STATE OF MICHIGAN
IN THE SUPREME COURT

DONNA WALKER, WILLIAM WALKER, and HEAD TO TOES MASSAGE THERAPY OF OXFORD, INC.,

Plaintiffs-Appellees,

Oakland County Circuit Court
Case No. 2015-145545-CK

Court of Appeals
Case No. 333160

OTIS M. UNDERWOOD, JR.,

Defendant-Appellant.
_____/

Supreme Court
Case No. _____

LEONARD KRUSE, P.C.
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APPLICATION FOR LEAVE TO APPEAL

NOW COMES the Defendant/Appellant, OTIS M. UNDERWOOD, JR., by and through his attorney, PHILLIP B. MAXWELL, and applies for leave to appeal saying the following:

1. This is a contract case. The parties entered into a written contract to lease space in a re-built structure after a fire in the adjoining building destroyed Underwood's building in Lake Orion, Michigan. The Plaintiff sought to lease the second floor to move her massage-manicure business into from her Oxford location. The building shell had been reconstructed but finish work was not done so that a tenant could custom finish to suit. A

copy of the contract is attached as **Exhibit A.**

2. The prospective tenants, Walkers, filed suit nine months later for loss of profits because the inspections of the mechanical, had not been approved and so the final inspection for compliance with all codes and laws (handicap drinking fountain, etc.) for a certificate of occupancy had not yet been issued.

3. The contract contained two provisions that led to the trial court granting Underwood Summary Disposition in an opinion and order dated December 4, 2015 by Oakland County Circuit Judge McMillen, see **Exhibit B.**

4. The Walkers appealed Judge McMillen's Order to Michigan Court of Appeals. The majority opinion reversed Judge McMillen and returned the case to circuit court, see **Exhibit C.**

5. Underwood seeks Leave to Appeal to this Court because Court of Appeals rejected or refused to follow and apply settled law in Michigan that the interpretive canon of *expressio unius est exclusio alterius* applied to contract disputes in Michigan Courts. Please see Defendant-Appellant Underwood's brief in support of this Application for Leave for the cited case authorities.

6. The Court of Appeals cited the case of *Short v Hollingsworth*, 291 Mich 271 (1938) as authority for insisting that without flag-words added to the remedy paragraph #10 of the parties contract to designate exclusivity to the named remedies the contract language limiting remedies to those provided had no lawful meaning and Plaintiffs could proceed with their suit for lost profits. The *Short,* supra case cited no Michigan case for authority

7. of their affirmation of the trial court to award money to the seller of stock (Short) damages for the failure of Hollingsworth to pay the last of 4 payments for the stock

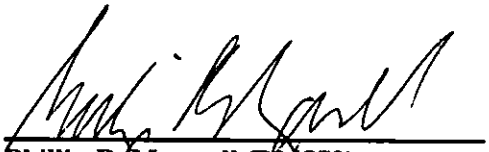
despite a forfeiture detailed in the contract language. The *Short*, supra case has not been cited by any court publishing its opinion. The out of state cases cited in the *Short,* supra opinion (Indiana, and Federal Circuit Court for the 8th Circuit) when examined does not reveal a holding under similar facts that would warrant the adoption into Michigan law a new legal requirement for people writing and signing contracts in Michigan. Other sources are equally unavailing, e.g. Williston on Contracts, Corbin on Contracts, Am Jur 2d, contract. The *Short,* supra, case in *sui generous*. The *Short,* supra, case did not apply existing law because the case was not decided on the exclusiveness of the forfeiture procedure because there was no law requiring that an agreed to remedy had to be the exclusive remedy for the court to enforce. The Court of Appeals majority opinion has written new law.

8. The result of the Court of Appeals reversal of the Circuit Court Dismissal is that the Court has re-drafted the contract and thereby impaired the rights of these citizens, and all citizens, to arrange their affairs as they see best including to freely contract with others and have the Court's enforce their contract..

9. That Defendant/Appellant argues the above outlined issues with a Brief accompanying this Application for Leave to Appeal and adopts the Brief by this reference.

WHEREFORE, Defendant/Appellant, OTIS M. UNDERWOOD, JR., prays this Honorable Court grant this Application for Leave to Appeal.

Respectfully submitted,



Phillip B. Maxwell (P24872)
Attorney for Defendant-Appellant
57 N Washington St.
Oxford, MI 4837

DATE: October 19, 2017

EXHIBIT A

OTIS M. UNDERWOOD, JR.
167 S. Washington St.
Oxford MI 48371
(248)628-3800
(248)628-4202 (fax)
underwoodpc@aol.com

April 29, 2014

DONNA WALKER
1112 Kings Cove Dr.
Rochester Hills MI 48306

RE: 18 S. Broadway St.
Lake Orion

Dear Mrs. Walker:

This letter agreement will serve as a preliminary contract for the lease of 18 S. Broadway, Lake Orion MI. This preliminary agreement is written in outline form because some of the details of the duties that both parties are undertaking are not presently known, and may be presently unknowable, because of the governmental authorities that may require approvals not presently known to one or both of the parties. These approvals are necessary to open and conduct business, the failure, of which will/may impair further duties that each of the parties owe to the other party.

1. The parties are indulified as:

LANDLORD: OTIS M. UNDERWOOD, JR.
167 S. Washington St.
Oxford MI 48371
(248)628-3800

TENANTS: DONNA WALKER
1112 Kings Cove Dr.
Rochester Hills MI 48306

WILLIAM WALKER
1112 Kings Cove Dr.
Rochester Hills MI 48306

Head to Toes Massage Therapy of Oxford, Inc.
Donna Walker and William Walker
121 S. Washington St.
Oxford MI 48371

2. This agreement is conditional upon the tenants fully completing to the satisfaction of Landlord the application form supplied. This may include additional inquiries as the Landlord sees fit as to the tenants' personal background and credit worthiness to undertake the obligations under the lease and to demonstrate the likelihood of success in the business tenants intend to conduct in the premises.

3. Upon acceptance of the tenants by the Landlord, the finish fit out of the premises will proceed to achieve approval of final inspections by the Orion Township Building Authorities as soon as is reasonably possible to obtain an occupancy permit.

4. Simultaneously with Landlord's finish construction, the tenant agrees to provide Landlord at their sole expense:

    a. A plan for the build out/fitting of their work area which, at a minimum shows:
        i. All counter space, including height/width dimensions and placement within the existing floor plan
        ii. All special electrical outlets and additional electrical outlets on the counters/walls to accommodate appliances
        iii. All additional plumbing requirements including sinks, water supply outlets with hot/cold designations
        iv. All electronic service/monitoring stations including cash registers; security PBR's; computer stations; credit card processing stations; security monitoring display screens, advertising signs/screens with designations of whatever signal input will be employed
        v. Any special lighting, specifically describing the light fixture to include wattage of the fixture.
        vi. Any special HVAC (Landlord has already installed and provided overhead lighting and floor/ceiling HVAC outlets).

    b. Tenant expressly agrees that their use plan does not and will not include any food preparation employing deep fat frying techniques or any others that would require a venting hood or Ansul® apparatus.

    c. The tenant will pay all expenses for the purchase of appliances, machines, base plate for chairs, if applicable as well as sinks/counter tops/work tables, cutting stones, etc. to be employed in the plan. Landlord will install at his expense electrical outlets and rough plumbing access, drains and supply. Any expense Landlord advances for tenants' agreed to obligation to pay, will be reimbursed not later than at the signing of the lease.

5. The tenant will forthwith make application to the Village of Lake Orion for a use permit of the premises for its business purposes. The tenant will use all reasonable efforts/expenses to obtain a use permit upon which actual occupancy depends.

6. Likewise, Landlord will use all reasonable efforts/expense to obtain a final occupancy permit of the building. The basement may be used for storage, etc. but no special finish construction is included in Landlord's obligations.

7. The Lease (form included as part of this agreement) will be signed for an initial 3 year term (and use of basement for storage, etc.) A monthly rental of $1,700, paid in advance, plus, the payment at signing, a $2,000 security deposit as well as a refund of any costs advanced by Landlord in the build out to begin occupancy.

8. At the lease signing, tenant will have inspected the premises under lease and sign a written declaration that they are satisfied that the premises is in good condition and accepts occupancy in an as-is condition.

9. Tennant agrees that at the lease signing they will have procured liability insurance naming landlord as additional insured in the minimum amount of $1 million/ $3 million per occurrence, for liability coverage. Tennant is also responsible for insuring against loss of the glass windows, its own furniture and fixtures/appliances and inventory. Landlord insures the building for liability claims made against him as well as his risk of loss from fire, and other hazards.

10. The failure of either party to perform the preliminary duties outlined in this letter agreement will permit the obligee of the duty to declare a default and terminate this preliminary agreement to lease or other remedy that may be agreed to by the parties.

11. The terms of the 13 page lease are agreed to and the forms of the lease will be signed by landlord and tenants and the forms of the lease referred to here will govern the rights and duties of the parties preliminary to and after its signing.

AS SO AGREED:

Donna Walker — 5/5/2014

DONNA WALKER, Individually — DATE

5-5-2014

WILLIAM WALKER, Individually — DATE

Donna Walker — 5/5/2014

HEAD TO TOES MASSAGE THERAPY OF OXFORD, INC. BY: Donna Walker, President — DATE

5-5-2014

HEAD TO TOES MASSAGE THERAPY OF OXFORD, INC. BY: William Walker, President — DATE

5-5-2014

OTIS M. UNDERWOOD, JR. /LANDLORD — DATE

EXHIBIT B

February 18, 2015

Mr. Otis M. Underwood, Jr.
167 S. Washington St.
Oxford, Michigan 48371

RE: 18 S. Broadway, Lake Orion, Michigan
Our File: 7088

Dear Mr. Underwood:

Please be advised that the undersigned represents William Walker, Donna Walker and Head to Toes Massage Therapy of Oxford, Inc.

In light of the numerous delays in readying the above referenced site for occupancy, please consider this letter notice of my clients' decision to terminate their interest in and any and all obligations regarding the property located at 18 S. Broadway, Lake Orion, Michigan.

Should you have any questions concerning the foregoing, please do not hesitate to contact me.

Best regards.

Sincerely,

Kelly A. Kruse

KAK/ck
cc: William and Donna Walker

LEONARD & KRUSE, P.C.
Attorneys and Counselors at Law
4190 Telegraph Road • Suite 3500 • Bloomfield Hills • Michigan 48302

EXHIBIT C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

DONNA WALKER, et al.,

Plaintiffs,

Case No. 15-145545-CK
Hon. Phyllis C. McMillen

v

OTIS M. UNDERWOOD, JR.,

Defendant.
_____/

OPINION AND ORDER
At a session of Court
Held in Pontiac, Michigan
On

DEC 04 2015

This matter is before the Court on the motion for summary disposition of defendant, Otis Underwood. Plaintiffs filed the instant action alleging breach of contract and fraudulent misrepresentation in connection with commercial property in Lake Orion owned by Defendant. Defendant moves for summary disposition pursuant to MCR 2.116(C)(8).

I. SUMMARY DISPOSITION STANDARDS

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). In a contract-based action, the motion is based only on the pleadings and any contracts attached to a pleading pursuant to MCR 2.113(F)(1). *Id.* The pleadings are comprised of the complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer. *Village of Diamondale v Grable*, 240

Mich App 553, 565; 618 NW2d 23 (2000). All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the non-movant. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to create a cause of action. *York v Fiftieth Dist Court*, 212 Mich App 345, 347; 536 NW2d 891 (1995); *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 409; 792 NW2d 686 (2010) (on a (C)(8) motion, the Court must accept as true facts alleged in the complaint, but not conclusions). But see *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008) (the trial court must also consider "any reasonable inferences or conclusions that can be drawn from the facts"). A court should grant the motion when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

II. ANALYSIS

A. Breach of Contract

To establish a breach of contract, a plaintiff must first establish the elements of a contract. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). A valid contract requires "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). The plaintiff must then establish the breach of the contract and damages resulting from the breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Defendant asserts several defenses to the claim, including an exclusive remedy provision in the May 5, 2014 agreement. That provision states:

> The failure of either party to perform the preliminary duties outlined in this letter agreement will permit the obligee of the duty to declare a default and terminate this preliminary agreement to lease or other remedy that may be agreed to by the parties. [Agreement, ¶ 10].

Defendant asserts that even if he breached a duty owed under the agreement, Plaintiffs' sole remedy was to declare a default and terminate the agreement. The Court agrees. That contracts are enforced according to their terms is a corollary of the parties' liberty to contract. *Rory v Continental Ins Co*, 473 Mich 457, 468, 703 NW2d 23 (2005). Courts examine contractual language and give the words their plain and ordinary meanings. *Wilkie v Auto–Owners Ins Co*, 469 Mich 41, 47, 664 NW2d 776 (2003). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law," and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375, 666 NW2d 251 (2003). Courts may not impose an ambiguity on clear contract language. *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 198, 702 NW2d 106 (2005).

The language in paragraph 10 is clear and unambiguous. If either party failed to perform, the other could declare a default and terminate the agreement. The pleadings do not reveal any other remedy agreed to by the parties. Accordingly, Defendant is entitled to dismissal of this claim pursuant to MCR 2.116(C)(8).

B. Fraudulent Misrepresentation

Actionable common-law fraud requires proof that "'(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the

representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.'" *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (citations omitted). Further, an action for fraud must be predicated upon a false statement relating to a past or existing fact; promises regarding the future are contractual and will not support a claim of fraud. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). A mere broken promise does not constitute fraud, nor is it evidence of fraud. *Higgins v Lawrence*, 107 Mich App 178, 184-185; 309 NW2d 194 (1981).

Fraud must be pleaded with particularity. MCR 2.112(B)(1). Plaintiffs must allege with particularity the statements each defendant made; references to unspecified allegations are insufficient. *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009).

Defendant is entitled to summary disposition pursuant to MCR 2.116(C)(8), because the claim is not pleaded with the required particularity.

Plaintiffs will be allowed to amend the complaint regarding certain allegations. MCR 2.116(I)(5). Some of the alleged statements are not actionable because they relate to future promises, e.g., Defendant's statements that the space "would be ready no later than August 1, 2014". Complaint, ¶ 11. Amendment regarding these statements would be futile. At least one of the alleged statements, however, relates to a past or existing fact, and could be the basis for a fraud claim. In Paragraph 28, the Complaint alleges that Defendant committed fraud when he "advised Plaintiffs, on multiple occasions, that he

had received permits and inspections for the property that he had not actually received." Complaint, ¶ 28. Plaintiffs will be allowed to amend the complaint regarding these statements.

WHEREFORE, IT IS HEREBY ORDERED that Defendant's motion for summary disposition is GRANTED. Both claims in the Complaint are dismissed. Plaintiffs may file an amended complaint alleging fraudulent misrepresentation within 14 days of this Order.

IT IS SO ORDERED.

Phyllis C. McMillen
Circuit Judge

EXHIBIT D

STATE OF MICHIGAN

COURT OF APPEALS

DONNA WALKER, WILLIAM WALKER, and HEAD TO TOES MASSAGE THERAPY OF OXFORD, INC., Plaintiffs-Appellants, v OTIS M. UNDERWOOD, JR., Defendant-Appellee.	UNPUBLISHED September 7, 2017 No. 332129 Oakland Circuit Court LC No. 2015-145545-CK
DONNA WALKER, WILLIAM WALKER, and HEAD TO TOES MASSAGE THERAPY OF OXFORD, INC., Plaintiffs-Appellees, v OTIS M. UNDERWOOD, JR., Defendant-Appellant.	 No. 333160 Oakland Circuit Court LC No. 2015-145545-CK

Before: SHAPIRO, P.J., and GLEICHER and O'BRIEN, JJ.

O'BRIEN, J. (*concurring in part and dissenting in part*)

I disagree with the majority's conclusion that holding the parties to their agreed upon remedies "requires the insertion of a word or words limiting the available remedies for breach to those specified." Therefore, I respectfully dissent to that portion of the majority's opinion.

The majority recognizes the canon *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) in a footnote but refuses to apply it to the parties' contract. In my opinion, the majority's refusal to even consider this rule of construction ignores the fact that this rule is only "a tool to ascertain" the parties' intent and "does not automatically lead to results." *Luttrell v Dep't of Corrections*, 421 Mich 93, 107; 365 NW2d 74 (1984). The rule is one "of logic and common sense," *Hackel v Macomb Co Comm*, 298 Mich App 311, 324; 826

NW2d 753 (2012) (citation and quotation marks omitted), and it "cannot govern if the result would defeat the clear . . . intent" of the parties, see *AFSCME v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005). Based on the parties' decision to identify specific remedies and list them in their contract, we can ascertain that they intended for those specific remedies to be available in the event of a breach. Nothing in the contract or otherwise tends to show that they intended for other remedies to be available. Thus, the only logical conclusion is that the parties intended to limit their available remedies to those specified in their contract. If, as the majority suggests, the parties did not intend to limit their available remedies, then there would have been no need to specify any remedies in the first place. Rather, the parties simply could have stated, "The failure of either party to perform the preliminary duties outlined in this agreement will permit the obligee of the duty to seek any remedy available under the law." But instead, the parties chose to list the available remedies. To now ignore those listed remedies renders them utterly meaningless, which I refuse to do. See *Nat'l Pride At Work, Inc v Governor of Michigan*, 481 Mich 56, 70; 748 NW2d 524 (2008) ("[A]n interpretation that renders language meaningless must be avoided."). Moreover, to allow plaintiffs to pursue a remedy that was not listed adds a provision to the contract that simply is not there. See *Sandusky Grain Co v Borden's Condensed Milk Co*, 214 Mich 306, 311; 183 NW2d 218 (1921) ("Courts may not arbitrarily read provisions out of or into [parties'] contracts in order to make [a party] liable or make new contracts for [the obligors] and the obligees.").

Further, I do not agree with the majority that the contract's use of the word "permit" in its remedy clause bears any weight on the interpretation of this agreement. Based on my reading of the contract, the word "permit" is used in the sense that plaintiffs have permission to pursue one of the agreed upon remedies in the event that Underwood does not fulfill his duties under the agreement. In other words, "permit" is permissive with regard to whether or not plaintiffs choose to pursue one of the agreed upon remedies, not with regard to the remedies themselves. And with regard to the majority's reliance on *Short v Hollingsworth*, 291 Mich 271; 289 NW 158 (1939), I find that this case is distinguishable because, unlike in *Short*, the parties in this case listed multiple remedies. Moreover, the language at issue in the contract from *Short* was drastically different from the language used in the contract before us: "shall" and "may" are traditionally recognized as contrasting permissive and mandatory language, see *Perkovic v Zurich American Ins Co*, 500 Mich 44, 61-62; 893 NW2d 322 (2017) (" 'May' generally denotes something that is permissive rather than mandatory, in contrast to the word 'shall' "), whereas "will permit" and "will be signed" or "will have procured" are not. Accordingly, I would affirm the trial court's order granting summary disposition pursuant to MCR 2.116(C)(8) in favor of Underwood in Docket No. 332129. I do agree, however, that Underwood's cross appeal in Docket No. 333160 is without merit.

/s/ Colleen A. O'Brien

STATE OF MICHIGAN

COURT OF APPEALS

DONNA WALKER, WILLIAM WALKER, and HEAD TO TOES MASSAGE THERAPY OF OXFORD, INC., Plaintiffs-Appellants, v OTIS M. UNDERWOOD, JR., Defendant-Appellee.	UNPUBLISHED September 7, 2017 Nos. 332129 Oakland Circuit Court LC No. 2015-145545-CK
DONNA WALKER, WILLIAM WALKER, and HEAD TO TOES MASSAGE THERAPY OF OXFORD, INC., Plaintiffs-Appellees, v OTIS M. UNDERWOOD, JR., Defendant-Appellant.	 No. 333160 Oakland Circuit Court LC No. 2015-145545-CK

Before: SHAPIRO, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

The parties signed a letter agreement regarding a building owned by defendant Otis M. Underwood, Jr. Underwood, an attorney, drafted the document. The contract provided that Underwood would build out part of the premises for plaintiffs' use as the new location of their spa business, and would "use all reasonable efforts/expense to obtain a final occupancy permit of [sic] the building." Nine months later, plaintiffs informed Underwood that they could wait no longer for him to complete the work necessary for an occupancy permit. They filed suit alleging breach of contract and fraudulent misrepresentation.

The circuit court granted summary disposition in Underwood's favor, ruling that the "sole remedy" permitted by the letter agreement was for the aggrieved party "to declare a default

and terminate this preliminary agreement to lease," unless the parties agreed otherwise. We read the contractual language differently, and reverse this ruling.[1] The circuit court denied Underwood's motion for sanctions; we affirm that decision.

I

We review de novo the circuit court's summary disposition ruling. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). The primary question presented in this case is whether the following paragraph of the letter agreement precluded plaintiffs from filing this lawsuit:

> 10. The failure of either party to perform the preliminary duties outlined in this agreement will permit the obligee of the duty to declare a default and terminate this preliminary agreement to lease or other remedy that may be agreed to by the parties.

We also review de novo the lower court's interpretation of the contract underlying the action. *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 72; 755 NW2d 563 (2008). We interpret contractual language according to its plain and ordinary meaning. *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008).

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [*Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (citations omitted).]

"It is an elementary rule of construction of contracts that in case of doubt, a contract is to be strictly construed against the party by whose agent it was drafted." *Shay v Aldrich*, 487 Mich 648, 673; 790 NW2d 629 (2010).

We turn to the sentence comprising paragraph 10 of the contract. Plaintiffs are the "obligee" referred to in the sentence, which consists of two clauses that we re-present separately here:

> The failure of either party to perform the preliminary duties outlined in this agreement will permit [plaintiffs] to declare a default and terminate this preliminary agreement to lease

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[1] The circuit court summarily dismissed plaintiffs' fraudulent misrepresentation claim on an alternate ground. Plaintiffs have abandoned any appeal of that ruling.

or other remedy that may be agreed to by the parties.

The first clause is independent and straightforward. It has a subject and a future tense verb: "will permit." The verb "permit" means the same things as "allow."[2] Alternatively stated, the first clause states that the nonbreaching party is allowed to declare a default and terminate the preliminary agreement to lease.

The second clause, however, lacks a verb. Although this clause is unartfully worded, it makes sense to assume that the drafter (Underwood) intended that the same verb form ("will permit") would apply, and that Underwood inadvertently omitted the verb. Reasonably interpreted, this clause "fairly admits of but one interpretation": that the nonbreaching party is allowed to pursue any other remedy agreed upon by the parties.

The circuit court interpreted these clauses to mean that in the event of a breach of the agreement, the parties agreed to confine themselves to either of the two remedies specifically mentioned: declaring a default and terminating the preliminary agreement to lease, or agreeing on some alternate remedy. The problem with this construction of the paragraph is that it requires the insertion of a word or words limiting the available remedies for breach to those specified. We decline to rewrite the parties' contract by adding a concept neither identified nor fairly inferable from the words actually used.[3] As the drafter and an attorney, Underwood was undoubtedly aware of the bedrock legal principle that contractual vagaries are construed against the drafter. Most likely he was also familiar with the concept of an exclusive remedy. The absence of language to that effect, coupled with the permissive tone of paragraph 10, persuades us that Underwood did not intend that the remedies mentioned would constitute the sole remedies available to either side.

Had Underwood meant to make the remedies mentioned in paragraph 10 exclusive, he could have done so simply by adding some language of limitation or restriction regarding the available remedies for breach. Here are three examples:

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[2] *The Merriam-Webster Collegiate Dictionary* (11th ed, 2014), p 923, defines "permit" as: "1: to consent to expressly or formally . . . 2: to give leave: AUTHORIZE 3: to make possible . . . vi : to give an opportunity : ALLOW."

[3] We reject the notion that the *expressio unius est exclusio alterius* canon counsels in favor of reading the two described remedies as exclusive. "[T]he canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v Peabody Coal Co*, 537 US 149, 168; 123 S Ct 748; 154 L Ed 2d 653 (2003). "The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand." *Chevron USA, Inc v Echazabal*, 536 US 73, 80-81; 122 S Ct 2045; 153 L Ed 2d 82 (2002). The two remedies listed are hardly so similar that they "go hand in hand." And given the use of the verb "permit" in conjunction with the two remedies mentioned, we must assume that the drafter intended an expansive rather than a limited realm of remedies.

> 10. The failure of either party to perform the preliminary duties outlined in this agreement will permit the obligee of the duty **either** to declare a default and terminate this preliminary agreement to lease or **another** remedy that must be agreed to by the parties.
>
> or
>
> 10. The failure of either party to perform the preliminary duties outlined in this agreement will permit the obligee of the duty **only** to declare a default and terminate this preliminary agreement to lease or other remedy that may be agreed to by the parties.
>
> Or
>
> 10. The failure of either party to perform the preliminary duties outlined in this agreement will permit the obligee of the duty to declare a default and terminate this preliminary agreement to lease or other remedy that may be agreed to by the parties. **No other remedies are permitted.**

We highlight that the verb chosen by Underwood—"permit"—suggests permission or acquiescence rather than prohibition or preclusion. Despite that the parties did not agree on a remedy or declare the default, nothing in this paragraph (or any other part of the agreement) provides that the two options mentioned were the only or sole remedies available. And "we may not read into the contract terms not agreed upon by the parties." *Trimble v Metro Life Ins Co*, 305 Mich 172, 175; 9 NW2d 49 (1943) (quotation marks and citation omitted).

We find additional support for our conclusion in *Short v Hollingsworth*, 291 Mich 271; 289 NW 158 (1939), a breach-of-contract action arising from the installment sale of the plaintiff's corporate stock to the defendants. The contract provided in relevant part, "If and in the event the buyers shall fail to make any installment payment on the date specified the sellers may, at any time after any installment payment is past due for ninety days, file a written request with said bank to return said stock to them[.]" *Id.* at 272. When the buyer-defendants defaulted on the fourth payment, the plaintiff brought an action to recover the balance of the contract price with interest. The defendants argued that the remedy set forth in the contract (return of the stock) was exclusive, and that the plaintiff could not bring a breach-of-contract action seeking the balance of the purchase price. *Id.* at 273. The Supreme Court held that the language of the contract did not evince an intent to limit the remedies available for breach, as the parties used the word "may" to describe one remedy, while elsewhere in the contract they used the word "shall" regarding other aspects of the agreement:

> The intention of the parties, we believe, from a reading of the entire contract and a consideration of all the circumstances, was not that the remedy expressed for defendants' breach should be exclusive. Although defendant earnestly argues to the contrary, it is significant that the remedy provided upon breach is made available in permissive language by the use of the word "may", whereas, other covenants expressed therein, creating obligations upon both parties, are imposed in mandatory language by the use of the word "shall".

> Typical of phrases appearing throughout the contract are: "the buyers *shall* pay"; "the stock so purchased * * * *shall* be deposited"; "annual installments * * * *shall* be paid"; "said bank *shall* make distribution of such payments". The use of the word "shall" appears throughout the contract as the choice of the parties in imposing the obligations assumed thereunder with but few exceptions, one being the provisions, that in the event of default the sellers *may* pursue the remedy hereinbefore quoted. [*Id.* at 274 (emphasis in original).]

The Court held that the contractual language did not "indicate an intent to provide an exclusive remedy[.]" *Id.* at 274-275. "The words used in the contract should be construed according to their ordinary meaning unless it is clear that a different meaning was intended, and we find nothing that would authorize us to construe the word *may*, used as aforesaid, as meaning *shall*." *Id.* at 275 (emphasis in original).

Here, the contract used the term "permit" rather than "may." This is a distinction lacking a meaningful difference; both words suggest permission, not restraint. As in *Short*, other paragraphs in the parties' letter agreement demonstrate that the parties used stronger language, indicative of compulsion, elsewhere. For example, paragraph 7 states:

> The Lease (form included as part of this agreement) **will be signed** for an initial 3 year term (and use of basement for storage, etc.)[.] A monthly rental of $1,700, paid in advance, plus, the payment at signing, a $2,000 security deposit as well as a refund of any costs advanced by Landlord in the build out to begin occupancy. [Emphasis added.]

Paragraph 9 provides:

> Tenant agrees that at the lease signing they **will have procured** liability insurance naming landlord as additional insured in the minimum amount of $1 million/$3 million per occurrence, for liability coverage. Tenant is also responsible for insuring against loss of the glass windows, its own furniture and fixtures/appliances and inventory. Landlord insures the building for liability claims made against him as well as his risk of loss from fire, and other hazards. [Emphasis added.]

The use of this mandatory language signals to us, as it did the Supreme Court in *Short*, that the parties knew how and when to use words compelling an action, and chose language of permission rather than obligation to describe available remedies. Accordingly, we reverse the circuit court's grant of summary disposition to Underwood, and remand for further proceedings.

II

In a cross appeal, Underwood argues that the circuit court erred in denying his motion for sanctions. We review a trial court's finding whether an action is frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 661-662.

The circuit court did not err by denying sanctions. Given our resolution of plaintiffs' appeal, their breach of contract claim must proceed toward trial. And Underwood has presented no caselaw holding that plaintiffs were precluded from bringing a fraudulent misrepresentation action. Plaintiff's' decision to jettison this portion of their case does not render it frivolous. See *Louya v William Beaumont Hosp*, 190 Mich App 151, 164; 475 NW2d 434 (1991) ("The ultimate outcome of the case does not necessarily determine the issue of frivolousness.").

We reverse in part, affirm in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher

STATE OF MICHIGAN
IN THE SUPREME COURT

DONNA WALKER, WILLIAM WALKER,
and HEAD TO TOES MASSAGE THERAPY
OF OXFORD, INC.,

Plaintiffs-Appellees,

Oakland County Circuit Court
Case No. 2015-145545-CK

Court of Appeals
Case No. 333160

OTIS M. UNDERWOOD, JR.,

Supreme Court
Case No. _____

Defendant-Appellant.
_____/

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PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF OAKLAND)

PHILLIP B. MAXWELL, being first duly sworn, deposes and says that on the 19th day of October, A.D., 2017, he served *Appellant, Otis M. Underwood's Application for Leave to Appeal and Brief in Support of Application for Leave to Appeal, and Proof of Service* upon:

LEONARD KRUSE, P.C.
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Oakland County Circuit Court
1200 N. Telegraph Rd.
Pontiac MI 48341

Clerk of the Court
Michigan Court of Appeals
201 W. Big Beaver Rd., Ste. 800
Troy MI 48084

by placing same in a sealed envelope, addressed as stated above, affixed sufficient postage thereon and placed same in a U.S. Mail receptacle in Oxford, Michigan.

Phillip B. Maxwell (P24872)

Subscribed and sworn to before me, a Notary Public, in and for said County and State on this 19th day of October, A.D., 2017.

RENEE F. BEEBE
Notary Public, Lapeer County, MI,
Acting in Oakland County
My Commission Expires: 12-15-18