide purchaser for value, NYPIA would not face any liability of any sort, including on a clawback theory. (June 30, 2011 Trial Transcript of NYPIA’s Opening Statement at p. 31).

²⁸ See also Discussion of the 22 days of trial from Subsection A’s Opportunity To Be Heard which is expressly reincorporated herein.

against NYPIA or its assets. As a result, this Court should reject NYPIA's argument to the contrary²⁹ and should deny NYPIA's Application in its entirety.^{30 31}

c. Since NYPIA Has Not Demonstrated Any Actual Prejudice, This Court Should Also Reject Its Application On This Basis As Well.

Moreover, NYPIA's alleged Due Process arguments also should be rejected since at no point in its Application or its Briefing to the Court of Appeals or to the Circuit Court has NYPIA mentioned let alone specify in any detail, what particular piece of evidence it would have offered or what witness it would have otherwise called if the alleged Due Process notice "violation" had not occurred. Mere generic assertions of a supposed Due Process deprivation are insufficient. Instead, appellants alleging Due Process deprivation are obligated to demonstrate actual prejudice. See, e.g., *Risch, supra*, at 379; *Truong, supra*, at pp. 332-

²⁹ While NYPIA has cited some cases for the proposition that joinder and a party's status affects Due Process, all of those cases are easily distinguishable. In those cases, contrary to here, the parties were not served with process, did not participate in the discovery process as NYPIA did, did not receive notice of potential remedies against them as did NYPIA, did not file pleadings acknowledging they faced potential liability under UFTA clawback as NYPIA did, and, most importantly, did not participate in a lengthy trial as NYPIA did.

³⁰ But even in the event that this Court were to consider this extensive NYPIA notice and actual knowledge prior to the remedy being imposed to be potentially deficient, this Court should still reject NYPIA's alleged "notice" argument. As set forth in great detail in the Morris Potential Appellees' Answer, and as the Court of Appeals rightly pointed out, NYPIA's filing of its January 16, 2013 Motion for Reconsideration after the clawback was imposed cured any alleged Due Process supposed Notice issue which might have allegedly existed in this case. (See the Arguments and Case Law set forth in the Morris Potential Appellees' Answer, at pp. 29-35) (demonstrating that a motion to reconsider cures any alleged notice issue). (See also May 29, 2014 Court of Appeals' Opinion, at pp. 27-28) (noting that the filing and consideration of the Motion to Reconsider additionally justified the rejection of any alleged Due Process Notice argument). This is especially true when one puts aside the fact that NYPIA had every opportunity to present its UFTA remedy defenses at trial and in fact did so at trial over the 22 day period, the filing of this Motion to Reconsider gave NYPIA every opportunity to raise any and all supposed evidence and testimony it wanted on the UFTA issue for a "second bite at the apple." See *In re Bartle*, 560 F3d 724 (7th Cir 2009); *Boulton v Fenton Township*, 272 Mich App 456; 726 NW2d 733 (2006); and *In re Moon Estate*, 2011 WL 254934, *6 (Mich Ct App January 27, 2011) (unpublished) (Ex. 12 to the Morris Potential Appellees' Answer); and *Hansa Consult of North America, LLC v Hansa Consult Ingenieurgesellschaft MBH*, 163 NH 45, 57; 35 A3d 587 (NH 2011). Thus, the Motion to Reconsider process eliminated any alleged Due Process notice error. *Id.* As such, this Court is given further reason to reject NYPIA's Application based on the motion to reconsider process being utilized. Thus, NYPIA is simply unable to meet its heavy burden of showing that the Court of Appeals decision was in any way in error, let alone was clearly erroneous as required in order to consider granting the Application under MCR 7.302(B)(5).

³¹ Of course, pursuant to MCR 7.302(B)(5), NYPIA must show not only legal error, but that the Court of Appeals' decision is "clearly erroneous" and will result in "manifest injustice."

333 and fn 2. See also MCR 2.613(A).³² A party alleging it has been denied Due Process based on some alleged notice irregularity must affirmatively show what evidence or testimony it would have offered or arguments it would have put forth had the alleged Due Process notice deprivation not occurred. For example, in *In re Bartle*, 560 F3d 724 (7th Cir 2009), the Seventh Circuit Court of Appeals assumed for purposes of the appeal that the plaintiff had been erroneously deprived of both notice and an opportunity to respond but noted that this was not the end of the inquiry:

Despite that opportunity, Bartle did not indicate to the district court what argument or evidence he would have presented in opposition to the government's motion. Even in his briefing to this court he has not done so. Instead, he has characterized his appeal as presenting a purely procedural argument. But procedures do not exist for their own sake; they exist to protect the parties' rights. We cannot say that Bartle's substantial rights were affected by an erroneous deprivation of an opportunity to be heard on the government's motion to dismiss when he has not set forth what he would have brought to the court's attention in opposition to that motion. It would be inconsistent with Rule 9005 and Rule 61 to reverse without such a showing.

Id. at 730.

Similarly, in *Sawyer*, *supra*, the New Hampshire Supreme Court assumed that the notice provided was not adequate but noted that despite this supposed potential inadequacy, the defendant did not make out a Due Process claim since he failed to identify any actual prejudice based on specific evidence he otherwise would have presented:

Even assuming, *arguendo*, that the defendant is correct that the petition did not adequately apprise him of the alleged abuse prior to the hearing, he will not prevail on his due process claim absent a showing of actual prejudice. *McIntire v. Woodall*, 140 N.H. 228, 230, 666 A.2d 934 (1995). The defendant has failed to make such a showing. At the hearing, the plaintiff testified to the specific dates of the alleged abuse. Thereafter, the defendant filed a motion for

³² See also, *Amouri v Holder*, 572 F3d 29, 36-37 (1st Cir 2009); *In re John Bartle*, *supra*, at 730; *Widie v United States Department of Justice*, 2013 WL 1834673, *2 (D Me May 1, 2013) (Ex. 15 to the Morris Potential Appellees' Answer); *In re Stewart*, 2009 WL 1649731, *3 (E D La June 10, 2009) (Ex. 16 to the Answer); *In the Matter of Sawyer*, 161 NH 11, 17 (NH 2010) (Ex. 17 to the Answer); *Washington v Harris*, 259 Ga App 705 (Ga Ct App 2003); *Realty v Pickett*, 963 SW2d 308, 313 (Mo Ct App 1998) (Ex. 18 to the Answer) (all holding that an individual or entity must show actual prejudice in order to create a basis for prevailing on a Due Process claim).

reconsideration in which he alleged a due process violation. **However, he made no showing as to how not knowing the specific dates prior to the hearing caused him actual prejudice. The defendant did not present any evidence to indicate that he in fact had a time-based defense which he would have presented had he known the alleged dates prior to the hearing.**

Id. at 17 (emphasis added). As a result, the Court in *Sawyer, supra*, affirmed the trial court's decision.

Like the appellants in *Bartle* and *Sawyer*, NYPIA has never pointed to any specific testimony or specific documentary evidence that it would otherwise have offered if the supposed procedural notice "deprivation" had not occurred. Based on the extent to which NYPIA did participate in every aspect of Trial it is difficult to envision what additional evidence it would have provided. Thus, NYPIA has failed to meet its burden of demonstrating any actual prejudice as required under current precedent. Thus, this additional fundamental flaw further justifies the denial of NYPIA's Application.

C. THE COURT OF APPEALS DID NOT ERR, LET ALONE CLEARLY ERR, WHEN IT ADDRESSED NYPIA'S MCR 2.205-BASED ARGUMENTS.

As its final main argument, NYPIA in its Application argues that the Court of Appeals somehow erred with regard to its discussion and decision regarding MCR 2.205. However, NYPIA's assertions are again without merit.³³ In its well-reasoned Opinion, the Court of Appeals carefully examined the various NYPIA arguments and rejected them. As the Court of Appeals stated:

This Court has also previously determined that the burden falls upon a defendant to object when a plaintiff fails to comply with the requirements of MCR 2.205. *United Services Automobile Ass 'n v Nothelfer*, 195 Mich App 87, 89; 489 NW2d 150 (1992). Any such objection must be timely made at the risk of being waived. *Id.* Although NYPIA questioned its role and potential liability, it did not object to its non-party status. Further, NYPIA was originally a defendant in the 2009 actions. Based on NYPIA's full participation in trial and other proceedings to demonstrate its status as a

³³ Like an entity asserting an alleged Due Process violation, a party asserting an alleged Court Rule violation must also show actual prejudice from this alleged violation in order to justify any form of relief. See, e.g., MCR 2.613(A); *Bell, supra*, at pp. 275-277 and *Harris, supra*, at *3. However, for the same reasons set forth in subsection c of this Supplemental Brief as well as in subsection d (pp. 35-36) of the Morris Potential Appellees' Answer, NYPIA is unable to show any actual prejudice from any alleged non-joinder. Thus, NYPIA's failure to show any actual prejudice from any alleged violation of MCR 2.205 also independently justifies this Court in rejecting NYPIA's Application.

good-faith transferee and failure to object or appeal its non-party status, its allegation of error on appeal regarding a violation of MCR 2.205 is not timely and is without merit.

(See May 29, 2014 Court of Appeals Opinion, at pp. 28-30) (emphasis added). Moreover, NYPIA's Application does not change this well-reasoned result. Instead, NYPIA's arguments ignore and do not really in any way address the Court of Appeals' well-reasoned conclusions that NYPIA did not timely raise and object to its non-party status under MCR 2.205 and as such waived any such alleged rights. As such, the Court of Appeals correctly determined that joinder issue. This is especially true since, regardless of how NYPIA was denominated, as the Court of Appeals correctly pointed out, NYPIA filed affirmative defenses in this case, was involved in the discovery process, and fully participated in the 22 days of trial and the determination of its status as a good faith transferee. (See May 29, 2014 Court of Appeals Opinion, at pp. 25-30).

But even in the event that this Court were to conclude that both the Circuit Court and Court of Appeals erred on the alleged party issue, this Court should then exercise its well-established discretion under the Michigan Court Rules ("MCR") to rejoin NYPIA as a party defendant or remand to the lower courts with instructions to rejoin NYPIA. MCR 2.207, the relevant Michigan Court Rule giving this Court this well-established authority regarding joinder, provides as follows:

Misjoinder of parties is not a ground for dismissal of an action. **Parties may be added or dropped by order of the court on motion of a party or on the court's own initiative at any stage of the action and on terms that are just.** When the presence of persons other than the original parties to the action is required to grant complete relief in the determination of a counterclaim or cross-claim, the court shall order those persons to be brought in as defendants if jurisdiction over them can be obtained. A claim against a party may be severed and proceeded with separately.

See MCR 2.207 (emphasis added). Thus, under the plain language of this Court Rule, this Court is given the express authority by motion **or its own initiative** to rejoin NYPIA as a direct party if this Court were to consider accepting NYPIA's argument regarding party status.

In addition to this express Court Rule which provides this Court with the authority to rejoin NYPIA as a party, the Michigan appellate courts, including this Court, have also repeatedly recognized that this is the appropriate remedy in the event that this Court were to accept NYPIA's argument. For example, in *Henkel v Henkel*, 282 Mich 473, 488; 276 NW 522 (1937), this Court expressly considered whether it had the authority to add a party on appeal under MCR 2.207's substantially similar predecessor. In *Henkel*, *supra*, on appeal, the defendant argued that a new party could not be added after a cross-bill had been filed. In the course of concluding that the new party was properly added, this Court, in *Henkel*, *supra*, concluded that courts, including this Court, had the authority to add a party at any stage of the proceedings, including on appeal. As this Court stated:

And, ordinarily, if the proper parties plaintiff are not joined, this Court will direct the joinder of the proper parties plaintiff on appeal. *Gillen v. Wakefield State Bank*, 246 Mich 158, 224 NW 761; *Windows v Colwell*, 247 Mich 372, 225 NW 573.

See id., at 488. As a result, this Court concluded in *Henkel*, *supra*, that the new party could be properly added (even on appeal) and thus affirmed the lower court decree as modified.³⁴

Similarly, in *Independent Bank v City of Three Rivers*, 2013 WL 5663217, *4 (Mich Ct App October 17, 2013) (unpublished) (attached as Ex. 2 to this Supplemental Brief),³⁵ the Michigan Court of Appeals considered whether a party can be added at any stage of the proceedings, including on appeal or on remand after an appeal. In *Independent Bank*, *supra*, the new defendant, Hentchel, argued that the Circuit Court erred in adding him as a party defendant after the statute of limitations had allegedly expired. In the course of rejecting this contention, the Court of Appeals notes that courts at any stage of proceedings,

³⁴ *See also Mannone v ChaseBank NA*, 2014 WL 891042, *2 (Mich Ct App March 6, 2014) (unpublished) (attached as Ex. 3 to this Supplemental Brief) (holding that courts have the authority to add parties at any stage of the proceedings on their own initiative and that thus "even if plaintiff had not moved to have Seterus [the new party] added as a defendant, the trial court, on its own initiative, could have added Seterus as a defendant").

³⁵ *See also Healthsource v Urban Hospital CarePlus*, 2006 WL 3687776, *7 (Mich Ct App December 14, 2006) (unpublished) (attached as Ex. 4 to this Supplemental Brief) (recognizing on appeal that an individual should have been named as a party and ordering their joinder on remand to the trial court).

including a trial court on remand, have the authority to add a party as a defendant. Moreover, the Court of Appeals also concluded that an additional party can be brought into an action even after the statute of limitations has expired. As the Court of Appeals stated:

MCR 2.207 permits a trial court to add a party at any stage of the proceeding, even on appeal or on remand following an appeal. Hentchel's argument that he, as trustee, could not have properly been added as a party because the statute of limitations had expired is unavailing. Even if the statute of limitations had expired, an "additional defendant may be brought [into an action] after the expiration of the statute of limitations where the new party is a necessary party...." Necessary parties are persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief...." MCR 2.205(A). Because Hentchel, as trustee, held legal title to the assets of the trust, Hentchel, as trustee, was a necessary party and could be joined regardless of whether the statute of limitations had expired.

See *id.* (citations omitted). In light of this, then, the Court of Appeals concluded that the Circuit Court properly added Hentchel on remand as a new party even though the statute of limitations had expired.³⁶

Applying both the plain language of MCR 2.207 as well as the common law, in the event that this Court were to conclude that a supposed error may have occurred, this Court should follow the plain language of MCR 2.207 as well as the common law³⁷ and rejoin NYPIA as a defendant itself or order a remand for this purpose. By any rational measure, it is only "just" that NYPIA be rejoined as a defendant under MCR 2.207 in the event that this Court were to consider accepting NYPIA's ill-supported party joinder argument. This is especially true since like the non-party in *Perry, supra*, NYPIA fully defended this clawback remedy, had a meaningful opportunity to be heard, testified extensively at trial, and failed to identify any additional evidence it would have otherwise offered. (See earlier Sections of this Supplemental

³⁶ See also *Perry v. Blum*, 629 F.3d 1, 16-17 (1st Cir. 2010) (holding in circumstances remarkably similar to those present in this case that a non-party was properly joined after trial in a matter since it was originally a party to action before it was dismissed, it had sufficient notice that claims were still attempting to be asserted against it, it had a meaningful opportunity to be heard, the non-party testified extensively at trial, and the non-party failed to identify any additional evidence that it would have otherwise introduced).

³⁷ See, e.g., *Henkel, supra*; *Three Rivers, supra*; and *Perry, supra*.

Brief which address each one of these questions). Moreover, this alternative is further justified when, as noted in both subsection c of this Brief and subsection d of the Potential Appellees' Answer to the Application, NYPIA is unable to point to any true prejudice since it fully defended the fraudulent transfer action over the twenty-two (22) day trial and to this day still cannot point to any evidence or argument it would have otherwise offered. Similarly, like the situation in *Perry, supra*, this Court is further justified in taking this action regarding the UFTA clawback remedy when one notes that NYPIA has already been timely served with process and thus was previously a party defendant on the direct UFTA claims.³⁸ ³⁹ Thus, by any rational measure, it is only "just" under MCR 2.207 that NYPIA's fraud not be rewarded when this Court has the authority to order the rejoinder of NYPIA for purposes of the clawback remedy.⁴⁰

III. CONCLUSION AND RELIEF REQUESTED

During a 22-day bench trial, overwhelming evidence was presented of a concealed scheme to fraudulently transfer all of the assets of MSG to NYPIA for little to no value. NYPIA was afforded every

³⁸ It is also worth noting that NYPIA can hardly complain if it is subsequently joined under MCR 2.205 and 2.207 since it took the position in the Court of Appeals that it should have been joined as a necessary party. (See, e.g., May 29, 2014 Court of Appeals' Opinion, at p. 28) (noting that on appeal NYPIA was taking the position that it was a necessary party under MCR 2.205 for the UFTA clawback remedy and thus should have been joined as a necessary party). In light of this NYPIA position, then, this Court is further justified in taking this alternative action of rejoining NYPIA and having this rejoinder be timely and relate back. See, e.g., *Three Rivers, supra, citing Forest v Parmalee*, 60 Mich App 40, 406; 231 NW2d 378 (1975), affirmed on other grounds, 402 Mich 348 (1978) (holding that the joinder of a new defendant is timely and related back if they are a necessary party).

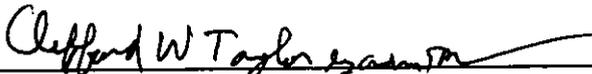
³⁹ Thus, this very unique factual situation of prior service of process and extensive participation by NYPIA is much more favorable to taking this MCR 2.207 action than situations in which the appellate courts have ordered joinder even though the new party was not really previously even involved in the case.

⁴⁰ But even in the event that this Court were to conclude that somehow NYPIA might have been prejudiced by not having sufficient notice in the UFTA action (even though NYPIA directly and actively participated at trial and during discovery) and that thus some type of remand might be appropriate, this Court should conclude that any alleged prejudice could be avoided by allowing the supplementation of the record on remand. In this sense, as the First Circuit Court of Appeals in *Perry, supra*, noted, if a remand is appropriate for any reason, then a court should not require an entirely new trial and instead should merely allow the non-party an opportunity to supplement the record on remand. See, e.g., *Perry, supra*, at fn. 7 (concluding that because of its remand order for improperly limiting the evidence provided at trial that any alleged possible Due Process issue could be more than adequately resolved by allowing the supplementation of the record. Thus, in the event that this Court were to consider remanding rather than denying leave, this Court should follow *Perry, supra*, and merely order a remand for supplementation of the record.

opportunity to defend against application of a clawback remedy against it as a subsequent transferee and to show that it took the assets in good faith and for value. However, as both the Circuit Court and Court of Appeals concluded, the evidence was overwhelming against NYPIA on these issues. (See Circuit Court's December 27, 2012 Opinion and May 29, 2014 Court of Appeals' Opinion). Almost certainly recognizing this overwhelming evidence, NYPIA at no point in its Application ever really genuinely disputes the evidence offered against it and instead tries to mint out of whole cloth alleged Due Process and joinder arguments. Since none of NYPIA's arguments set forth in its Application withstand any actual scrutiny, this Court should conclude that NYPIA has not met its heavy burden under MCR 7.302(B) of demonstrating that this Court should grant its Application. As a result, this Court should deny NYPIA's Application in its entirety.⁴¹

Respectfully submitted,

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Dated: May 12, 2015

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⁴¹ Alternatively, this Court should "take the action" set forth in Section C of this Supplemental Brief and order the rejoinder of NYPIA itself under MCR 2.207 or remand to the lower courts with instructions to do so or for consideration by the lower courts of this option.

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.
PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Shonell Latorraine HARRIS, Defendant-Appellant.

No. 235656.
Dec. 3, 2002.

Before: O'CONNELL, P.J., and WHITE and B.B. MACKENZIE, FN* JJ.

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

[UNPUBLISHED]

PER CURIAM.

*1 Defendant was convicted, following a jury trial, of assault with intent to murder, M.C.L. § 750.83, possession of a firearm during the commission of a felony, M.C.L. § 750.227b(1), and possession of a firearm by a felon, M.C.L. § 750.224f. Defendant was sentenced, as an habitual offender third, M.C.L. § 769.11, to 35 to 60 years' imprisonment for the assault with intent to murder conviction, 57 months' to 10 years' imprisonment for the felon in possession of firearm conviction, and 2 years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

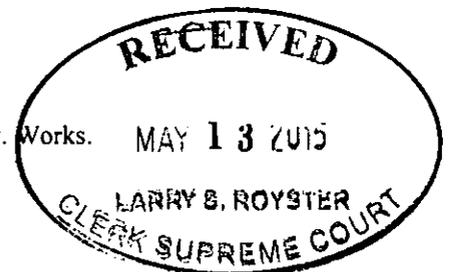
This case arises from a drive-by shooting in which the complainant and primary prosecution witness was a police informant, Desmond Savage. Savage had pleaded guilty to unrelated federal charges and agreed to cooperate with law enforce-

ment officers in unrelated cases in exchange for a lesser sentence. The information he provided led to the arrests of three of defendant's acquaintances.

The alleged assault occurred in this case as follows: a white Cadillac, which was owned by an acquaintance of defendant, drove by Savage as he was driving to his sister's house. After the car had passed by, Savage looked over his shoulder and saw the driver of the car remove the hood that was covering his face. Savage was certain the driver was defendant. He never lost eye contact with the white Cadillac after seeing defendant inside. After stopping at his sister's home, Savage left and drove past the white Cadillac. He saw its windows go down, observed one person inside, and heard two or three gunshots. The padding from his seat flew up into the air inside his vehicle.

After the shooting, Savage drove to the Alcohol, Tobacco, and Firearms office to meet with Special Agent Terry Bowden, with whom Savage had worked as an informant. Savage told Bowden that a person named "Shonell" had shot at him. Bowden then inspected Savage's car and found two bullet holes on the outside of Savage's vehicle, one on the rear passenger side, and one on the tailgate's right side. One of the bullets was found lodged in the far left interior dashboard and the other was recovered from inside the tailgate. Also, there was a tear in the passenger seat consistent with Savage's statement that he saw stuffing fly up from the seat after the shots had been fired. Both bullets appeared to have a trajectory consistent with having been fired into the rear passenger side of the vehicle toward the front driver's seat. Further, each bullet had an upward trajectory that was consistent with having been fired from a sedan or a vehicle that was lower than Savage's vehicle.

The next day, Bowden was able to find a photograph of Shonell Harris, which allowed Bowden to conduct a photographic lineup with Savage. Savage positively identified Shonell Harris as the



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shooter from the array of photographs. Defendant was arrested, and during his interview that day, he stated that he knew Savage was cooperating with law enforcement and that Savage was probably shot as a result of his cooperation. Defendant believed Savage caused the arrests of two of the people about whom Savage had been an informant. Defendant admitted to being friends with one of them.

*2 Defendant first argues the prosecution failed to present sufficient evidence for a rational factfinder to conclude beyond a reasonable doubt that defendant was the perpetrator of the crimes, or alternatively, that he had the required specific intent to murder. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v. Johnson*, 460 Mich. 720, 723; 597 NW2d 73 (1999); see also *People v. Wolfe*, 440 Mich. 508, 515 n 6; 489 NW2d 748, amended in part on other grounds 441 Mich. 1201 (1992). "Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew." *People v. Vaughn*, 186 Mich.App 376, 380; 465 NW2d 365 (1990). A trier of fact may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by any direct or circumstantial evidence. *Id.* at 379-380.

"The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v. Barclay*, 208 Mich.App 670, 674; 528 NW2d 842 (1995). "An assault may be committed without actually touching the person of the one assaulted." *People v. Snell*, 118 Mich.App 750, 754; 325 NW2d 563 (1982). An actual intent to kill must be found; an intent to place the victim in fear of being murdered is insufficient. *People v. Taylor*, 422 Mich. 554, 567; 375 NW2d 1 (1985); *People v. Burnett*, 166 Mich.App 741, 756-757; 421 NW2d 278 (1988).

Defendant first argues the evidence was insufficient to support his convictions because it did not establish that defendant was the perpetrator of the crime. We disagree. Savage had known defendant for two to three years before trial, and Savage was one hundred percent certain by personal identification that the driver was defendant. Also, Savage never lost eye contact with the white Cadillac after seeing defendant inside. Savage had initially believed the person who shot him was defendant, and identified defendant from an array of photographs as the driver of Williams' car. Also, defendant had a motive for attempting to kill Savage. Defendant knew that Savage was cooperating with law enforcement and believed Savage was the cause of Lewis' and Watkins' arrests.

Defendant also challenges Savage's credibility because he was an informant. However, Savage's cooperation with government did not involve the instant case and Savage received no apparent benefit from his testimony in the instant case. See, e.g., *People v. Monasterski*, 105 Mich.App 645, 657; 307 NW2d 394 (1981) (informant-witness testimony acceptable where immunity deal put before jury and defendant could cross-examine). In addition, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra*, 440 Mich. at 514; *People v. Elkhoja*, 251 Mich.App 417, 442; 651 NW2d 408 (2002).

*3 With regard to the required intent to commit assault with intent to murder, there also was sufficient evidence for a rational factfinder to conclude beyond a reasonable doubt that defendant possessed the specific intent to commit murder. Savage told Bowden that "Shonell" had shot at him. Bowden then inspected Savage's car and found two bullet holes on the outside of Savage's vehicle, one on the rear passenger side, and the other on the tailgate's right side. The evidence showed that each bullet had been fired at an upward trajectory, which was consistent with having been fired from the Cadillac that Savage had just passed on the street. In addi-

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tion, the bullets were fired from a place toward the rear right side of Savage's vehicle, and appeared to have been aimed toward the front driver's seat. With the evidence taken in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant intended to kill Savage with a firearm. See *Johnson, supra* at 723.

Defendant next argues that he is entitled to a new trial because the trial court violated MCR 6.414(F) by instructing the jury in part before the parties made their closing arguments.^{FN1} Defendant failed to object at trial, so the forfeited issue is reviewed for plain error affecting substantial rights.^{FN2} *People v. Carines*, 460 Mich. 750, 763; 597 NW2d 130 (1999). Under MCR 6.414(F), the trial court must instruct the jury after the closing arguments are made. However, the rule also provides for an exception: "with the parties' consent, the court may instruct the jury before the parties make closing arguments." MCR 6.414(F). Here, the trial court instructed the jury in part before closing arguments, but the court did not obtain the consent of the parties on the record. The prosecution suggests that consent was obtained during a bench conference immediately before instruction. However, with no indication on the record, consent cannot be inferred from an off-the-record bench conference.

FN1. According to the trial transcript, after closing arguments, the trial judge gave at least one additional instruction to the jury. See MCR 6.414(F), Staff comment ("Implicit in this provision is the option, if consented to by the parties, of instructing the jury both before and after closing arguments."). We note that staff comment to the Michigan Court Rules is not binding authority. *Id.*

FN2. We note that the trial court asked counsel more than once whether they had any objections to the jury instructions and they declined. After the parties noted their intentions to rest their respective cases, the

court stated (without objection): "[W]hat I would plan to do is to go immediately into jury instructions after we bring the [j]ury back." When both parties rested in front of the jury, the court began jury instructions before closing arguments.

Because defendant's objection now is to the timing of the instructions, not their substance, and because defendant did not explicitly consent to the court's timing, we decline to find the issue waived for appeal. See *People v. Carter*, 462 Mich. 206, 214, 215-216; 612 NW2d 144 (2000).

Thus, the trial court appears to have violated the court rule. However, reversal is not required because defendant has not shown that he was prejudiced by this procedure. See MCR 2.613(A); MCL 769.26; *Carines, supra*. Defendant argues that this action by the trial court caused prejudice as the jury began its deliberations once it was instructed and before the conclusion of the case, and that, since the jury assembled the next day to deliberate, it had already reached a conclusion and any instructions forgotten or not understood would have been neglected. However, the trial court specifically explained to the jurors that deliberations were not to begin until after the attorneys had made their closing arguments. To that end, the jury is presumed to follow its instructions. *People v. Graves*, 458 Mich. 476, 486; 581 NW2d 229 (1998). Moreover, juries commonly spend more than one day deliberating on a case and prejudice cannot be inferred from this.^{FN3} In the absence of any objection, which would have allowed the trial court to avoid or correct the error, defendant has not shown any prejudice by the trial court's instruction of the jury before closing arguments without the recorded consent of counsel. Therefore, defendant is not entitled to a new trial. See *Carines, supra*.

FN3. Further, we note that the jury was instructed that closing arguments are not evidence to be considered in deliberations.

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See CJ12d 2.5; *People v. Green*, 228
Mich.App 684, 693; 580 NW2d 444 (1998) .

*4 Affirmed.

Mich.App.,2002.
People v. Harris
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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
INDEPENDENT BANK, Plaintiff–Appellee,
v.
CITY OF THREE RIVERS, Defendant–Appellee,
and
Theodore P. Hentchel, Jr., Individually and as
Trustee of the Victoria May Hentchel Trust, UAD
9/27/2002, Defendant–Appellant.

Docket No. 305914.
Oct. 17, 2013.

Calhoun Circuit Court; LC No.2011–000757–CZ.

Before: MURRAY, P.J., and DONOFRIO and
BORRELLO, JJ.

PER CURIAM.

*1 Defendant Theodore P. Hentchel, Jr., individually and as trustee of the Victoria May Hentchel Trust, UAD 9/27/2002, appeals as of right the trial court's order granting summary disposition for defendant City of Three Rivers (the City) and plaintiff Independent Bank (the Bank). Because the doctrine of res judicata bars Hentchel's attempt to relitigate issues that the trial court previously adjudicated, we affirm.

This case stems from a May 1, 2006, judgment entered in favor of the City against defendant Theodore P. Hentchel, Jr., a licensed attorney, in the amount of \$41,961.01. On November 26, 2008, the City filed a complaint against Hentchel alleging that certain transfers that he made to the Victoria May Hentchel Trust, UAD 9/27/2002, were fraudulent and were made with the intent to defraud his

creditors (the 2008 action). In the 2008 action, the trial court granted the City's motion for summary disposition, concluding that Hentchel's transfers of his interests in a pension, a savings and investment plan, and stock options violated the Uniform Fraudulent Transfer Act, MCL 566.31 *et seq.* The court entered a judgment in favor of the City in the amount of \$47,616.50 and an injunction requiring Hentchel, as trustee of the trust, to transfer assets of the trust up to \$47,616.50 plus interest to the City. Hentchel appealed the trial court's decision to this Court, which dismissed the appeal because Hentchel failed to “order and secure the filing of the ‘full transcript of the testimony and other proceedings in the trial court or tribunal’ as required by MCR 7.210(B)(1)[.]” *City of Three Rivers v. Hentchel*, unpublished order of the Court of Appeals, entered December 13, 2010 (Docket No. 299976).

On or about January 10, 2011, the trial court issued a request and writ for garnishment on behalf of the City and against Hentchel that was served on the Bank. Thereafter, the Bank filed with the court a garnishee disclosure that disclosed a trust account in the amount of \$27,323.01. In a letter dated February 6, 2011, Hentchel directed the Bank not to turn over the funds in the account to the City. On March 9, 2011, the Bank filed this interpleader action asking the trial court to allow it to pay the garnished funds to the court or to a third party and asking to be discharged from all liability to either the City or the trust upon delivery of the funds.

The City moved for summary disposition arguing that Hentchel failed to file an objection to the writ of garnishment as provided by MCR 3.101(K). The City sought an order directing the Bank to turn over the funds to the City. In response to the motion, the Bank asserted that it took no position with respect to the underlying claims of the City and Hentchel and sought an order permitting it to deposit the garnished funds with the trial court or as directed by the court. The Bank requested an award

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of costs, including attorney fees incurred in the interpleader action. Hentchel also filed a motion for summary disposition asserting several arguments that challenged the trial court's previous decision in the 2008 action. Thereafter, the trial court consolidated the 2008 action and the interpleader action.

*2 In response to Hentchel's motion, the City argued that res judicata barred relitigation of issues that the trial court had previously addressed and adjudicated. The City asserted that because this Court dismissed Hentchel's appeal in the 2008 action, all orders that adjudicated the issues pertaining to that action were final.

The trial court granted the City's motion for summary disposition and ordered the Bank to turn over the garnished funds to the City. The court also granted summary disposition for the Bank pursuant to MCR 2.116(I)(2) and discharged it from any liability with respect to the garnishment. The court ordered Hentchel to pay the Bank's actual costs incurred in bringing the interpleader action. The court denied Hentchel's motion for summary disposition on the basis that res judicata barred Hentchel from relitigating the issues presented in his motion. Finally, the court imposed sanctions on Hentchel pursuant to MCR 2.114(E). Hentchel now appeals the trial court's decision.

On appeal, Hentchel raises many of the same arguments that the trial court determined were barred by the doctrine of res judicata because the court adjudicated those issues in the 2008 action. We review de novo the application of legal doctrines such as res judicata. *Estes v. Titus*, 481 Mich. 573, 578–579; 751 NW2d 493 (2008).

The doctrine of res judicata is intended to conserve judicial resources, encourage reliance on adjudication, foster finality in litigation, and relieve parties of the cost and vexation of multiple lawsuits. *TBCI, PC v. State Farm Mut. Auto Ins. Co.*, 289 Mich.App 39, 43; 795 NW2d 229 (2010). “Res judicata bars a subsequent action between the same parties when the evidence or essential facts are

identical.” *Dart v. Dart*, 460 Mich. 573, 586; 597 NW2d 82 (1999). Res judicata applies when “(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies.” *Id.*

In this case, Hentchel attempted to litigate many of the same issues in the interpleader action that had already been decided on the merits in the 2008 action. The trial court consolidated the interpleader action with the 2008 action after it had entered a final judgment in the 2008 action and only postjudgment proceedings to enforce the judgment remained. The interpleader action itself pertained to the City's attempt to enforce the judgment in the 2008 action. Hentchel appealed the judgment in the 2008 action to this Court, which dismissed his appeal because he failed to file the transcript of the testimony and other lower court proceedings.

Hentchel appears to challenge the trial court's determination that res judicata barred the litigation of his arguments on the basis that there is no judgment against Hentchel as trustee of the trust and that Hentchel, as trustee, was not a party to the 2008 action. Thus, Hentchel appears to contest the third res judicata requirement, i.e., that “both actions involve the same parties or their privies.” *Dart*, 460 Mich. at 586.

*3 The record shows that the caption in the consolidated 2008 action and interpleader action was amended to include Hentchel, as trustee, as a party at the same time that the two actions were consolidated. The City filed the 2008 action against Hentchel alleging that he made fraudulent transfers to the trust in an effort to defraud his creditors. On August 16, 2010, the trial court entered a judgment in favor of the City in the amount of \$47,616.50 and an injunction requiring Hentchel, as trustee, to transfer assets of the trust up to \$47,616.50 plus interest to the City. On November 29, 2010, the trial court entered an order to show cause requiring Hentchel to appear before the court and show cause why he should not be held in contempt for failing to

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turn over trust assets to the City. In response, Hentchel asserted that he, as trustee, was never made a party to the action and that the trial court had no jurisdiction over him as trustee. Thereafter, the trial court stated:

On August 16, 2010, this court entered an order in a case where Theodore P. Hentchel Jr., was a party. It required the trustee to transfer the assets of the Victor[ia] May Hentchel Trust up to \$47,616.50 plus interest forthwith to the Plaintiff, City of Three Rivers. There's no evidence that that order has been complied with at this point.

* * *

Mr. Hentchel in his response to the show cause order that triggered these proceedings notes that Theodore Hentchel Jr., as trustee is not specifically identified as a party....

* * *

Mr. Hentchel is an attorney. When he initially responded in this case, he responded on behalf of himself and the two trusts.^[FN1] In his response [he] acknowledged that he was a trustee. He has filed various things with the court acknowledging that he's the trustee of the trust, but now is essentially arguing that because the trust was identified as a party rather than the trustee that the court cannot take action to enforce its orders.

FN1. This appeal involves only one of the trusts.

* * *

The court does have the authority under MCR 2.207 to address mis-joined or non-joined ... parties. The court also has the authority under [MCR] 2.118 to permit amendment of pleadings. Both these rules are discretionary.

Mr. Hentchel has been aware from the beginning that the trust was implicated as a party. He's

admitted from the beginning that he's a trustee. He's appeared on behalf of both himself and the trust. He's filed pleadings or affidavits with the court identifying himself as the trustee in that context.

While the court recognizes the legal argument behind the position advanced by Mr. Hentchel, the court is satisfied that throughout these proceedings he's acted on behalf of the trust, as well as himself and advanced positions on behalf of the trust, as well as himself.

The court exercising the discretion that it has will amend the caption of the case to identify Theodore P. Hentchel Jr., individually and as trustee of the Victoria May Hentchel Trust that he has appeared on behalf of, and acted on behalf of throughout these proceedings.

*4 Accordingly, Hentchel, as trustee, was added as a party in the 2008 action at the same time that it was consolidated with the interpleader action. MCR 2.207 permits a trial court to add a party at any stage of the proceeding, even on appeal or on remand following an appeal. *Henkel v. Henkel*, 282 Mich. 473, 488; 276 NW 522 (1937); *Shouneyia v. Shouneyia*, 291 Mich.App 318, 325; 807 NW2d 48 (2011). Hentchel's argument that he, as trustee, could not have properly been added as a party because the statute of limitations had expired is unavailing. Even if the statute of limitations had expired, an "additional defendant may be brought [into an action] after the expiration of the statute of limitations where the new party is a necessary party...." *Forest v. Parmalee*, 60 Mich.App 401, 406; 231 NW2d 378 (1975), *aff'd* on other grounds 402 Mich. 348 (1978). Necessary parties are "persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief...." MCR 2.205(A). Because Hentchel, as trustee, held legal title to the assets of the trust, Hentchel, as trustee, was a necessary party ^{FN2} and could be joined regardless whether the statute of limitations had expired. Moreover, as the trial court

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recognized, the court merely amended the caption to reflect the manner in which the case was being litigated, including the fact that Hentchel had acted on behalf of himself individually and on behalf of the trust. Thus, because the 2008 action involved the same parties, including Hentchel as trustee, the trial court correctly determined that res judicata barred Hentchel's attempt to relitigate issues pertaining to the judgment in the 2008 action. Further, because Hentchel's remaining issues on appeal pertain solely to the judgment in the 2008 action, res judicata likewise precludes our review of those issues.

FN2. Our conclusion is consistent with *Healthsource v. Urban Hosp. Care Plus*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2006 (Docket No. 270482), on which Hentchel relies. In that case, this Court stated:

Because the trustee holds legal title to the trust assets in this case, the trustee's presence as a party was necessary to permit the trial court to render complete relief. Accordingly, the trustee should have been joined as a necessary party in this matter. MCR 2.205(A). "Parties may be added or dropped by order of the court ... on the court's own initiative at any stage of the action and on terms that are just." MCR 2.207. On remand, the trial court shall join the trustee as a party in this matter, and shall align it as a plaintiff or defendant according to its respective interest. MCR 2.205(A); MCR 7.216(A)(7). [*Id.*, slip op at 8.]

Affirmed. The City and the Bank, being the prevailing parties, may tax costs pursuant to MCR 7.219.

Mich.App.,2013.
Independent Bank v. City of Three Rivers

Not Reported in N.W.2d, 2013 WL 5663217
(Mich.App.)

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(Cite as: 2014 WL 891042 (Mich.App.))

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
Salvatore MANNONE, Jr., Plaintiff–Appellant,
v.

CHASE BANK NA, Federal National Mortgage
Association, Flagstar Bank FSB, Orlans and Asso-
ciates, Mortgage Electronic Registration Systems,
Inc., and Seterus, Inc., Defendants–Appellees.

Docket No. 310492.
March 6, 2014.

Macomb Circuit Court; LC No.2011–005171–CH.

Before: MURPHY, C.J., and M.J. KELLY and
RONAYNE KRAUSE, JJ.

PER CURIAM.

*1 In this action to quiet title, plaintiff appeals as of right the trial court's order granting defendants Federal National Mortgage Association (FNMA), Mortgage Electronic Registration Systems, Inc. (MERS), and Seterus, Inc. (Seterus) summary disposition pursuant to MCR 2.116(C)(8), and (C)(10). We affirm.

Plaintiff obtained a loan from Flagstar Bank secured by a mortgage on his residential property. Pursuant to the mortgage, Flagstar Bank was designated as the mortgagee with the right of foreclosure and the power of sale. Subsequently, the mortgage was assigned to MERS, and the assignment was recorded on November 3, 2003. It was then assigned to Chase Home Finance, LLC, and the assignment was recorded on July 21, 2010. Finally, it was assigned to FNMA, with the assignment having been recorded on March 3, 2011.

After plaintiff defaulted on the loan, defendants foreclosed on the property by advertisement, and a sheriff's sale was held where FNMA was the highest bidder. Plaintiff brought this action to quiet title. Defendants FNMA, MERS, and Seterus moved for summary disposition, and the trial court granted defendants' motion.^{FN1}

FN1. The other defendants were dismissed from the action by separate orders. This appeal involves only defendants FNMA, MERS, and Seterus.

On appeal, plaintiff contends that defendant Seterus was not a proper party to the action, and that summary disposition was improper.

We first address the issue of whether joinder of Seterus was proper. Plaintiff argues that Seterus was not properly added as a defendant. The record reflects otherwise. Plaintiff filed a motion requesting that Seterus be added as a defendant, and the trial court granted the motion and entered an order to this effect. It does not appear that plaintiff filed an amended complaint adding Seterus as a defendant. However, at every scheduled court hearing after that motion was granted, Seterus made an appearance before the court through its attorney.

Defendant Seterus does not object to being added into the lawsuit, regardless of not being served with amended complaint. Typically, the issue of service of a complaint is raised by a defendant in situations in which a complaint was not served within the required timeframe. In that situation, this Court has found that a party waives any objection to service of process by making a general appearance and submitting to the court's jurisdiction. *Macomb Concrete Corp v. Wexford Corp*, 37 Mich.App 423, 425; 195 NW2d 93 (1972).

Here, there is no question that Seterus appeared at every scheduled court hearing after the trial court granted plaintiff's motion to add Seterus as a de-

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defendant and submitted to the trial court's jurisdiction. Therefore, the trial court had jurisdiction over Seterus, making Seterus a party to the proceedings.

The court rules regarding joinder also provide guidance. MCR 2.205(A) provides for the necessary joinder of parties.

[P]ersons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

*2 Further, MCR 2.207 provides that “[p]arties may be added or dropped by order of the court on motion of a party or on the court's own initiative at any stage of the action and on terms that are just .” In the instant case, therefore, even if plaintiff had not moved to have Seterus added as a defendant, the trial court, on its own initiative, could have added Seterus as a party. Accordingly, plaintiff's argument is without merit.

Next, we turn to the issue of whether the grant of summary disposition to defendants was proper. We review a trial court's decision to grant summary disposition de novo. *Gillie v. Genesee Co Treasurer*, 277 Mich.App 333, 344; 745 NW2d 137 (2007). Whether a party has authority to initiate foreclosure proceedings involves statutory interpretation and application, which are questions of law that we review de novo. *Adams Outdoor Advertising v. City of Holland*, 463 Mich. 675, 681; 625 NW2d 377 (2001).

Because plaintiff does not argue specifically that the trial court erred with respect to MCL 2.116(C)(7), we will not review this issue on appeal. Thus, plaintiff properly appeals only the trial court's grant of summary disposition under MCR 2.116(C)(8) and (C)(10).

A trial court may properly grant summary disposition under MCR 2.116(C)(8) if “the opposing

party has failed to state a claim on which relief can be granted.” *Morris & Doherty, PC v. Lockwood*, 259 Mich.App 38, 42; 672 NW2d 884 (2003). Motions brought pursuant to this subrule test the legal sufficiency of a claim based solely upon the pleadings. When deciding a motion under subrule (C)(8), the trial court must accept all well-pleaded factual allegations as true and construe them in the light most favorable to the non-moving parties. *Adair v. State of Michigan*, 470 Mich. 105, 119; 680 NW2d 386 (2004).

While the trial court granted summary disposition pursuant to MCR 2.116(C)(8), it based its decision on documentary evidence outside the pleadings. Therefore, reliance on this subrule was erroneous.

Summary disposition, however, was appropriately granted under MCR 2.116(C)(10). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Robinson v. Ford Motor Co.*, 277 Mich.App 146, 150; 744 NW2d 363 (2007). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v. Taylor*, 263 Mich.App 618, 621; 689 NW2d 506 (2004). “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. Gen Motors Corp.*, 469 Mich. 177, 183; 665 NW2d 468 (2003).

Plaintiff argues that defendants' mortgage interest was invalid because the mortgage was severed from the note during the securitization process. The Michigan Supreme Court rejected this argument in *Residential Funding Co LLC v. Saurman*, 490 Mich. 909, 910; 805 NW2d 183 (2011), where the Court stated: “The security is always made in trust to secure obligations, and the trust and the beneficial interest need not be in the same hands.”

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The Court also specified that the mortgage and the note are to be construed together. *Id.* at 909.

*3 Plaintiff also argues that, because defendants' mortgage interest was invalid, it was not entitled to foreclose on the property. MCL 600.3204(1) allows an eligible party to foreclose by advertisement when the following conditions are met:

(a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.

(b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.

(c) The mortgage containing the power of sale has been properly recorded.

(d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

The parties do not dispute the facts that the mortgage was in default, that no other proceedings had been initiated for collection, and that the mortgage had been recorded, consistent with the requirements of MCL 600.3204(1)(a), (b), and (c). Plaintiff appears to argue that neither FNMA nor Seterus were the owner of the indebtedness and that this precluded their authority to foreclose by advertisement on the property in accordance with MCL 600.3204(3), which states: "If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale ... evidencing the assignment of the mortgage to the party foreclosing the mortgage."

The exhibits attached to defendants' brief in support of the motion for summary disposition provide evidence of a record chain of title. Plaintiff executed a note on March 26, 2003 in which he promised to pay \$104,800 to Flagstar Bank. On the same day and as security for the loan, plaintiff also executed a mortgage in which he mortgaged, warranted, granted and conveyed to Flagstar Bank and its successors and assigns, with power of sale, his residence. The mortgage was assigned to MERS on September 1, 2003 and recorded on November 3, 2003. The mortgage was subsequently assigned to Chase Home Finance LLC on July 13, 2010, and recorded on July 21, 2010. Finally, the mortgage was assigned to FNMA on October 1, 2010, and recorded on March 3, 2011.

"Only the record holder of the mortgage has the power to foreclose." *Arnold v. DMR Fin Serv(s), Inc.* 448 Mich. 671, 678; 532 NW2d 852 (1995). However, it has further been explained by the Michigan Supreme Court that the Legislature's use of the phrase "interest in the indebtedness" for identifying a category of parties entitled to foreclose by advertisement indicates the intent to include mortgagees of record along with parties who "own[] the indebtedness" and parties who act as "the servicing agent of the mortgage." *Residential Funding*, 490 Mich. at 910; see also MCL 600.3204(1)(d). Therefore, as long as the servicing agent is the agent for the record mortgage holder, foreclosure by such an agent is permitted.

*4 There is no genuine issue of fact disputing that, at the time of the foreclosure, Seterus was the servicing agent of the mortgage and that FNMA was the record owner of an interest in the indebtedness secured by the mortgage. This is in compliance with MCL 600.3204(1)(d), which permits "the servicing agent of the mortgage" to "foreclose a mortgage by advertisement." *Residential Funding*, 490 Mich. at 910. Overall, defendants were in compliance with the foreclosure laws.

Finally, plaintiff lacked standing to challenge the validity of the assignments because he was not a

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party to them, *Bowles v. Oakman*, 246 Mich. 674, 677; 225 NW 613 (1929). Plaintiff also lacked standing to challenge the foreclosure because the redemption period had expired. *Piotrowski v. State Land Office Bd*, 302 Mich. 179, 187–188; 4 NW2d 514 (1942). Because plaintiff failed to redeem the property before the redemption period expired, FNMA became vested with “all the right, title, and interest” in the property by operation of law, *Id.* at 187, and plaintiff lost standing to assert claims with respect to the property. On this basis alone, defendants were entitled to dismissal of the claims against them.

Affirmed.

Mich.App.,2014.
Mannone v. Chase Bank NA
Not Reported in N.W.2d, 2014 WL 891042
(Mich.App.)

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Not Reported in N.W.2d, 2006 WL 3687776 (Mich.App.)
(Cite as: 2006 WL 3687776 (Mich.App.))

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.
HEALTHSOURCE, Plaintiff-Appellee,
v.
URBAN HOSPITAL CARE PLUS, Defendant-Appellant.

Docket No. 270482.
Dec. 14, 2006.

Wayne Circuit Court; LC No. 05-531775-CZ.

Before: WHITBECK, C.J., and SAWYER and
JANSEN, JJ.

PER CURIAM.

*1 Defendant appeals as of right the trial court's grant of summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). We affirm the grant of summary disposition, but remand for further proceedings.

I. Facts

Defendant is a non-profit entity that receives public funding to support health care programs in Wayne County. Among other projects, defendant arranged funding for the now-terminated PlusCare program, which provided health care for indigent Wayne County residents. Plaintiff, a subsidiary of the Detroit Medical Center, was one of two contractors retained by defendant to provide medical services to PlusCare program enrollees.^{FN1} Under the contract between plaintiff and defendant, defendant was required to regularly compensate plaintiff on a per-patient basis, paying a set amount monthly for each Wayne County resident enrolled in the PlusCare program. Under the contract, a portion of the PlusCare monies owed by defendant to

plaintiff were to be withheld and deposited into a trust account. This trust account was designed to ensure that sufficient PlusCare funds would remain available to pay for services in the event of plaintiff's insolvency. It is undisputed that more than \$2 million owed by defendant to plaintiff was withheld and is currently contained in the trust account.

FN1. Defendant also contracted with a second contractor, UltiMed, to provide health care services for PlusCare enrollees.

The contract between plaintiff and defendant governed the creation and maintenance of the trust account. Section 13.01 of the contract provided:

[Plaintiff] shall enter into a trust agreement with [defendant] as set forth in Appendix B. All amounts entitled "Trust Deposits" in Appendix B shall be reductions of the amounts otherwise payable to [plaintiff] under ... this contract, and [plaintiff] shall have no rights to such Trust Deposits except as expressly set forth in Appendix B.

Section 13.02 of the contract required plaintiff to submit to defendant regular budget projections, balance sheets, financial statements, claims reports, and other financial information.

Appendix B of the contract contained the parties' trust agreement. As executed by the parties, this trust agreement provided that "[defendant] shall deposit with the Trustee for the Trust the sum of \$1,370,472, which shall constitute the initial deposit for the Trust as agreed to by [defendant] and [plaintiff]." The agreement also provided that "[e]ach payment to [plaintiff] under this agreement] after the date of this Trust Agreement shall be reduced by up to 7 1/2 % of such payment," and required that these regular 7 1/2 percent reductions be paid into the trust account. The agreement directed the trustee to hold the trust assets in an interest-

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bearing account, and to keep detailed records of the amount on deposit. Section 3 of the agreement directed the trustee to release the trust funds to defendant in the event of plaintiff's bankruptcy or insolvency. Section 4 explained that neither plaintiff nor defendant would have any right to the trust funds except as provided in the trust agreement, and stated that neither party would have the right to control or direct the actions of the trustee.

*2 Section 6 of the trust agreement governed the termination of the trust account. As amended by the parties, that section provided that "[t]he Trust created under this agreement shall terminate upon ... [d]elivery to the Trustee of a writing signed by [plaintiff] and [defendant] stating that the Trust is terminated[.]" Section 6 also provided, "Immediately upon such termination, the Trustee shall pay over to [plaintiff] all assets then held by the Trustee under this Trust Agreement."

It is undisputed that the PlusCare program terminated in its entirety on September 30, 2003. Section 12.05 of the contract between the parties provided that "[plaintiff] shall not be responsible for paying claims it receives more than one year from the date Services were provided to an Enrollee." Therefore, payment by plaintiff of any enrollee claims not satisfied as of September 30, 2004, was necessarily time-barred by the plain language of the parties' contract.

Upon termination of the PlusCare program, plaintiff requested that defendant consent to the release of the trust funds. Plaintiff asserted that it was entitled to the trust funds as reimbursement for certain PlusCare enrollee claims that it had paid with its own money. According to plaintiff, defendant stated that it would not consent to the release of the trust funds until after the expiration of a two-year period. In October 2005, more than two years after the PlusCare program's termination, plaintiff again requested release of the trust funds. Defendant was apparently concerned that there remained outstanding claims by PlusCare enrollees that still had not been paid by plaintiff. Thus, plaintiff sent defend-

ant documents that purported to show that all PlusCare enrollee claims had been paid in full by plaintiff. Plaintiff also indicated that it was willing to execute an indemnity or release agreement "protecting [defendant] from [plaintiff's] failure to pay provider claims relating to [plaintiff's] involvement in the PlusCare program."

After nearly a month, plaintiff again sent correspondence requesting that defendant consent to the release of the trust funds to plaintiff. Plaintiff informed defendant that "all eligible claims have been paid," and that the only claims that were not paid during the pendency of the PlusCare program had been non-covered or ineligible claims.

Almost one year later, defendant responded to plaintiff, indicating that it would consent to the release of the trust funds if plaintiff would execute an indemnity or release agreement. Specifically, defendant wrote:

Attached is the release document for the [PlusCare] trust. Please review. Once it is executed, [defendant] will send the required letter to [the trustee] so that the funds can be released to [plaintiff].

The proposed release agreement was broad and generally worded. On its face, the proposed release applied to both plaintiff and the Detroit Medical Center, stating that both entities waived and released any and all present and future claims that they had or might ever have against defendant. By its plain language, the release document was not limited to claims arising out of the PlusCare program, but arguably applied to all legal claims that might ever arise. The proposed release also specifically provided that plaintiff and the Detroit Medical Center waived and released any and all claims against defendant arising in relation to a completely separate lawsuit, Wayne Circuit Case No. 03-317433-CK.

*3 Contending that the release was overly broad in scope, plaintiff refused to execute the doc-

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ument. In November 2005, plaintiff commenced the present action, seeking a court-ordered release of the trust funds. Plaintiff alleged in its complaint that the PlusCare program had long since ended, that all legitimate PlusCare enrollee claims had been paid, that any unpaid claims were now time-barred under the terms of the parties' contract, and that the purpose for which the trust was created had therefore ceased to exist. Asserting that "[t]he trust no longer serves any legitimate purpose," the complaint asked the trial court to terminate the trust and release the trust assets to plaintiff.

Defendant countered by asserting that it was not willing to consent to the release of the trust funds because it had no way of knowing whether all PlusCare enrollee claims had been properly paid by plaintiff. Defendant also asserted that unless defendant was willing to execute the proposed release agreement, it could not consent to the release of the trust assets until all terms of the trust agreement had been satisfied.

On December 5, 2005, defendant served plaintiff with its first set of discovery requests. Defendant requested numerous documents and voluminous records from plaintiff, including all documents concerning every PlusCare enrollee claim that had ever been paid. Plaintiff did not fully comply with the discovery request, instead stating that it would be "impossible" to deliver up the information requested by plaintiff without incurring unreasonable expenses.

In January 2006, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), claiming that there were no disputed questions of fact, that the trust's purpose had long since ended, and that it was therefore entitled to a release of the trust assets.

In response to the motion, defendant asserted that (1) summary disposition would be premature because discovery was still open and plaintiff had not complied with the discovery request, and (2) there remained genuine issues of material fact that

had not been resolved. Relying on Wayne Circuit Case No. 03-317433-CK, in which the Detroit Medical Center sued UltiMed,^{FN2} defendant argued that there remained a genuine question of fact with respect to whether all claims paid by plaintiff were legitimate and non-fraudulent. In Wayne Circuit Case No. 03-317433-CK, there was evidence that Detroit Medical Center had falsified or forged certain signatures on PlusCare enrollee claims that were submitted to UltiMed for payment. Based on this evidence, defendant argued in the present matter that because Detroit Medical Center had submitted fraudulent or falsified PlusCare claims to UltiMed, it had likely submitted falsified or fraudulent PlusCare claims to plaintiff as well. Therefore, defendant asserted that there remained a factual question regarding whether plaintiff had wrongfully paid fraudulent PlusCare claims.

FN2. UltiMed was similar to plaintiff in that both entities were contractors retained by defendant to provide medical services for PlusCare enrollees. As a subsidiary of the Detroit Medical Center, plaintiff naturally relied on the Detroit Medical Center as a health care provider for many of its enrollee-patients. Similarly, UltiMed relied on the Detroit Medical Center as a health care providers for its enrollee-patients. However, although plaintiff was a subsidiary of the Detroit Medical Center, UltiMed was not.

Defendant also asserted that there remained a genuine issue of material fact with respect to whether any eligible PlusCare claims remained yet to be satisfied by plaintiff. Defendant contended that it was unable to determine whether all eligible PlusCare claims had been paid by plaintiff because plaintiff had failed to comply with the discovery request for financial reports and other documents.

*4 On April 21, 2006, the trial court granted plaintiff's motion for summary disposition under MCR 2.116(C)(10). The court ordered that "the Trust is terminated and the Trustee shall immedi-

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ately disburse all trust proceeds to [plaintiff]. Defendant ... shall cooperate fully to ensure the immediate release of the trust proceeds and shall execute any documents requested by the Trustee." The trial court stayed the order for 14 days to allow defendant to file a motion for reconsideration. Defendant moved for reconsideration, but the motion was denied. This Court granted a stay of the trial court's order, and expedited this appeal.^{FN3}

FN3. Unpublished order of the Court of Appeals, entered June 2, 2006 (Docket No. 270482).

II. Standard of Review

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v. Ameribank*, 468 Mich. 557, 561; 664 NW2d 151 (2003). Under MCR 2.116(C)(10), summary disposition is proper when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion for summary disposition under (C)(10) tests whether there is factual support for a claim. *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v. Detroit Bd of Ed*, 470 Mich. 274, 278; 681 NW2d 342 (2004).

The proper interpretation of a contract is a question of law that we review de novo. *Schmalfeldt v. North Pointe Ins Co*, 469 Mich. 422, 426; 670 NW2d 651 (2003). The primary goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language of the contract itself. *Old Kent Bank v. Sobczak*, 243 Mich.App 57, 63; 620 NW2d 663 (2000). Similarly, we review de novo the language used in a trust document as a question of law. *In re Estate of Reisman*, 266 Mich.App 522, 527; 702 NW2d 658 (2005).

Finally, whether a trust has terminated is a question of law. See *Herpolsheimer v. Herpolsheimer Realty Co*, 344 Mich. 657, 669; 75 NW2d 333 (1956). We review questions of law de novo. *Fraser Twp v. Linwood-Bay Sportsman's Club*, 270 Mich.App 289, 293; 715 NW2d 89 (2006).

III. Analysis

Defendant argues that summary disposition should have been precluded by the fact that no meaningful discovery had been completed. We disagree.

If summary disposition is granted before discovery on a disputed issue is complete, it is generally considered premature. *Oliver v. Smith*, 269 Mich.App 560, 567; 715 NW2d 314 (2006); *Stringwell v. Ann Arbor Pub School Dist*, 262 Mich.App 709, 714; 686 NW2d 825 (2004). However, the mere fact that discovery is incomplete does not preclude summary disposition. *Van Vorous v. Burmeister*, 262 Mich.App 467, 476-477; 687 NW2d 132 (2004). The nonmoving party must present some independent evidence that a genuine issue of material fact exists. *Id.* Summary disposition may be granted before the end of discovery if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Trentadue v. Buckler Automatic Lawn Sprinkler Co*, 266 Mich.App 297, 306; 701 NW2d 756 (2005); *Dimondale v. Grable*, 240 Mich.App 553, 566; 618 NW2d 23 (2000).

*5 The central question presented in this case concerns the termination date of the parties' trust. As noted above, § 6 of the parties' trust agreement governed the termination of the trust account. As amended by the parties, that section provided that "[t]he Trust created under this agreement shall terminate upon ... [d]elivery to the Trustee of a writing signed by [plaintiff] and [defendant] stating that the Trust is terminated[.]" Section 6 also provided, "Immediately upon such termination, the Trustee shall pay over to [plaintiff] all assets then held by the Trustee under this Trust Agreement."

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As the language of § 6 makes clear, plaintiff and plaintiff alone is entitled to the trust assets upon termination of the trust. As the language further makes clear, the question whether the trust had terminated was in no way dependent on which PlusCare enrollee claims were paid by plaintiff, whether plaintiff paid false or fraudulent claims, or whether any outstanding PlusCare claims still remained to be paid. Instead, the question whether the trust had terminated depended on one critical inquiry: whether the parties agreed that the trust should be terminated.

We concede that there may have remained questions of fact with respect to whether plaintiff paid all PlusCare enrollee claims and whether plaintiff paid any false, fraudulent, or ineligible claims. However, in order to preclude summary disposition and justify further discovery on a particular issue, a party must present some independent evidence that a genuine issue of *material* fact exists. *VanVorous, supra* at 476-477. "A material fact is an ultimate fact issue upon which a jury's verdict must be based." *Belmont v. Forest Hills Pub Schools*, 114 Mich.App 692, 696; 319 NW2d 386 (1982); see also Black's Law Dictionary (7th ed) (providing that a material fact is "[a] fact that is significant or essential to the issue or matter at hand"). Because the questions whether plaintiff had paid all outstanding PlusCare claims and whether plaintiff paid any fraudulent claims were irrelevant to the ultimate question in this matter—whether the parties' trust had terminated—the remaining questions of fact with respect to these issues were not "material" for purposes of the MCR 2.116(C)(10) summary disposition rule. In other words, further discovery of plaintiff's financial documents and claim-payment records did not stand a reasonable chance of uncovering factual support for defendant's contention that the trust had not terminated. *Trentadue, supra* at 306; *Dimondale, supra* at 566. The mere fact that discovery was incomplete on certain immaterial matters was not sufficient to foreclose summary disposition in this case.

Defendant also argues that remaining questions of fact concerning whether plaintiff paid all eligible PlusCare claims, whether plaintiff paid any fraudulent claims, and whether any claims still remained to be paid were sufficient to preclude summary disposition in this matter. We disagree.

*6 Summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any *material* fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10) (emphasis added). As noted above, a "material fact" is "an ultimate fact issue upon which a jury's verdict must be based." *Belmont, supra* at 696. The questions whether plaintiff paid all eligible PlusCare claims, whether plaintiff paid any fraudulent claims, and whether any claims still remained to be paid had no bearing on whether the parties had in fact agreed or not agreed to terminate the trust. Because these questions were irrelevant to the ultimate fact question in this case, these issues were not "material" for purposes of MCR 2.116(C)(10). Thus, even assuming *arguendo* that genuine questions of fact existed with respect to all of these issues, such factual disputes were insufficient to overcome summary disposition for plaintiff.

Defendant next argues that the trial court erred in ruling that because the purpose of the trust had been completed, the trust had necessarily terminated. We disagree.

Despite the language of § 6 of the trust agreement, the trial court had the inherent power to terminate the trust agreement in this case. The circuit court has broad equitable powers. MCL 600.601(1)(b); *Lester v. Spreen*, 84 Mich.App 689, 695; 270 NW2d 493 (1978). Under Michigan law, a court of equity has the power to terminate a trust upon completion of the purpose for which the trust was established, and upon agreement by all trust beneficiaries that the trust should be terminated. *Fornell v. Fornell Equipment, Inc.* 390 Mich. 540, 551; 213 NW2d 172 (1973) (stating that "it is within the power of a court of equity to decree a termin-

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(Cite as: 2006 WL 3687776 (Mich.App.))

ation of a trust where the purpose for which it was created is fulfilled and all of the parties owning the entire beneficial interest are in agreement that the trust be dissolved”).

We agree with defendant that the language of § 6 could lead to an unjust and unreasonable result in the present matter, effectively delaying the release of trust assets forever while plaintiff continues to baselessly withhold its consent for trust termination. A trust such as that established in the present matter must necessarily terminate at *some* point. Indeed, the purpose of the trust, expressly provided in the parties' trust agreement, was to ensure that sufficient funds remained available to pay eligible PlusCare claims in the event of plaintiff's insolvency or bankruptcy. Therefore, by its very language, the parties' agreement envisioned that the trust would end upon completion of the PlusCare program and payment of all outstanding expenses.

Turning to the specific facts of this case, there remained no question of fact regarding whether the trust's purpose had concluded. As noted above, it is undisputed that the PlusCare program terminated in its entirety on September 30, 2003. Moreover, § 12.05 of the parties' contract provided that “[plaintiff] shall not be responsible for paying claims it receives more than one year from the date Services were provided to an Enrollee.” Therefore, payment by plaintiff of any enrollee claims not satisfied as of September 30, 2004, was necessarily time-barred by the plain language of the agreement.

*7 Because the PlusCare program had terminated and all claims were either paid or barred by the passage of time, reasonable minds could not have concluded that the trust remained necessary to protect against plaintiff's possible insolvency or bankruptcy. In short, the purpose of the trust was complete. Further, plaintiff was the sole beneficiary of the trust. Section 6 of the trust agreement recognized this basic fact by making all trust assets payable to plaintiff upon the trust's termination. Because the trust's express purpose had been completed, and because the trust's sole beneficiary had

agreed to the trust's termination, the trial court properly ordered the termination of the trust in this case. *Fornell, supra* at 551. Summary disposition of this issue was properly granted.

Finally, defendant argues that the trial court had no authority to order the trustee to distribute the trust assets to plaintiff because the trustee was never made a party to this action.^{FN4} We agree.

FN4. Defendant does not challenge the trial court's ruling on the basis of the “real party in interest” rule of MCR 2.201. Nonetheless, we note in passing that while MCR 2.201(B) generally requires that an action be prosecuted in the name of the real party in interest, subsection (B)(1) provides an exception for a “trustee of an express trust.” MCL 600.2041, which provides that “[e]very action shall be prosecuted in the name of the real party in interest,” similarly provides an exception for trustees of an express trust.

We recognize that circuit courts have broad powers, MCL 600.601, and that they have the authority to make any order proper to fully effectuate their jurisdiction and judgments, MCL 600.611. However, circuit courts generally lack jurisdiction over non-parties against whom no complaint has been filed. *Spurling v. Battista*, 76 Mich.App 350, 353-354; 256 NW2d 788 (1977). Here, no complaint was filed against the trustee, and the trustee was never made a party to this action. Therefore, even though summary disposition was proper, the trial court nonetheless erred in ordering the trustee to release the trust funds to plaintiff.

Because the trustee holds legal title to the trust assets in this case, the trustee's presence as a party was necessary to permit the trial court to render complete relief. Accordingly, the trustee should have been joined as a necessary party in this matter. MCR 2.205(A). “Parties may be added or dropped by order of the court ... on the court's own initiative at any stage of the action and on terms that are

Not Reported in N.W.2d, 2006 WL 3687776 (Mich.App.)
(Cite as: 2006 WL 3687776 (Mich.App.))

just.” MCR 2.207. On remand, the trial court shall join the trustee as a party in this matter, and shall align it as a plaintiff or defendant according to its respective interest. MCR 2.205(A); MCR 7.216(A)(7).

Affirmed but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Mich.App.,2006.
Healthsource v. Urban Hosp. Care Plus
Not Reported in N.W.2d, 2006 WL 3687776
(Mich.App.)

END OF DOCUMENT

STATE OF MICHIGAN
IN THE SUPREME COURT

GLENN S. MORRIS,
Plaintiff/Appellee,

v

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C, a professional limited liability company, and DAVID W. CHARRON,

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY, L.L.C.,
Appellant.

Supreme Court Docket No. 149631
Court of Appeals No. 315007
Lower Court Case No. 09-01878-CB
Circuit Judge Christopher P. Yates

MORRIS, SCHNOOR & GREMEL
PROPERTIES, L.L.C.,

Plaintiff/Appellee,

v

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C, a professional limited liability company, and DAVID W. CHARRON,

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY, L.L.C.,
Appellant.

Supreme Court Docket No. 149632
Court of Appeals No. 315702
Lower Court Case No. 09-11842-CB
Circuit Judge Christopher P. Yates

GLENN S. MORRIS,
Plaintiff/Appellee,

v

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C, a professional limited liability company, and DAVID W. CHARRON,

Defendants,

and

NEW YORK PRIVATE INSURANCE AGENCY, L.L.C.,
Appellant.

Supreme Court Docket No. 149633
Court of Appeals No. 315742
Lower Court Case No. 09-01878-CB
Circuit Judge Christopher P. Yates

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CERTIFICATE OF SERVICE

The undersigned states that on the 13th day of May, 2015, she served a copy of **PLAINTIFFS-POTENTIAL APPELLEES GLENN S. MORRIS AND MORRIS, SCHNOOR & GREMEL PROPERTIES, LLC'S SUPPLEMENTAL OPPOSING BRIEF TO POTENTIAL APPELLANT NEW YOUR PRIVATE INSURANCE, LLC'S APPLICATION FOR LEAVE TO APPEAL**, and a copy of this **CERTIFICATE OF SERVICE**, upon:

David W. Charron, Esq.
CH Law PLC
4949 Plainfield, N.W.
Grand Rapids, MI 49525

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by First Class US Mail, postage fully prepaid.

I declare that the statements above are true to the best of my knowledge, information, and belief.


Katherine J. Brashier-Fornage
Legal Administrative Assistant

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Founded in 1852
by Sidney Davy Miller

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October 6, 2014

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Clerk of the Court
The Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa Street
Lansing, MI 48915

RE: *Morris, et al. v Morris, Schnoor & Gremel, Inc., et al*
Supreme Court Docket No. 149631 and 149633; and
Morris, Schnoor & Gremel Properties, LLC v Schnoor & Gremel, Inc., et al
Supreme Court Docket No. 149632

Dear Clerk:

Enclosed please find the original and seven (7) copies of **PLAINTIFFS-POTENTIAL APPELLEES GLENN S. MORRIS AND MORRIS, SCHNOOR & GREMEL PROPERTIES, LLC'S SUPPLEMENTAL OPPOSING BRIEF TO POTENTIAL APPELLANT NEW YOUR PRIVATE INSURANCE, LLC'S APPLICATION FOR LEAVE TO APPEAL** and the original **CERTIFICATE OF SERVICE**, in the above-referenced matter.

If you have any questions, please do not hesitate to contact our office. Thank you.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By:

Katherine J. Brashier-Fromage
Katherine J. Brashier-Fromage
Legal Administrative Assistant

/kbf
Enclosures

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Earl E. Erland, Esq.

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