STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs/Appellees,

vs.

MI Supreme Court Case No. 156651
Lower Court: Oakland County Circuit
LC No. 2015-145545-CK
COA No. 332129

OTIS M. UNDERWOOD, JR.

Defendant/Appellant.
_____/

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PLAINTIFFS'/APPELLEES' BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

Dated: November 14, 2017

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Statutes:

STATEMENT OF BASIS OF JURISDICTION

Plaintiffs/Appellees concur with Defendant/Appellant's statement of jurisdiction.

STATEMENT OF QUESTIONS INVOLVED

I. Did the Court of Appeals err when it reversed the decision of the Trial Court concerning the contract between the parties.

Plaintiffs/Appellees say, “no”

Defendant/Appellant says, “yes”

Court of Appeals says, “no”

STATEMENT OF FACTS

Otis Underwood has owned the property located 18 S. Broadway, Lake Orion, Michigan since the 1980's. During his ownership of this building, Mr. Underwood's relationship with the Lake Orion Building Department has been, to say the least, contentious. More than once, Mr. Underwood has been sued by Oakland County municipalities on property related issues. See Exhibit A (Oakland County Circuit Court case listing) to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1.**

The subject property was destroyed by fire in 2004. Despite determinations by the Building Department that the building, in its destroyed state, constituted a public safety hazard, Mr. Underwood repeatedly refused to undertake the repairs necessary to secure the property. Consequently, Lake Orion officials were required to take extraordinary measures to prevent the public from coming in contact with the building or even near it. See Exhibit A (May 20, 2004 memo from Chief Jerry Narsh) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**. When Mr. Underwood continued to refuse to cooperate with the Building Department, Lake Orion sued him to obtain compliance with state and local laws and to render the property safe.

Eventually, the building was improved to a point where finish work could begin. Mr. Underwood then set about locating tenants.

For the several years preceding the execution of the contract at issue in this litigation,

Plaintiffs had operated a successful spa in Oxford, Michigan. When their existing lease was six months from expiration, they began looking for a new location. After several meetings and conversations with Defendant, the parties executed the contract attached as Exhibit B to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**. This contract was drafted by the Defendant and signed by the parties on May 5, 2014. See Exhibit C (Underwood deposition at page 19) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2** and Exhibit B (Contract) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

The contract between the parties required that the Defendant use reasonable efforts to obtain a final occupancy permit. Notwithstanding this requirement in the contract he drafted, Defendant, Underwood, repeatedly delayed taking the steps necessary to obtain that permit[1]. For instance:

- On December 3, 2013, Lake Orion advised Mr. Underwood that the building permits he had previously pulled had expired. It further advised Mr. Underwood that no further work could be performed without pulling a new building permit. See Exhibit D (December 3, 2013 letter from the Village of Lake Orion) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**. Mr. Underwood did not pull a new building permit for work on the property until December 4, 2014. See Exhibit E (email from O. Underwood dated December 4, 2014 with attached application for building permit and receipt) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto

[1] In fact, as of Mr. Underwood's deposition, which was taken on July 16, 2015, an occupancy permit had not yet been secured.

as **Exhibit 2**.

- Mr. Underwood did not retain an architect until August, 2014. See Exhibit G (August 7, 2014 letter from TDG Architects indicating that it had been retained by Defendant as of that date) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

- Mr. Underwood did not submit an application for a zoning compliance permit until August 22, 2014. The Township approved the permit within four days. See Exhibit H (Zoning Compliance Application) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

- Work on the build out of 18 S. Broadway, Lake Orion, Michigan proceeded sporadically. Oftentimes days and even weeks would go by without any perceptible work having been done. Moreover, Mr. Underwood refused to hire competent personnel to perform the work necessary to finish the project. Rather, he did much of the work himself along with an older gentleman and teenager. This significantly delayed completion of the project.

  On multiple occasions Plaintiffs asked to bring in their own contractors to finish the build out. Mr. Underwood repeatedly refused these requests. See Exhibit I (Affidavit of Donna Walker) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2** and Exhibit C (Underwood deposition at page 64) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**. Mr. Underwood has acknowledged that he could have hired contractors to do the work that he was doing himself. See Exhibit C (Underwood deposition at pages 75-77) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

- According to Defendant one reason for his delay in building out the premises was the township's insistence that work he had previously done be inspected. Mr. Underwood testified that the township - as is required by the Building Code - wanted to confirm that he had properly installed the building's footings and masonry because its files reflected that no such inspections had been requested or conducted at the time that that work was done. See Exhibit C (Underwood deposition at pages 40-42) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

Mr. Underwood further testified that because it would require disassembling the work that had previously been done, he was not willing to comply with the Township's request. Rather, he requested and received permission to have his own engineer inspect the premises and present a sealed letter confirming the adequacy of the prior construction. Mr. Underwood did not hire the engineer to conduct this analysis until October, 2014 at the earliest. See Exhibit J (October 10, 2014 email from Defendant) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2** and Exhibit K (October 20, 2014 email from Defendant to engineer) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

- Among the permits required to be pulled before an occupancy permit allowing the Plaintiffs to occupy the building are:

  building plan permit

  finish electric permit

  HVAC permit

  Finish plumbing permit

  Sprinkler permit

  elevator permit

  inspection and approval by the fire inspector

  occupancy permit

  As of July, 2015, Mr. Underwood had not yet applied for the HVAC permit, the finish plumbing permit, the electrical permit, the mechanical permit requested fire department approval or obtained approval of the elevator or applied for an occupancy permit. See Exhibit C (Underwood deposition at pages 54-57, 64 and 70) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

- Defendant did not even hire an HVAC engineer until December, 2014. See Exhibit C (Underwood deposition at page 57) to Plaintiffs' Response to

Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

- Mr. Underwood did not make contact with an elevator company until September, 2014 and did not request that they perform the work necessary to receive elevator approval until October 20, 2014 at the earliest. See Exhibit K (Underwood email dated October 20, 2014) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

Interestingly, in the past, Defendant had allowed his tenants use of the property even though no occupancy permit had been issued. Once Lake Orion learned of this malfeasance, it required Mr. Underwood to comply with the Village Codes. See Exhibit L (September 28, 1993 letter to Mr. Underwood) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2** and Exhibit M (November 16, 1993 memo from Mary Simmons) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**. Clearly, given his past interactions with the Building Department, Mr. Underwood was aware of the requirements for renovating a building and obtaining an occupancy permit.

Nevertheless, beginning shortly after the contract was signed and continuing into the fall, Mr. Underwood regularly promised the Plaintiffs that the property would be ready for occupancy within weeks. See Exhibit I (Affidavit of Donna Walker) to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

After nearly 9 months had elapsed since the signing of the Agreement and with no

occupancy date in sight, Plaintiffs had lost the opportunity to revive their formerly successful business and gave Defendant notice that they could no longer wait for Defendant to make the premises habitable. This lawsuit followed.

Throughout the period between the date on which the Agreement was signed and the date on which Plaintiffs gave notice to Defendant of his breach of the Agreement, Defendant continuously made statements to the Plaintiffs which were intended to lay fault for the delay in completion at the feet of the Township Building Department and as being out of his hands. That was simply not the case. Rather, Defendant's unwillingness to abide by statute, ordinance and code as well as his refusal to hire the necessary contractors caused the unwarranted delay and caused Plaintiffs to lose their business. See Exhibit K (Underwood deposition at pages 57 and 77 to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**.

ARGUMENT

STANDARD OF REVIEW: The Court of Appeals reviews decisions on Motions for Summary Disposition *de novo*. *Grossman vs. Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004).

I. The Defendant's Application fails to comply with MCR 7.305(B).

MCR 7.305(B) requires an applicant to include, in their Application, a statement explaining why the appeal:

(3) "...involves a legal principal of major significance to the state's jurisprudence

(5) in an appeal of a decision of the Court of Appeals,

(a) the decision is clearly erroneous and will cause material injustice, or

(b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

Notwithstanding this requirement, the Defendant has only argued that the Trial Court erred; he has not satisfied the Court's more stringent requirements for a successful Application for Leave to Appeal.

Essentially, Defendant quarrels with the Court of Appeals application of existing case law: namely the case of *Short vs. Hollingsworth,* 291 Mich 271, 298 N.W.158 (1938), and the Court's analysis.

As the Defendant acknowledges, *Short* has never been overruled and, as an opinion of the Michigan Supreme Court, remains good law. Consequently, Defendant cannot satisfy MCR 7.305(B)(5)(b).

Nor has Defendant complied with MCR 7.305(B)(3) or (B)(5)(a).

The issue involved - a contract dispute between private parties - does not involve a "legal principal of major significance." Nor is the decision clearly erroneous. Defendant does not argue that the *Short* case does not stand for the proposition upon which the Court of Appeals based its decision. Rather, he argues that the Court of Appeals should not have relied upon it.

Finally, the Defendant has not indicated that the decision issued by the Court of

Appeals will cause "material injustice." Nor could he. This is simply a garden variety contract dispute.

II. The Court of Appeals decision is consistent with Michigan law and does not conflict with the doctrine of expressio unius est exclusio alterius

A. The *expressio unius est exclusio alterius* doctrine does not apply to this case.

The crux of Defendant's argument is that the doctrine of *expressio unius est exclusio alterius* applies to the case at bar. However, for the reasons set forth in footnote 3 by the Court of Appeals, that doctrine is inapplicable to this case.

In its decision, the Court of Appeals specifically recognized that the doctrine does not apply to this case because the doctrine only applies "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. See **Exhibit 3** (Opinion and Order of Court of Appeals).

The paragraph at issue in this case does not include items which "are members of an associated group or series." Even the cases cited by Defendant illustrate this point.

For instance, in *Luttrell vs. Dept. of Corrections*, 421 Mich 93, 321 N.W 817 (1984), the Court was asked to determine whether drug traffickers were included in a statute which prohibited "prisoners convicted of a crime of violence or any assaultive crime" from participating in a community release program. Relying upon the doctrine, the Court held that the statute did not include drug traffickers.

Similarly, in *Bradley vs. Saranac Board of Education*, 455 Mich 285, 554 N.W.2d 901 (1997), the Court was asked to consider whether the Michigan Freedom of Information Act exempted the personnel records of school employees from production. In doing so, it analyzed the FOIA exemption statute which contains a specific exemption for the personnel records of law enforcement employees.

The Court concluded that because the statute did not exempt the personnel records. In doing so, the Court recognized that at another part of the statute, the Legislature specifically exempted the personnel records of law enforcement employees from production. Using the *expressio unius est exclusio alterius* doctrine, the Court determined that if the Legislature intended to exempt the personnel records of other government personnel.

Hackel vs. Macomb County Comm., 298 Mich App 311, 826 NW 2d 753 (2012) involved a dispute between Mark Hackel, the Macomb County Executive and the County Commission over who had authority to approve a contract. Mr. Hackel argued that the County Charter impliedly granted him the authority to approve contracts. To resolve the dispute, the Court reviewed the provisions of the Charter. After doing so, the Court applied the *expressio unius est exclusio alterius* doctrine to hold that because the Charter expressly identified the respective powers held by the parties and because the Charter granted only the Commission the right to approve contracts, that right could not be concurrently held by the County Executive.

Each of these cases illustrates the point made by the Court of Appeals in footnote 3: the *expressio unius est exclusio alterius* doctrine does not apply to this case because the paragraph in question does not contain "an associated group or series."

Finally, the language quoted by Defendant from *Chevron USA Inc. vs. Exhazabal*, 536U.S. 73, 153 L.Ed.2d 82 (2002) is presented out of context. Defendant includes the following quotation in its Brief:

> The argument follows the reliance of the Ninth Circuit majority on the interpretative canon, *expressio unius est exclusio alterius*, "expressing one item of [an] associated group or series excludes another left unmentioned.

Id.

The Supreme Court, however, went on to disclaim use of that doctrine in connection with the issues raised in the case because there was not a "series of two or more terms or things that should be understood to go hand in hand." The same conclusion applies to the case at bar. The contract at issue did not contain such a series. Rather, it contained two permissive options which did not rule out any others and, thus, the Court of Appeals correctly held that the doctrine did not apply in this instance.

B. The analysis by the Court of Appeals was consistent with Michigan law.

As is long settled by Michigan law, a contract is strictly construed against its drafter – in this case, the Defendant. *Lichnovsly vs. Ziebert Int'l Corp*., 414 Mich 228, 324 N.W.2d 732 (1982). See Exhibit C (Underwood deposition at page 19) to Plaintiffs'

Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2**.

Not only must examination of the language employed by Mr. Underwood be strictly construed against him, but because this matter arose in connection with a motion for summary disposition, the facts must be construed in the light most favorable to the Plaintiffs

Mr. Underwood chose to use permissive language in paragraph 10 - the paragraph in issue. As the Court of Appeals Opinion explained, in other places in the Agreement, Mr. Underwood chose to use mandatory words - ie., shall and will. Having made that decision, the Defendant cannot now be heard to argue that the language of paragraph 10 was mandatory.

In his Application for Leave to Appeal, the Defendant criticizes the Court's reliance upon *Short, supra*. That criticism is misplaced as the facts of *Short* are very similar to those which exist in this case.

The Plaintiff in *Short* filed suit to enforce a contract which called for certain payments from the Defendants to the Plaintiff. In defense of the action, Mr. Hollingsworth claimed that because the contract between the parties stated, "If and in the event the buyers shall fail to make any installment payment on the date specified **the sellers <u>may</u>**, 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*. (Emphasis added).

Like the contract in this case, the *Short* contract contained language mandatory in nature in other places throughout the document.

The Supreme Court held that because of the u se of the permissive language, the contract could not be interpreted to conclude that the return of stock was the exclusive remedy available to the Plaintiff Seller. Rather, it was an option for him.

The Court of Appeals properly applied the analysis and holding of *Short* to the case at bar - a decision which Plaintiffs submit should be upheld.

III. For additional reasons not reached by the Court of Appeals, it was proper for the decision of the Trial Court to be reversed.

A. The Defendant did not properly raise, in the Court of Appeals, the argument which formed the basis for the Trial Court's decision to grant summary disposition on Plaintiffs' Breach of Contract claim.

In his Motion for Summary Disposition which resulted in the December 4, 2015 Order, Defendant made four arguments with respect to Plaintiffs' Breach of Contract claim:

- The Letter Agreement at issue was not a binding contract;
- The Letter Agreement did not create a mutuality of obligations;
- The Letter Agreement did not include all of the essential terms to create a contract; and
- The parol evidence rule barred oral modifications of the Letter Agreement.

See **Exhibit 4** (Defendant's September 15, 2015 Motion for Summary Disposition and accompanying Brief).

At no place in Defendant's Motion or Brief did he argue that the language of the contract, itself, barred Plaintiffs from pursuing litigation against him for breach of contract. This argument was only indirectly raised by Defendant in his Reply Brief[2] and then addressed by defense counsel at the hearing on the Motion at which time counsel for Defendant stated that with respect to the prevailing argument, "frankly, it only occurred to me after I'd spent many pages arguing that there was no contract." In other words, Defendant acknowledged at the hearing on his Summary Disposition Motion that the argument made at the hearing on Defendant's Motion for Summary Disposition was the 180 degree opposite of that which he presented in his Motion.

Reply briefs are not mentioned in the Court Rules governing trial courts, but are addressed in MCR 7.212(G) which states that arguments set forth in reply briefs must be limited to a rebuttal of the arguments raised in the opposing party's response brief. Additionally, the Court of Appeals, in *Blazer Foods, Inc. vs. Restaurant Properties, Inc*., 259 Mich App 241, 673 N.W.2d 805 (2004), held that "Reply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." An argument raised for the first time in a Reply Brief is considered abandoned. *JD Norman Industries vs. City of Leslie,* No. 321314 (Mich App, 2015) citing *Blazer Foods, supra,* a copy of *JD Norman* is attached hereto as **Exhibit 5**.

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[2] While, in one sentence of his Reply Brief, Defendant said that terminating the contract was the Plaintiff's sole remedy, he did not quote the language upon which the Court ended up relying or otherwise provide support for that legal argument.

Defendant's failure to raise the argument which resulted in dismissal of Plaintiffs' breach of contract claim and failure to cite any law in support of the argument deprived Plaintiffs of the opportunity to brief that issue and to present the following compelling arguments to the Trial Court.

B. The contract also contains a latent ambiguity.

A latent ambiguity "arises from a collateral matter when the document's terms are applied or executed. Because the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist." *Shay vs. Aldrich*, 487 Mich 648, 790 N.W.2d 629 (2010) (citations omitted).

"To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation." *Id.*

In all contracts, "the covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." See, e.g. *Hammond vs. United of Oakland, Inc.*, 193 Mich App 146, 483 N.W.2d 652 (1992). This is especially so when the contract makes the manner of performance discretionary with the drafter. *Ferrell vs. Vic Taney Intern., Inc.*, 137 Mich App 238, 357

N.W.2d 669 (1984).

i. Defendant's prior actions which were unknown to Plaintiffs

The first latent ambiguity in the subject contract arises from paragraph six of the contract which provides:

> 6. Likewise, Landlord will use all reasonable efforts/expense to obtain a final occupancy permit of the building**.**

See Exhibit B (Contract**)** to Plaintiffs' Response to Defendant's First Motion for Summary Disposition which is attached hereto as **Exhibit 2.**

Based upon this paragraph and the implied term of good faith, Plaintiffs believed and expected that Defendant would act as dictated by the contract. What they didn't know and could not have known, was Defendant's history of having an extraordinarily contentious relationship with the Building Department, his history of ignoring statutes, rules, ordinances and regulations and his history of delaying work on the subject property.

After the contract was signed and during the pendency of this lawsuit, Plaintiffs discovered that the Defendant did have a history which undermined the terms of the contract and which rendered paragraph ten ambiguous. Just a sampling of what was learned is as follows:

-- As far back as January, 1978, Underwood & Scupholm was cited for using the subject building without a proper sewer hook-up even though a notice advising Mr. Underwood of the necessity of hooking up to the city line had

been issued in May, 1975. See Exhibit B (January, 1978 notice) to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**.

-- On November 9, 1989, a fire inspection of Mr. Underwood's property revealed numerous fire code violations. See Exhibit C (notice of fire code violations) to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**.

-- On March 28, 1990, the Township Building Inspector inspected the subject property and discovered an unsafe condition in the roof of the building. Eventually, it was determined that Mr. Underwood had undertaken to make changes to the roof without obtaining a permit and that the changes made by Mr. Underwood were not up to code. A citation and correction order was then issued by the Township with respect to this condition. Only after much back and forth, multiple inspections and a hearing before the Township Board did Mr. Underwood obtain an engineers certificate attesting to the adequacy of the repairs made by Mr. Underwood. See Exhibit D (documents related to this issue) to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**.

-- On February 10, 1994, Mr. Underwood was issued a code violation citation

for occupying the subject building without an occupancy permit. See Exhibit E (code violation) to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**.

-- On August 28, 1996, the Village issued an ordinance violation arising out of the Defendant's failure to cut the weeds behind his building which, then, created a constant public nuisance. See Exhibit F (ordinance violation) to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**.

-- On February 3, 2004, Mr. Underwood was notified that a State Building Inspector had inspected the property and had found the roof to be leaking and dangerous. Mr. Underwood was given 60 days to remedy the problem. See Exhibit G (February 3, 2004 notice) to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**.

-- On March 4, 2004, a fire ravaged the structure immediately adjacent to the subject property. As a result of that fire, the subject building was heavily damaged and, pursuant to Village Ordinance was required to be destroyed Since the date of the fire, Defendant has engaged in a decade long battle with the Township concerning reconstruction of the property. Among the issues which have arisen are the following:

-- Following the fire, the south wall of the building remained standing, but was considered structurally unsound and a public health and safety hazard. Nevertheless, Mr. Underwood refused to demolish this wall. Eventually, it was necessary for the Village to issue a condemnation notice for the remaining parts of the structure. See Exhibit H (Condemnation Notice) to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**.

-- Eventually, it became necessary for the Village of Lake Orion to file a lawsuit against Mr. Underwood because of his unwillingness to take the steps necessary to demolish the remnants of the building. See Oakland County Case No. 04-059247-CC. The Court granted the Village summary judgment on this issue. See Exhibit I (Opinion and Order) to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**.

-- A consent judgment was entered in the Oakland County case on December 15, 2005. The Consent Judgment required Mr. Underwood to complete the interior and exterior work on the building by September 1, 2006. See Exhibit J (Consent Judgment) to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**. That did not occur. In fact, it still hasn't occurred. See Exhibit

K (Underwood deposition) at pages 54-57, 64 and 70 to Plaintiffs' Response to Defendant's Second Motion for Summary Disposition which is attached hereto as **Exhibit 1**.

Of course, Defendant was well aware of each of the foregoing facts.

When the provisions of paragraph ten which purports to eliminate any real recourse for breach of the contract is considered in connection with the Defendant's long pattern of disregarding local and state law, it is apparent that a latent ambiguity with respect to the effect of paragraph ten exists.

This is particularly so as paragraph ten only indicates that a breach "will permit" the non-breaching party to withdraw from the contract. The language limiting any further relief to that upon which the parties agree assumes a degree of good faith that Mr. Underwood failed to exhibit throughout the entire relationship and which, if he had made Plaintiffs aware of his past actions, would have alerted Plaintiffs that it was extremely likely that they would not timely be able to assume their tenancy.

ii. Conflict between the Lease and the Contract

The Lease, which was included as part of the Contract (see paragraph 7), provides:

> (47) It is agreed that each and every (sic) of the rights, remedies and benefits provided by this lease shall be cumulative and shall not be exclusive of any other of said rights, remedies and benefits, or of any other rights, remedies and benefits allowed by law.

See Exhibit F (Lease) to Plaintiffs' Response to Defendant's First Motion for Summary

Disposition which is attached hereto as **Exhibit 1**.

When this provision, which was incorporated into the Contract via paragraph 7 is read in concert with paragraph 10, it is evident that an ambiguity exists as to the remedies available to the parties.

C. Paragraph 10 of the Contract Provides Only an Illusory Remedy because it is no Remedy at all.

"A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." See Restatement Contracts 2d §3 and *Clarke, Inc. vs. Draeger*, No. 316194 (Mich App, 2015), a copy of which is attached hereto as **Exhibit 5**.

When interpreting a contract it should be construed "so as to avoid illusory promises..." *Cole vs. Arvin Meritor, Inc.*, 549 F.3d 1064 (6th Cir., 2008), a copy of which is attached hereto as **Exhibit 5**.

Nevertheless, that is exactly the interpretation of the subject language which Defendant favors.

Dictionary.law.com defines a remedy as:

> the means to achieve justice in any matter in which legal rights are involved

It is, however, impossible to "achieve justice" when the interpretation of paragraph 10 relied upon by the Trial Court and the Defendant decidedly results in an absence of justice. Nor does the Defendant and Trial Court's interpretation of paragraph 10 actually

provide a remedy for breach of the contract - an essential element of a contract, as set forth above.

Because the meaning ascribed to paragraph 10 as suggested by Defendant essentially deprive Plaintiffs of any remedy for the Defendant's breach, it is, indeed, an illusory promise by the Defendant as it is " a promise which by [its] terms makes performance entirely optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue." Restatement, 2d, §2.

As, according to Defendant, the existence of a remedy for his own breach was entirely at the discretion of the Defendant, himself, his promise of a remedy was, most certainly, illusory.

D. A provision which purports to deny another access to the courts is against public policy

"Contracts are against public policy when they tend to injure the state or the public. Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Brown vs. Union Banking Co.*, 274 Mich 499, 265 N.W. 499 (1936).

Access to the courts is an absolutely fundamental right that ***must*** be enjoyed by every citizen for our system of governance to function at all. *Moore vs. Fragatos*, 116 Mich App 179, 321 N.W.2d 781 (1982). (emphasis added).

In this case, the provision drafted by Defendant and the interpretation by the Trial Court works to deprive the Plaintiffs of access to the Courts and gives the Defendant no

incentive to perform. Accordingly, and in accordance with long-standing Michigan precedent, it should be held to be against public policy.

E. The provision at issue deprives the Plaintiffs of a minimum adequate remedy.

Michigan's Uniform Commercial Code addresses contracts which fail to provide a viable remedy to a party to a contract. MCL §440.2719. If a contract fails to provide a minimum adequate remedy, then the aggrieved party may avail itself of any of the other remedies available under the Act. *Id.*

For instance, in *Whitesell Corp. vs. Whirlpool Corp*., No. 10-1702; 10-1761 (6th Cir., 2012), a copy of which is attached hereto as **Exhibit 5**, the parties had entered into a contract which provided that Whitesell Corporation would provide certain parts to Whirlpool to be used in the manufacture of certain fasteners. Eventually, Whirlpool breached the contract by purchasing the parts from another vendor.

In the ensuing lawsuit, Whitesell sought to recover, among other things, its lost profits. Whirlpool argued that Whitesell was prohibited from recovering lost profits because of a liability limiting clause found within the parties agreement. The Court disagreed. In doing so, it held:

> The provision deprives Whitesell of any form of damages resulting from Whirlpool's failure to purchase. The district court, therefore, correctly determined that the clause deprived Whitesell of minimum adequate remedies...**Without an adequate remedy, Whirlpool had no incentive to continue purchasing from Whitesell**. While parties are free to negotiate the specific terms of an agreement, "it is the very

> essence of a sales contract that at least minimum adequate remedies be available. Mich. Comp. Laws §440.2719 cmt 1.
>
> ***
>
> Here, the clause completely deprives Whitesell of any remedy; therefore, it cannot be considered reasonable. For this reason, the district court correctly held that the liability-limiting clause should be stricken from the agreement and replaced by the remedies provided by the Michigan Commercial Code, which allows a seller to recover lost profits after a breach of contract.

While Plaintiffs recognize that the UCC does not apply to a lease for commercial property, it does provide a clear indication of Michigan's public policy with respect to the enforcement of contracts. There is no just reason why parties to a contract involving goods should be protected from an unconscionable provision in a contract, but parties to a contract concerning real estate should not.

This is particularly so as disclaimers of remedies and warranties have been held to be unconscionable. *Mallory vs. Conida Warehouses, Inc.*, 134 Mich 28, 350 NW2d 825 (1984). While *Mallory* was also a case involving the sale of goods, the Court did not expressly limit its holding to such cases and Plaintiffs suggest to the Court that the logic supporting these policies applies with equal force to cases such as the cast at bar.

CONCLUSION

WHEREFORE, your Plaintiffs pray this Honorable Court deny Defendant's Application for Leave to Appeal. Plaintiffs further pray for such other and further relief as the Court may deem just and equitable.

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Dated: November 14, 2017

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing BRIEF OF APPEAL was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. Mail disclosed on the Notice of Electronic Filing on November 14, 2017

/s/Kelly A. Kruse
Attorney for Plaintiffs/Appellees