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. 156651

Defendant-Appellant.
_____/

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APPELLANT, OTIS M. UNDERWOOD, JR.'S

SUPPLEMENTAL BRIEF IN SUPPORT OF

APPLICATION FOR LEAVE TO APPEAL

"ORAL ARGUMENT REQUESTED"

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DATE: June 11, 2018

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STATEMENT OF THE BASIS OF JURISDICTION

This court has jurisdiction of this matter pursuant to MCR 7.301(A)(2) from the Order of the Court of Appeals, State of Michigan, entered on September 7, 2017.

STATEMENT OF QUESTIONS PRESENTED

I. Should the Michigan Supreme Court grant Leave to Appeal where the Court of Appeals opinion reversing the Oakland County Circuit Court grant of Summary Disposition to Defendant-Landlord where : 1) The Plaintiff sent to Landlord a notice of default/rescission of the preliminary contract as provided in the contract but maintains an ongoing right to sue for lost profits 2) the Court of Appeals opinion incorrectly declared that this notice was not sent; and 3) that the Plaintiff announced that they were not satisfied when the contract's existence depended upon their satisfaction and this ended by the notice of rescission, and 4) that he Court of Appeals could not, and should not re-write the contract's paragraph 10 limiting remedies and conclude that the entirety of paragraph 10 was to be erased/ignored so as to allow Plaintiff a suit for a claim of lost profits.

Court of Appeals Majority says:	2 No-1 Yes
Defendant-Appellant says:	Yes
Plaintiff-Appellee says:	No

STANDARD FOR REVIEW

Appellate Courts review de novo the grant of summary disposition whether as a legal issue, *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 322(2005):

"This Court reviews de novo a trial court's decision to grant summary disposition under MCR 2.116(C)(8)." *McDowell*, supra at 354, citing *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201(1998). "MCR 2.116(C)(8) tests the legal sufficiency of the pleadings standing alone." *McDowell*, supra at 354, citing *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817(1999). " 'The motion must be granted if no factual development could justify the plaintiff's claim for relief.' " *McDowell*, supra at 354-355, quoting *Spiek*, supra at 337; see also *Maiden*, supra at 199.

APPENDIX OF EXHIBITS

STATEMENT OF FACTS

In April 2014, Defendant Landlord offered for lease a building in downtown Lake Orion. The shell, or weather envelope had been completely reconstructed as a result of a fire in the neighbor's building, the Sagebrush Cantina. The spread of the fire caused Defendant's structure to be gutted and burned out. Besides reconstructing the weather envelope, basic plumbing, heating/cooling, electrical service and fire suppression had been installed. Any finish to this structure abided until tenants were signed and their particular business needs were given form in a professional plan drawn which then would be reviewed by the building authorities for code compliance and safety/handicap access.

Two business women, "partners," agreed to lease both floors. The main floor at sidewalk level was to be a hair salon and the Plaintiff Walkers were to take the second floor for their massage/manicure, etc. business called "Head to Toes."

A letter agreement was drafted and mailed to both of the potential tenants; please see **Appendix of Exhibits 1a-16a**. The agreement was signed May 5, 2014. It provided that the tenants were to commission a planner to produce a drawing of what they needed to do business. The Defendant Landlord agreed to accomplish the build out of the finish construction (paragraph 4 of the May 5, 2014 letter agreement.) The landlord agreed to fund the build out but the tenants agreed, at signing of the lease, to pay the landlord their allocable costs of just the materials used by Landlord's laborers and trades people. Please see paragraph 4(c) of the letter agreement.

Since neither landlord nor tenant was a professional builder, the letter agreement contained in the opening paragraph the following language:

> 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.

The parties agreed in paragraph 10:

> 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.

On December 8, 2014, the Plaintiffs Walkers sent notice to the Landlord that they were cancelling the agreement. The first floor tenant, Exclusive Suites Salon, Ms. Sager, likewise gave notice but there was no lawsuit with Landlord by either party. Plaintiff Walkers, however, filed suit on February 17, 2015. In their Complaint, Count I, Plaintiffs alleged, in paragraphs 10 through 16, "Defendant had "promised" dates the leasehold premises would be ready." They further alleged in paragraph 20 that Defendant breached each of the obligations assumed by him in the letter agreement.

In Count II, "Fraudulent Misrepresentation," Plaintiffs alleged in paragraphs 24 through 27 the premises to be leased would be ready, on dates they claim Landlord orally misrepresented. In paragraph 28 it was alleged that permits and inspections had not been done (for reconstruction of weather envelope.)

The Defendant filed a Motion for Summary Disposition under MCR 2.116(C)(8), where it was argued that there was no contract because paragraph 8 provided Plaintiffs Walkers with an exit from their agreement to lease because they had sole discretion to accept or reject the finish construction work. Further, paragraph 10 limited both parties from any remedy (court action for damages) other than to declare a default and terminate the letter agreement.

The Defendant's answer was that there existed a binding contract and urged the court that

uncertainty of the parties duties is the same as ambiguity, and further, because Defendant drafted the letter agreement, the court should measure Defendant's performance by what Plaintiff expected (ambiguities held against the drafter). Paragraph 8 of the letter agreement provided Plaintiffs with an exit from their agreement to lease because they had sole discretion to accept or reject "to their satisfaction" the finish construction work. Further, paragraph 10 limited both parties from any remedy (court action for damages) other than to declare a default and terminate the letter agreement instead of signing a lease, unless the parties' agree to something else after signing the letter agreement on May 5, 2014. There never was any such agreement to provide any other remedy. The Plaintiff was not required to pay Defendant Landlord any money until the lease was signed if the Plaintiff chose to accept the premises.

The Plaintiffs' Answer was that any uncertainty of the parties duties is the same as ambiguity. Further, because Defendant drafted the letter agreement the Court should measure Defendant's performance by what Plaintiff expected (ambiguities held against the drafter), even if there was no "contract" language to support this notion.

As to the fraud claims Plaintiff asserted in their Complaint and 1st Amended Complaint that oral estimates given months after the May 15, 2014 signing, should be construed as promises. There was no fraud in the inducement pleaded or sought to be alleged.

Defendant testified at his deposition, tx pg. 65-66: see **Appendix of Exhibits 82a-83a.**

> A. I don't know anything. I don't even know what they do. I do remember a conversation with Ms. Walker before she moved out of wherever she was occupying in Oxford, and it was August or September of '14, and she told me - - she wanted a firm date from me when she could open up, and of course I replied as I always did, that I'm going as hard as I can go, and I've got troubles with the township, and it's not in my control when I get it done.

> And she said that she was gonna move out, she'd given her landlord notice, and I said to her, all construction that I'm aware of usually takes longer than the best minds can project, and particularly is that so when I'm not a professional builder, and the relations with the township. I had already communicated those problems.
>
> I suggested to her that she ask her landlord instead of a new lease if she could go month to month, and she said she would not ask him for that, that she was leaving and moving out. And really, she didn't ask for my advice. I offered it, but she rejected it out of hand.
>
> Q. You also denied in your Answer that the Plaintiffs had performed all their obligations assigned to them under the preliminary contract. What obligations do you believe that the Plaintiffs failed to perform?
>
> A. Well, the chief one is the plan.
>
> Q. Anything else?
>
> A. I'd have to look at the agreement again.
>
> Q. Please, feel free
>
> A. They didn't have much, many obligations. I was the one that was totally at risk in building the thing out. But I had to know what they wanted, and I only learned and assumed that Brian Gill's plan was gonna be okayed. Nobody ever told me its fine with me. But as I say, they were - - they had open access to the building.

On 12/4/15, the Court issued its Opinion and Order. The Court found that Paragraph 10 of the Agreement was clear and unambiguous that either party could terminate the agreement as the sole remedy unless something different was agreed to. There was no such agreement. The Court granted Summary Disposition per MCR 2.116(C)(8) and dismissed that count.

As to the fraud claim, the Court recited existing law that fraud must be predicated on a past or existing fact. The Plaintiff's allegations were projected completion estimates into the future and hence, granted Summary Disposition per MCR 2.116(C)(8) dismissal. The Court

allowed Plaintiff to file an amended complaint on the fraud count.

The amended complaint was filed on December 16, 2016 and Defendant again moved for Summary Disposition per MCR 2.116(C)(8) on January 29, 2016. The motion contained Defendant's affidavit, and a letter under the seal of Lawrence Mangindin, License Professional Engineer, dated November 22, 2014 demonstrating that the Orion Township file had all of the construction permits, inspection reports, etc. for the building project, and Mr. Magindin's certification that the building had been constructed per plans of the prior architect/engineer and that the building complied with all code requirements.

Defendant's Motion for Summary Disposition cited to the Court *Hart v. Ludwig*, 347 Mich 559 (1956) for the legal proposition that Plaintiff cannot maintain an action for fraud (tort) based upon nonperformance of a contract. Subsequent cases applied and interpreted this legal concept. Defendant pointed out that Plaintiff attempted to use a rehash of its breach of contract count, styled as a fraud claim, all relying on conversational estimates of construction completion into the future.

The Trial Court granted Summary Disposition on March 2, 2016. Please see **Appendix of Exhibits 128a-129a**.

The Defendant filed a Motion for Sanctions under MCR 2.114(D) as well as MCR 2.625, MCL 600.2591(A)(3). This Motion was heard on April 20, 2016 the Court denied sanctions stating as follows: tx 20 April 2016 pg. 6 line 22-25, pg. 7 line 1-7: see **Appendix of Exhibits 135a-136a.**

> THE COURT: This case was primarily a case of contract interpretation. I happened to have interpreted the contract in a manner that allowed summary disposition of the case. There's no basis to claim that it was a frivolous lawsuit. It was not devoid of legal merit, and it was not meant to harass. There clearly was a dispute between the parties.

> Likewise, the claims for fraud, there clearly were representations made by the – by the Defendant. I simply can't find that this is a meritless case, and therefore, I'm going to deny the motion for sanctions.

The Defendant was, and is the prevailing party. A taxation of costs, both statutory and fees paid by court ordered "facilitation" were filed with the clerk under MCR 2.625. The Plaintiff filed timely objections and this issue was made part of the motion for sanctions but not addressed orally by either party or the Judge. The Plaintiff made no comment, written or oral about the amount of the sanction sought for payment of Mr. Maxwell's fees and expenses either as to his time spent or his hourly rate of $250.00 per hour.

The Plaintiff appealed to Court of Appeals the MCR 2.116(C)(8) dismissal of the contract claim. No appeal was taken for the twice dismissed fraud claim.

The Appellant's Brief to Court of Appeals argued that the content of Paragraph 10 of the letter agreement should be held void as against Public Policy because Plaintiffs made a mistake when they agreed to lease without a guaranteed occupancy date and Defendant Landlord should be made to pay for it.

The Plaintiffs claimed they had been defrauded because they moved out of their existing quarters in Oxford at the end of June, 2014.

The Plaintiffs never transferred as much as 1 cent, that is correct, nothing to the Defendant Landlord except a signature on the 5/5/2014 agreement. The agreement contained no move in date. And to this date, nothing has been paid to Defendant Landlord for the custom finish work of the 2nd floor to be leased by Plaintiff until they gave their notice of withdrawal on December 8, 2014. In short, there was no fraud in the inducement alleged. Oral projections of estimated completion dates were pleaded as "fraudulent." The Trial Court granted MCR 2.116(C)(8) Summary Disposition and offered Plaintiffs additional time to file an amended

Complaint. The Amended Fraud Complaint was filed on December 16, 2015 where the same allegations were made but coupled with a claim that Defendant Landlord was a litigation "bad man"; that tradespeople had not "pulled" their permits for the work they had nearly completed; and that this "delay" had cost Plaintiffs the loss of customers.

Defendant Landlord moved again for MRC 2.116(C)(8) Summary Disposition on the strength of the legal authority of *Huron Tool & Engr v. Precision Consulting Services,* 209 Mich App 365(1995) and *Fultz v. Union Commerce Associates*, 470 Mich 460(2004) to the legal proposition that fraud cannot be maintained alleging the non-performance of a contractual duty; only a breach of contract action will lie. So Summary Disposition was granted again ending, finally, the case brought by Plaintiffs.

LEGAL ARGUMENT

The Court of Appeals took issue with the wording of paragraph 10 of the preliminary agreement to lease, pg. 3, 3rd paragraph, **Appendix of Exhibits 3a.** The Court of Appeals said that paragraph 10 ". . . requires the insertion of a word or words limiting the available remedies . . ." see **Appendix of Exhibits 140a.** The Landlord has not conceded that he breached the preliminary agreement. The trial did not find that he had breached, given the lack of an agreed to move in date, and his only duty was to work "reasonably." The circumstances under which the finish work was to be done are stated in the first Paragraph of the preliminary agreement:

> " . . .because some of the details of the duties that both parties are under taking 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 . . ."

Nevertheless, the Plaintiff Walkers gave notice of their ". . .decision to terminate their interest in and any and all obligations regarding the property. . ." on February 18, 2015, please

see **Appendix of Exhibits 17a**.[1]

This letter was sent and understood by both parties as declaring a "default"/rescission as provided in paragraph 10 of the letter agreement, **Appendix of Exhibits 17a**.[2] Walkers filed suit against Underwood on February 17, 2015 seeking lost profits as damages,

Summary disposition was granted by J. McMillen, Oakland Circuit on December 4, 2015, **Appendix of Exhibits 127a**. Neither party argued that *expressio unius est exclusio alterius* had application, nor did J. McMillen use the cannon in her opinion which found that the contract was not ambiguous and that Walkers had availed themselves of the remedy provided which was in effect a return of the parties to the pre contract positions with neither party entitled to monetary damages because the parties did not avail themselves of " . . . any other remedy agreed upon by the parties" language of paragraph 10.

The Court of appeals majority opinion found a problem with this insisting " . . . it requires the insertion of a word or words "limiting the available remedies," pg. 3, paragraph 3, **Appendix of Exhibits 140a**. No factual explanation for this conclusion is given and no legal authority is cited. The Opinion does not contradict J. McMillen's finding that the preliminary contract is not ambiguous. Rather the Court, in footnote 3 states:

> [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 exclusion 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

[1] "In light of the numerous delays in readying the above reference site for occupancy, please consider this letter notice of my clients' decision to terminate their in and any and all obligations regarding the property located at 18 S. Broadway, Lake Orion Michigan."
[2] Investigation revealed that Walkers voluntarily moved from their existing location in Oxford and Mrs. Walker began working as a commission sales agent at Crestview Cadillac dealership, where Google shows she is still employed.

> 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. See **Appendix of Exhibits 140a.**

The Court of Appeals is mistaken both as to the meaning and application of the maxim to the preliminary contract at issue here. The negative implication of the maxim *expressio unius est exclusio alterius* supplies the limitation of remedies found troubling by the Court of Appeals. But not troubling in the sense of offending established Michigan law of contract/statutory interpretation using the cannon. Moreover, by misunderstanding the meaning of *expressio unius est exclusio alterius* the Court of Appeals has ordered a ridiculous result of rendering the language of paragraph 10 of the contract wholly meaningless and adds ". . .that Underwood did not intend that the remedies mentioned would constitute the sole remedies available to either side, page 3, 3rd paragraph, of the Court of Appeals opinion of September 7, 2017, **Appendix of Exhibits 140a.** This follows from the misapplication of the case *Short v Hollingworth*, 291 Mich 271; 289 NW 158 (1939), which was a predecessor case to Michigan's adoption of a Uniform Sales Act, which in turn graduated to become part of the Uniform Commerce Code.

The Court of Appeals opinion, because of interpretation misunderstanding has left this contract with the elimination of paragraph 10 as though it had never been written. This opinion was result oriented so that the Walkers' could sue for lost profits. In short, the exact opposite of what paragraph 10 of the contract unambiguously expressed as the parties agreement.

The Court of Appeals on pg. 3 re-writes the contract by expressing their opinion that words need to be added to advise the paragraph 10 were the "exclusive remedies" but cite no statute, no case law, in short, nothing other than their apparently personal opinion to conclude that the Landlord/Defendant did not initiate that the remedies ". . . would constitute the sole

remedies available to either side"! The error of their reasoning, may have germinated in a mistake of fact. That is found on the first paragraph of pg. 4 (after the re-drafting of paragraph 10: 3 examples) where, in the 3rd line the Court writes, ". . . **or declare the default**." But the Walkers did declare the default by their letter of February 18, 2015, **Appendix of Exhibits 17a.**

The Court of Appeals failed, therefore, to appreciate that the terms of the 3 year lease never took effect because the Walkers' letter expressed a lack of satisfaction with the progress to a move in date for the rental unit. Satisfaction contracts are permitted under Michigan Law.

The Court of Appeals cites *Short v Hollingsworth,* 291 Mich 271(1939) as "additional support for our conclusion." The plain meaning of this language is that this case had already been decided, i.e. that Walkers could sue for lost profits even though they contributed nothing to the tenancy. Even though they were obliged to furnish landlord with a "plan" (and pay for the plan) which would detail the mechanical necessities, HVAC, electrical and plumbing to be installed and inspected they never supplied anything more than a penciled sketch showing furniture placement. Landlord brought in the architect, and a licensed mechanical engineer for HVAC changes that required special exhaust of air for a manicurist/nail technician/makeup and fresh air with pre-heaters for ambient air heating and conditioning.

The point here is that the *Short,* supra, case was a stock sale case, not a real property lease agreement. This difference is pertinent because *Short*, supra, was succeeded by an effort to codify a sales Act and then adoption within the Uniform Commercial Code. These transactions were deemed by the UCC legislation as special instances of contract sales and provided special rules. There was no "sale" in the Walkers' case.

This error by the Court of Appeals deprives the parties of: 1) the freedom of contract, no ambiguity of the contract having been declared by either the trial Court or the Court of Appeals;

2) that the Court of appeals failed to notice fact not contested by either party; that the Plaintiff, Walkers declared a default by their letter of February 18, 2015, (please see **Appendix of Exhibits 17a).** Having rescinded the contract, Walkers are not entitled to any damages because of that letter; 3) but for the application of *expressio unius est exclusio alterius* the remedy of rescission(default) or some other agreed upon remedy was exclusive and neither party argued that there was even a discussion, much less another agreed upon remedy; 4) the Court of Appeals citation of *Short v. Hollingsworth*, supra, is both inapposite but the Court of Appeals only claims that the remedy portion of the contract is affected by the use of the word "may" in introducing the remedy agreed to by signature of both the parties, especially when the parties' contract was one of satisfaction, as defined by law which is the necessary first step of the party to be charged with having to elect any remedy.

1) Freedom of Contract

Although the Court of Appeals wrote that the preliminary contract, in this case, the second clause, ". . . is [un]artfully worded, . . " sic, page 3, the Appellant accepts that this may be so. But urged that in considering the following arguments this Court's observation in *Quality Products v Hagel Precision*, 469 Mich 362, 370(2003), Quoting *Wilkie v Auto Owners Ins*. Co, 469 Mich 41, 51-52(2003) will be recalled:

> "One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made." [15 Corbin, Contracts (Interim ed), ch 79, §1376, p 17.]

2) Rescission Abrogates the Contract Entirely

Even though the Court of Appeals failed to take notice of the Walkers' letter declaring a default, as they had a right to do under paragraph 10 of the contract, but having done so

completely abrogates any further right to damages. *Cushman v Avis*, 28 Mich App 370, 372-373(1970):

> Plaintiff signed, confirmed, and agreed that the original agreement was to be "rescinded and void from its inception". No other construction is possible. *Canvasser Custom Builder, Inc., v. Seskin*(1969), 18 Mich App 606. Breach of contract and rescission were complete April 14, 1962.
>
> Rescission abrogates the contract completely. After a binding election to rescind, a party cannot insist on former contract rights. It is as if no such contract had been made. 17A CJS, Contracts §440, pp 551, 552, 1 Black on Rescission and Cancellation (2d Ed), §1; *Wall v Zynda*(1938), 283 Mich 260, 264; *Travelers Insurance Company v. Carey* (1970), 24 Mich App 207

3) Exclusive Remedies

The first part of Appellant's Brief demonstrated that the interpretive maxim, *expressio unius est exclusio alterius* has aged roots in Michigan Law. The maxim has application to this case although neither party recognized the application. The trial Court read the entire contract and found that paragraph 10 was clear and that Walkers had availed themselves of the default/rescission language of this satisfaction contract and granted Summary Disposition. Appellant, Underwood contends that not only Judge McMillen of Oakland County Circuit got the case right, but Judge O'Brien's dissent was spot-on in succinctly expressing her opinion of the proper application of the law to these facts. But the Court of Appeals majority totally rejected the procedure and legal effects of that rescission language and the Walker's forfeiture to hold that the case should go back to the Oakland County Circuit Court for further litigation of the claims of damages asserted by the Walkers. The

basis for this is/was that the forfeiture option of this satisfaction contract was badly phrased when compared to other obligations that would be taken on signing a lease **after** all construction and governmental approvals had been obtained.

> The use of this mandatory language signals to us, as it did the Supreme Court in *Short*, supra, that the parties knew how and when to use words compelling an action, and chose language of permission rather than obligation to described available remedies. Accordingly, we reverse the circuit court's grant of summary disposition to Underwood, and remand for further proceedings. Pg. 5

The exact language employed by the Court in *Short*, supra, pages 274-275 is:

> 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.
>
> . . . .
>
> To us, the language used does not indicate an intent to provide an exclusive remedy, and we find nothing elsewhere in the record to indicate that the parties intended a contrary result.
>
> . . . .
>
> The trial court entered judgment for plaintiff. Defendants take this appeal, claiming that inasmuch as the contract provided a remedy in the event of default by the purchasers, the remedy so provided is exclusive and that plaintiff had no right to bring an action at law for recovery of the balance of the purchase price. They also claim that because the stock had never been delivered to them, title thereto remains in plaintiff, and that plaintiff's only alternative remedy is an action for damages for failure to perform the contract.
>
> Whether or not the remedy provided in the contract upon breach thereof by defendants is exclusive depends upon the intention of the parties. *In re Hale Desk Co.*, (C.C.A.), 97 Fed (2d) 372. See, also, *Commercial Credit Co., v. Insular Motor Corp.*(C.C.A.), 17 Fed. (2d) 896; *Clear Lake Co-operative Live Stock Shippers' Ass'n v. Weir*, 200 Iowa, 1293 (206 N.W. 297). If it appears to have been the intention that the remedy specified in the contract should be exclusive, the rights of the parties will

> be controlled thereby. For cases holding the expressed remedy to be exclusive, see *Nave v. Powell*, 52 Ind. App. 496(96 N.E.395); *Schminke Milling Co. v Diamond Bros*., 99 Fed (2d) 467. For cases bearing upon the question in actions for breach of warranty, see annotations, 50 L.R. A. (N.S.) pp. 753, 774, and 778.

An examination of all the cases cited by the Court in *Short*, supra fail to explain a legal reason why a limitation of remedies may not be agreed to by the parties, and enforced by the Court unless some language obtains for inclusion in all contracts limiting remedies. Does the contract have to list every conceivable remedy and note that the parties only agree to 2, or 4, or whatever their agreement decides? What if the contracting parties turn out to be wrong and additional remedies become known during the performance of the contract. Or, what if the theory of recovery blends two or more causes for action, one of which may be breach of contract. Is the failure in regards to the drafting of the contract mean that there is no contract, and that the litigation is an action on assumpsit or with no written contract at all. Appellant's research has disclosed no case decision that has a discussion of the "exclusive" remedy concept, where the parties agreement is clear and understood. May not the exclusionary maxim of *expressio unius est exclusio alterius* enforce what was agreed to but nothing more despite the possibility that there may be in the law other/further remedies. Without exception, every case cited by the Court in *Short*, supra, and the Court of Appeals in this case use the word "exclusive" to establish some bar, limit, or requirement. The Court of Appeals has re-written the contract to completely erase the limitation of remedies expressed in paragraph 10. There has been no agreement to this.

4) <u>A full reading of the contract at issue in this case provides, in paragraph 8 language of a satisfaction contract.</u>

> 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.

This language availed the Walkers of the contract right to back out of the contract at any time prior to signing the 3 year lease. The continuation of the contractual relationship depended upon their satisfaction. This can be discerned from the language of the preliminary contract and the uncontested fact(s) that the Walkers contributed nothing to the custom finish of their unit, not any money, not even the "plan" they agreed to furnish lessor Underwood. Their inspections (they had their own key to the premises) usually on Sundays was the same: "Beautiful; beautiful. When will it be ready to move in?"

Even though Plaintiff Walkers exclaimed about the appearance of the space to be leased, there was no satisfaction in that the preliminary contract did not result in the 3 year lease being signed. The preliminary contract allowed Plaintiff Walkers' to issue a default rescission notice which they sent to lessor. The Walkers only brought suit that is now before the Court. Satisfaction contract cases applicable: *Isbell v Anderson Carriage Co*, 170 Mich 304(1912); *Schmand v Jandorf*, 175 Mich 88(1913), and *Bailey v Goldberg*, 236 Mich 29(1926).

The legal arguments to examine the maxim *expressio unius est exclusio alterius* through case law application. In Federal Court sampling follows.

I
Expressio Unius Est Exclusio Alterius

In Federal Court

Antonin Scalia and Bryan A. Garner published a book ©2012, Reading Law: the Interpretation of Legal Texts, published by Thompson-West. Part 10 is entitled **Negative-Implication Cannon-The expression of one thing implies the exclusion of others *expressio unius est exclusio alterius.*** Please see **Appendix of Exhibits 146a-150a** for a complete copy of part 10**.** The authors posit that common sense can supply the context of the maxims application.

It applies in this case to the preliminary contract at issue here. This is supported by the inclusion of a right to rescind the contract, or an opportunity to renegotiate any or all of the terms of the contract. The use of the negative cannon supplies any legal requirement, if there is one, to "limiting other available remedies" besides those contained in paragraph 10.

In Michigan Case Law

The language of paragraph 10 of the contract was understood and enforced by Judge McMillen, Oakland County Circuit Court, and, by Judge O'Brien of the Court of Appeals in her dissent where it was written:

> 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.").

In foot note 3 on pg. 3 of the majority opinion in this case cites *Barnhart v Peabody Coal Co*, 537 US 149, 168; 123 S Ct 748; 154 L Ed 2d 653 (2003), implying that paragraph 10 is deficient because two remedies for (alleged) breach are listed and seeks to add a legal burden to inform the business-person of all or most of the remedies in the contract cases. Until this opinion was issued a legal requirement to inform the other contractee of all or most of the possible remedies is unknown to Michigan law. Or, any other state's law. No authority is cited except the signatures of the two Judges'.

The Plaintiff-Appellee has plead in Oakland County Circuit, and argued to the Court of Appeals that Walkers want lost profits damages. Although just when these damages would begin (due to no agreed to completion date, and an unknown ending period (whether Mr. Walker could retire from his General Motors executive job and operate a spa/massage parlor without a license, since presumably, Mrs. Walker would retain her commission sales position at Crestview Cadillac Dealership. But the overwhelming point is that the contract is clear and unambiguous and was agreeable to both parties when the contract was written. Also, if the contract, as written, would be refused enforcement then landlord has a case to file for the agreed upon re-imbursement of the material cost for the finish fit out of the Plaintiff's 2000 sq. ft. unit of the building.

In *Barnhart v Peabody Coal Co*, 537 US 149, 168; 123 S Ct 748; 154 L Ed 2d 653 (2003). Mr. Justice Souter capsulized the case in his pre-amble.

> The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act) includes the present 26 U. S. C. § 9706(a), providing generally that the Commissioner of Social Security "shall, before October 1, 1993,"

assign each coal industry retiree eligible for benefits to an extant operating company or a "related" entity, which shall then be responsible for funding the assigned beneficiary's benefits. The question is whether an initial assignment made after that date is valid despite its untimeliness. We hold that it is.

Second, there is no reason to read the provision in § 9706(f) for correction of erroneous assignments as implying that the Commissioner should not employ her § 9706(a) authority to make a tardy initial assignment in a situation like this. We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it. *United Dominion Industries, Inc.* v. *United States,* 532 U. S. 822, 836 (2001). As we have held repeatedly, the 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. *United States* v. *Vonn,* 535 U. S. 55, 65 (2002). We explained this point as recently as last Term's unanimous opinion in *Chevron U. S. A. Inc.* v. *Echazabal,* 536 U. S. 73, 81 (2002):

> "Just as statutory language suggesting exclusiveness is missing, so is that essential extrastatutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication. The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which [is] abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded. E. Crawford, Construction of Statutes 337 (1940) (*expressio unius* `"properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference"' (quoting *State ex rel. Curtis* v. *De Corps,* 169*169 134 Ohio St. 295, 299, 16 N. E. 2d 459, 462 (1938))); *United States* v. *Vonn, supra.*"

In *Curtis v DeCorps*, 169 Ohio St 295, 16 NE2d 459(1938), the Ohio legislature enacted a provision that called for civil service workers to be laid off in the reverse order of last hired first to be laid off work. There had been a previous Act passed providing that police and fire workers would be laid off in inverse order of length of employment (favoring younger persons for those jobs. When the Plaintiff was laid off after long years of service he sued to regain his

job and the court issued mandamus to re-instate him arguing that *expressio unius est exclusio alterius* applies because police and fireman work is favored to have a younger work force.

> In *Ford v United States*, 273 U.S. 593, 611, 47 S. Ct. 531, 537, 71 L.Ed. 793, 801, the court said: "This maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment." Again, "The maxim of interpretation relied on is often helpful, but its wise application varies with the circumstances."
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> The fact that Section 486-17b, General Code, grants seniority rights to member of the police and fire departments is not indicative of an intention on the part of the Legislature to withdraw from the jurisdiction of municipal civil service commissions the element of seniority in service as a subject of regulation. The provisions of Section 186-17b, General Code, do not in any way amend, modify or restrict those of Section 186-19, General Code. The broad and comprehensive powers with which municipal civil service commissions are vested include the authority to prescribe the requirement that seniority in service shall be considered in laying off employees in classified civil service.

While the landlord Defendant may be criticized for a foolish belief in the fidelity of the Walkers intention to move into the custom designed fit out of the space they agreed to lease, the landlord was not so foolish as to spend and spend to complete the finish work and also run a risk of suit for loss of profits. If, as expected, problems with inspectors of the various mechanical systems HVAC, electrical, etc. systems might occur. The preliminary contract was so drafted that it could not be used as a weapon for either side.

The Supreme Court of the United States cited an Ohio case *Curtis v DeCorps*, 134 Ohio St 295(1938), 16 NE2d 459, which illustrates an application of the maxim *expressio unius est exclusio alterius* that demonstrates that the contract here provides what the parties agreed to: a walk away, landlord will not get paid for the custom materials used which Plaintiff agreed in the contract they would pay upon finding the finished unit ready to be occupied to their satisfaction and acceptance of the space by their signatures on a 3 year lease. Walkers, on the other hand,

knew or should have known that sending their letter of February 18, 2015 declaring a default/rescission would not be legally capable of pursing in Court a loss of profits claim against landlord.

We find the resolution here challenged to be consistent with the provisions of the Civil Service Act and therefore valid and enforceable, and hold that appellant in entitled to a write compelling his reinstatement as prayed for.

In the case of *Williams v. Mayor of Detroit*, 2 Mich 560(1853), the Plaintiff sued the Mayor claiming he was being forced to pay pro–tanto to improve the street paving which his house fronted, viz; Atwater St., City of Detroit. The Court held that *Expressio unius est exclusio alterius* cannot be applied because 1) it would make the State Constitution unworkable; and 2) neither the state or City of Detroit would "take" any property. Rather, the improvement would be a public one to "enhance transportation". The value of his house would economically rise by fronting a street more agreeable to travel upon. Plaintiff lost on bill for Injunction about paying for road improvement.

In *Perry v Cheboygan*, 55 Mich 250 (1884), the Plaintiff was a member of the Water Commission of the Defendant Village. The Plaintiff was an engineer and plumber and physically worked on the construction of the water works for about one year. Plaintiff then sent a bill to the Village of $10 which he claimed was a mistake. The bill was corrected to $100 less this payment leaving a $90 balance. The Village charter did not include a provision for the council to compensate members of the Water Board, although all other Boards contained a provision to compensate the members; at pg. 254:

> If this is a proper case for the application of the maxim that the express mention of one thing is the exclusion of another, the position of the plaintiff's counsel in undoubtedly correct.
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> Upon an examination of the various provisions of the charter I am of opinion that the omission to provide compensation to members of the board of water commissioners was intentional, and it follows that the members accepting such office must be deemed to have done so with knowledge of and with reference to the provisions of the charter relating to the services which they were to perform, and that such services were to be rendered gratuitously.

In *Weinberg v Regents of the University of Michigan*, 97 Mich 246, 253 (1893), a suit was filed to receive payment for materials furnished to a contractor in building the University Hospital. Plaintiff sued as Defendant's, the State. The Court held Plaintiff should name the Regents individually.

> The Regents make no contracts on behalf of the State, but solely on behalf of and for the benefit of the University. All the other public corporations mentioned in the Constitution, which have occasion to erect public building or to make public improvements, are expressly included in this statute. *Expressio unius est exclusio alterius*. It expressly enumerates the State, counties, cities, village, townships, and school-districts. If the University were under the control and management of the Legislature it would undoubtedly come within this statute, as did the agricultural College, Normal School, State Public School, asylums, prisons, reform schools, houses of correction, etc. But the general supervision of the University is, by the Constitution, vested in the Regents. Const. art. 13, §§7, 8.

In 1913, in *Eikhoff v Charter Commission*, 176 Mich 535 (1913) was reported that Plaintiff was duly elected and seated as a member of the Charter Commission. Without any notice or even allegation of misconduct, nor any hearing whatsoever, the Commission passed a resolution and Plaintiff was ousted from this seat. Plaintiff sought a writ of Prohibition to keep his seat. The Court granted the writ and the Commission appealed. The Court upheld the writ without writing the words e*xpressio unius est exclusio alterius.* But the legal analysis of the Court applies the Canon to reach a result consistent with the logic of the Canon.

> 1. Statutes-Construction.
> It is a well-established rule of statutory construction that where powers are specifically conferred they cannot be extended by implication: it is to be inferred that no other or greater power was given than that which the statute specifies. Pg. 535
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> . . . .
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> We have stated all the powers and authority specifically conferred upon charter commissions by this legislation. It is a well-established rule of statutory construction that where powers are specifically conferred they cannot be extended by inference, but that the inference is that it was intended that no other or greater power was given than that specified. Pg. 540.
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> . . . .
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> The next question to be considered is whether this statute confers upon charter commissions the power to oust one of their members. It is not contended that such power is specifically granted by this statute. Pg. 541.
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> .
> Respondent charter commission has assumed that power and authority to remove petitioner and oust him from this office as a member of such commission, and has in fact actually passed a resolution to that effect. Such action was without authority of law, as was distinctly held in the cases of *Speed v. Detroit Commons Council*, supra. Pg. 542.

In the case of *Marshall v Wabash Railway Co.,* 201 Mich 167 (1918), Plaintiff Marshall suffered a Personal Injury aboard Defendant's steam train on February 2, 1908. Plaintiff obtained a State Court judgment for his damages of February 13, 1913. A Michigan Statute was enacted in 1899 that declared any judgment obtained against a steam railroad to be a priority lien against railroad assets. On January 29, 1912, the Wabash Railroad Company plead in Federal Court that receivers be appointed to manage debts from liquidation of assets. Plaintiff sought to obtain a decree advancing the judgment lien ahead of mortgage(s). The Michigan Supreme Court declined to apply the statute as requested. The Court's reasoning is stated a pg. 172:

> If it was the legislative intent to subordinate previously given mortgages to liens for torts, labor or to her claims against the delinquent corporation,

> there was no difficulty in so providing in plain words. Under the legal maxim of construction that express mention of one **thing implies the exclusion of other similar things**, there is reason in the contention that, the act having expressly named certain liens made subordinate, it by implication excludes others not mentioned, upon the presumption that, having designated some, the legislature designated all it was intended the act should include.

In *Taylor v Mich Public Utilities*, 217 M 400, 402-403 (1922), the Writ of Mandamus was denied because the foreclosure had expired thereby making the municipality the only entity authorized by statute to conduct a hearing and act upon the complaint of the rate (price) of the gas used by consumers.

> The Michigan public utilities commission is a creature of the statute, has no inherent or common law power and its jurisdiction in any instance must affirmatively appear in the statute before it can be invoked or exercised. *Expressio unius est exclusio alterius* has been a long time legal maxim and a safe guide in the construction of statutes marking powers not in accordance with the common law.

In the case of *Van Sweden v. Van Sweden*, 250 Mich 238, 241 (1930), where a 16 year old son worked for his father and hammered a nail which flew into the boy's eye, the Workers' Compensation Commission claims he was an illegal employee: double compensation. The Michigan Supreme Court said no to double compensation as his was not a hazardous job and his job was not listed in the WCDA Act as hazardous. *Expressio unius est exclusio alterius* was not included. The contract has no other remedies except rescission:

> The mentioned permit is a work permit issued, under certain regulations, by designated public school officials. The boy had no such permit, and the commission held the act applicable and his employment unlawful. The statute does not include a carpenter's helper in its mention of business callings, unless the language "or any person coming within the provisions of this act," serves as a catch-all. If such were its purpose, it could have been made plain by omitting special mentioned callings and stating that the act applies to every employer. The enumerated callings are easily comprehended, and a search of the act and its amendments fails to disclose any further inclusion by the term, "any person coming within the provisions of the act." It is a familiar rule that inclusion by specific

> mention excludes what is not mentioned. The employment of the boy, as a carpenter's helper, by his father, without a work permit, was not made unlawful by the mentioned statute.

In the case of *Dave's Place v Liquor Control Comm*., 277 Mich 551(1936), at pgs. 554-555, comes the following quote:

> In the absence of any other reason and in the light of the findings of the circuit judge, we are forced to conclude that the commission has attempted to amend the act by construction to read "a corporation, etc., all of whose stockholders shall be American citizens."
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> . . . .
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> The commission has planted itself squarely upon an erroneous construction of the quoted section of the liquor control act. The "complete control" granted by constitutional amendment is "subject to statutory limitations."
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> "It is a general principle of interpretation that the mention of one thing implies the exclusion of another thing; *expressio unius est exclusio alterius."* 25 R.C.L. p.981.
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> See, *Taylor v. Michigan Public Utilities Commission*, 217 Mich 400(1922).
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> The statute says:
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> "Vendors shall be, when a corporation, only a corporation authorized to do business under the laws of the State of Michigan."
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> The limitations of citizenship contained in the same section are applied only to individuals or partnerships and not to the stockholders of domestic corporations.
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> Under the facts presented the licenses should have been issued. The petition for the writ of mandamus is granted with costs.

In *Sebewaing Industries v Sebewaing*, 337 Mich 530(1953), the Village sought to purchase a new electricity generator to supply power to the residents. This upgrade was proposed to be financed by revenue certificates which did not involve the full faith and credit of the village and, for that reason, was not submitted to the voters for approval.

The Plaintiff contended that the Charter could not be expected to expressly confer power for everything required of the governmental administration some things must be left to

implication in order to function, citing *Torrent v City of Muskegon*, 47 Mich 115 (1881). In *Sebewaing*, supra, at pg. 545:

> Neither does it follow from the express power conferred upon defendant to acquire and improve its utility that a power is to be implied to borrow for that purpose. Further distinguishing the instant case from *Torrent* is the fact that here the statute is not silent on the subject for which an implied power is asserted by defendant. Chapter 12, § 5 of the statute expressly provides 2 methods of financing the acquisition of the equipment in question. *Expressum facit cessare tacitum*. That which is expressed puts an end to or renders ineffective that which is implied. *Galloway v. Holmes*, 1 Doug (Mich) 330. So stated in the opinion of 4 members of this Court, the other concurring in the result, in *Taylor v Public Utilities Commission*, 217 Mich 400 (PUR1922D, 198). *Expressio unius est exclusio alterius.* Express mention in a statute of one thing implies the exclusion of other similar things. *Perry v. Village of Cheboygan*, 55 Mich 250; *Weinberg v. Regents of the University of Michigan*, 97 Mich 246; *Marshall v. Wabash Railway Co.*, 201 Mich 167 (8 ALR 435); *Taylor v Public Utilites Commission,* supra; *Van Sweden v Van Sweden,* 250 Mich 238. When a statute creates an entity, grants it powers and prescribes the mode of their exercise, that mode must be followed and none other. *Taylor v Public Utilities Commission,* supra (4 Justices); (2 Lewis' Sutherland Statutory Construction [2d ed], §§ 491-493). When powers are granted by statute to its creature the enumeration thereof in a particular field must be deemed to exclude all other of a similar nature in that same field. So held in *Bank of Michigan v. Niles*, 1 Doug (Mich) 401.

In the case of *Stowers v Wolesdzko*, 386 Mich 119(1971), the Plaintiff, a housewife with 2 children, and a husband lived in Livonia. But this was not a happy home. Plaintiff told her husband +/- 2 months before the events which came to the Court, that she wanted a divorce. In December, 1963 the Defendant, Dr. Woledzko, a psychiatrist, engaged Plaintiff in a conversation. This led to a petition to the Probate Court for an Order to hospitalize her for observation/diagnosis of suspected mental illness. The Defendant doctor, per his contract with Plaintiff's husband treated her, without her consent.

The Defendant lost a medical malpractice claim by jury verdict. The legal challenge to this verdict was MCL 330.21 only proved for diagnostic observation without a court

determination of "insanity" the Defendant's treatment was tortious. The Defendant pleaded *expressio unius est exclusio alterius* that Plaintiff treatment at private hospital was authorized by the statute authorizing "custody and treatment" at a public hospital but the court held this not to apply to private hospitals.

In *Alco Universal v. City of Flint*, 386, Mich 359, 362 (1971), there was a contest between the Flint City Commission and others against approval of Plaintiff's plans for housing development. The City Commission decided to drop the project without giving any reason.

The cannon e*xpressio unius est exclusio alterius* is not cited in the opinion. The Court did not grant mandamus. The reasoning is stated succinctly:

> The normal meaning of "approve" with relation to government action implies the power to disapprove. For example, the language "shall be approved by the local legislative body" in §17 of The Michigan Liquor Control Act, MCLA §436.17 (State exercise of discretion. *Lewis v. Grand Rapids* (CA6, 1966), 356 F2d 2769, 285 et seq.; *cert den* (1966), 385 US 838 (87 S Ct 84, 17 L Ed 2d 71). See generally 6 CJS 127 "Approve" and "Approved": discretion not necessarily implied but normally is.

Next, the case of *Alan v Wayne County*, 388 M 210, 253 (1972) was before the Court on bonding issues to fund a re-build of "Briggs Stadium" where the Detroit Tigers sometimes displayed glory before fans, such as the writer. Kudos for the late Judge Blair Moody for writing an opinion of 178 pgs. There is little light shed on the problem in this present case in his opinion however. In fact, the sole contribution is two sentences quoted here:

> On the principle of *expressio unius est exclusio alterius*, this is another reason why the stadium bonds do not qualify under Act 94. *Sebewaing Industries, Inc. v. Village of Sebewaing*, 337 Mich 530, 545(1953).

In *Lutrell v Dept. of Corrections*, 421 Mich 93, 95, 107(1984) contains the following quote(s):

> The narrow issue to be decided in this case is whether the Legislature intended to preclude the Department of Corrections from denying certain classes of offenders, "drug traffickers" in this case, eligibility for placement in community residence programs. We hold that the plain language of the statute does not preclude a construction that the Department of Corrections is authorized to define eligibility for community placement by category, in addition to the two categories for which the Legislature has explicitly defined eligibility. Pg.95
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> . . . .
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> E. *Expressio Unius Est Exclusio Alterius*
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> The offenders rely heavily on the rule of e*xpressio unius est exclusio alterius* As the offenders indicate, this is a recognized rule of statutory interpretation. But like all other such rules, it is a tool to ascertain the intent of the Legislature. Pg. 107

Feld v R & C Beauty Salon, 435 Mich 352, 363(1990) is a WCDA case where Plaintiff attorney insisted on his attendances with client where employer/Insurance carrier refer Plaintiff to their "Regular" doctor for examination/opinion letter/testimony; authorized by MCL 418.385. This statute specifically provides that Plaintiff's doctor may attend the Defendant's examination. Plaintiff attorney argued that Plaintiff's Doctors' will not/have not agreed to this statutory provision so claimant's attorney should be allowed to stand in.

Expressio unius est exclusio alterius is cited by the majority opinion to deny Plaintiff the presence of her attorney for a defense medical exam. The opinion cited *2A SANDS*, Sutherland Statutorily Construction (4th Ed.) §47.24 and quoted *SANDS*, supra §47.23 p. 194 in part:

2A Sands, supra, § 47.23, p 194 provides in part:

> [*Expressio unius est exclusio alterius*] is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions. "When what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions, that mode must be followed and none other, and

> such parties only may act." The method prescribed in a statute for enforcing the rights provided in it is likewise presumed to be exclusive.
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> [12] rule [*expressio unius est exclusio alterius*] is well recognized in Michigan.... It is particularly applicable to the construction of statutes, such as the workers' compensation act, which are in derogation of the common law. [*Revard, supra* at 95.]
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> See also *Brown v Eller Outdoor Advertising Co*, 139 Mich App 7, 13-14; 360 NW2d 322 (1984), lv den 424 Mich 902 (1986). In *Brown*, the Court reviewed with approval the reasoning of the WCAB when it applied the maxim *expressio unius est exclusio alterius* to determine that the express mention of weekly compensation benefits in § 801(5) of the WDCA, MCL 418.801(5), MSA 17.237(801)(5), implies the exclusion of other types of benefits.

In *Bradley v Saranac Board of Ed*., 455 Mich 285, 298(1997), the Plaintiff, a public school teacher, sought an injunctive Order forbidding Defendant School Board's compliance with a FOIA requested release of her personnel file maintained by the school district. The FOIA request was made by a parent of one of her students. The Court ruled that a release should be made subject to redaction of certain passages.

The Court held that the personnel records of the teacher were not exempt under the FOIA. The reasoning:

> This Court recognizes the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things.[28]
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> [28] *Stowers v Wolodzko*, 386 Mich 119; 191 NW2d 355(1971)

In *Rory v Continental Insurance Co*, 473 Mich 457, 49(2005), the reporter of decision has succinctly written a description of the contesting parties arguments and holding of the Court so that it is quoted here:

> Shirley Rory and Ethel Woods brought an action in the Wayne Circuit Court against Continental Insurance Company. The plaintiffs alleged that the defendant unreasonable refused their claim for uninsured motorist benefits, submitted sixteen months after the accident causing their injuries, by invoking a policy provision requiring such a claim or suit be filed within one year from the date of the accident. The Court, Robert L.

Ziolkowski, J., denied the defendant summary disposition, concluding that the contractual one-year limit was not reasonable and was an unenforceable adhesion clause. The Court of Appeals, Borrello, P.J. , and White and Smolenski, J.J., affirmed, agreeing that the one-year limitations period was unreasonable. 262 Mich App 679(2004). The defendant appealed. The Supreme Court granted the defendant's application for leave to appeal. 471 Mich 904(2004).

In an opinion by Justice Young, joined by chief Justice Taylor, and Justices Corrigan and Markman, the Supreme Court held:

> Insurance policies are subject to the same contract construction principles that apply to any other species of contract. Unless a contact provision violates law or a traditional defense to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written.
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> 1. Unambiguous contracts are not open to judicial construction, and must be enforced according to their unambiguous terms unless doing so would violate law or public policy. Enforcing contract according to their unambiguous terms respects the parties' freedom to contract. A judicial assessment of reasonableness is an invalid basis on which to refuse to enforce contractual provision. Only recognized tradition contract defenses may be used to avoid the enforcement of contract provisions.

The case of *Hoerstman Gen Contracting v Hahn*, 474 Mich 66, 74-75(2006) contains the following quote:

> As already noted, Article 3 of the UCC is comprehensive. It is intended to apply to nearly every situation involving negotiable instruments. See MCL 440.3102. The language contained in MCL 440.3311 completely covers the details of accord and satisfactions.
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> MCL 440.3311(3) and (4) contain exceptions or conditions. Their enumeration eliminates the possibility of their being other exceptions under the legal maxim *expressio unius est exclusio alterius.*[8] The maxim is a rule of construction that is a product of logic and common sense. *Feld v. Robert & Charles Beauty Salon*, 435 Mich. 352, 362, 459 N.W.2d 279 (1990), quoting 2A Sands, Sutherland Statutory Construction (4th ed.), § 47.24, p. 203. This Court long ago stated that no maxim is more uniformly used to properly construe statutes. *Taylor v. Michigan Public Utilities Comm.*, 217 Mich. 400, 403, 186 N.W. 485 (1922).
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> Therefore, the language of the statute shows that the Legislature covered the entire area of accord and satisfactions involving negotiable

> instruments. It clearly intended that the statute would abrogate the common law on this subject.[9]
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> [8] "The expression of one thing is the exclusion of another." Black's Law Dictionary (7th ed.), p. 1635.
> [9] We note that this conclusion does not eliminate common-law accord and satisfactions entirely. An accord and satisfaction can exist without the use of a negotiable instrument. For instance, the parties could use cash or goods to satisfy a debt rather than a check. MCL 440.3311 would not apply in those situations.

Michigan Court of Appeals cases

In the case of *Revard v Johns-Manville Sales*, 111 Mich App 91, 94-95(1981), the Court decided a dispute of the parties that contended the Dust Fund (MCL 418.827[5]) of the Workers' Compensation Act was entitled to a reimbursement for paying benefits. It was held that since the Dust Fund could only be reimbursed if it was, under the statute, and "insurer," which it was not, no reimbursement was obtainable.

> This conclusion is, in addition, amply supported by the rule of statutory construction which holds that the express mention of certain things implies the exclusion of other similar things. *Expressio unius est* 95*95 *exclusio alterius.* This rule is well recognized in Michigan. See *Stowers v Wolodzko*, 386 Mich 119, 133; 191 NW2d 355 (1971), *People v Malik*,70 Mich App 133, 136; 245 NW2d 434 (1976). It is particularly applicable to the construction of statutes, such as the workers' compensation act, which are in derogation of the common law.

Edmond v Dep't of Corrections, 116 Mich App 1, 7(1982), is two cases brought by inmates challenging an exclusion from consideration by two classes of prisoners; a)drug dealers; b) murderers; in a community placement program. The Circuit Court was reversed holding that the Department may not exclude an entire class of prisoners. But the Department could chose to exclude any individual prisoner in consonance with the Legislation establishing the community placement program of the Act:

> Given that the Legislature severely restricted eligibility for community placement for prisoners convicted of violent or assaultive crimes and first-degree murder, but imposed no comparable restrictions on "drug traffickers", it seems unlikely that the Legislature did intend the Department of Corrections' blanket preclusion. This conclusion is

> supported by the doctrine of e*xpressio unius est exclusio alterius*, that is, that the express mention in a statute of one group or class implies the exclusion of other unnamed groups or classes. See *People v Lange*, 105 Mich App 263, 266; 306 NW2d 514 (1981), and cases cited therein.

In *AFSCME v Detroit*, 267 Mich App 255, 257, 260-262(2005), this multiparty litigation ruled upon legislation, contracts of Wayne, Macomb, and Oakland Counties seeking to create a regional transportation system: hence DARTA: Detroit Area Regional Transportation System.

The Circuit Court, James Rashid, J. agreed that the Regional Transit Coordinating Council was not the appropriate authority to act in place of the other regional transportation authorities. The Court of Appeals wrote convincingly upon the law:

> Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v. State Farm Mut. Auto. Ins. Co.*, 466 Mich. 588, 594, 648 N.W.2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent—the words of the statute. *Neal v. Wilkes*, 470 Mich. 661, 665, 685 N.W.2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and further judicial construction is neither permitted nor required. *DiBenedetto v. West Shore Hosp.*, 461 Mich. 394, 402, 605 N.W.2d 300 (2000). Under the plain meaning rule, "courts should give the ordinary and accepted meaning to the mandatory word `shall' and the permissive word `may' unless to do so would frustrate the legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Browder v. Int'l Fidelity Ins. Co.*, 413 Mich. 603, 612, 321 N.W.2d 668 (1982). Michigan recognizes the maxim "*expressio unius est exclusio alterius;* that the express mention in a statute of one thing implies the exclusion of other similar things." *Bradley v. Saranac Community Schools Bd. of Ed.*, 455 Mich. 285, 298, 565 N.W.2d 650 (1997). However, "this maxim is merely an aid to interpreting legislative intent and cannot govern if the result would defeat the clear legislative intent. . . ." *Grand Rapids Employees Independent Union v. Grand Rapids*, 235 Mich.App. 398, 406, 597 N.W.2d 284 (1999). The legislative history of an act may be examined "to ascertain the reason for the act and the meaning of its provisions." *DeVormer v. DeVormer*,240 Mich.App. 601, 607, 618 N.W.2d 39 (2000). Legislative history is valuable when it evidences a legislative intent to repudiate a judicial construction or considers alternatives in statutory language. *In re Certified Question (Kenneth Henes Special Projects v. Continental Biomass Industries, Inc*), 468 Mich. 109, 115 n. 5, 659 N.W.2d 597 (2003). However, legislative

> history is afforded little significance when it is not an official view of the legislators and cannot be utilized to create an ambiguity where one does not otherwise exist. *Id.*
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> The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc. v. Hobbs Int'l Inc. (After Remand)*, 463 Mich. 504, 511, 620 N.W.2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent on the basis of the plain language of 716*716the contract itself. *Old Kent Bank v. Sobczak*, 243 Mich.App. 57, 63, 620 N.W.2d 663 (2000). "`If the contract language is clear and unambiguous, its meaning presents a question of law'" for the courts to determine. *UAW-GM Human Resource Ctr. v. KSL Recreation Corp.*, 228 Mich. App. 486, 491, 579 N.W.2d 411 (1998) (citations deleted). Illegal portions of a contractual agreement may be severed. *Stokes v. Millen Roofing Co.*, 466 Mich. 660, 666, 649 N.W.2d 371 (2002). However, in order to sever "the illegal portion, the illegal provision must not be central to the parties' agreement." *Id.* "If the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded ... as entire and not divisible." *Id.*, quoting 3 Williston, Contracts (3d ed), § 532, p 765.

In *Tuggle v Dept of State Police*, 269 Mich App 657, 663-664(2006), the Plaintiff was convicted of an attempt to break into a building with intent to steal. He sought from the Circuit Court an Order re-characterizing his conviction to breaking into an unoccupied building so that he could purchase a firearm. His argument stressed e*xpressio unius est exclusio alterius*.

> Plaintiffs couple the rules of statutory interpretation with the maxim that the expression of one thing means the exclusion of another, or *expressio unius est exclusio alterius* According to plaintiffs, the inclusion of breaking and entering of an occupied dwelling as a separately listed specified felony in MCL 750.224f(6)(v) strongly implies that breaking and entering an unoccupied building is excluded from the definition of a specified felony. To adopt defendants' reading of the statute, which includes breaking and entering an unoccupied building as a crime involving the attempted or threatened use of force against the property of another in the general definition of a specified felony provided by MCL 750.224f(6)(i), plaintiffs contend, would impermissibly render the specified felonies listed in MCL 750.224f(6)(v) surplusage to the general definition. Further, according to plaintiffs, the only possible legislative reason for specifically listing breaking and entering an

> occupied dwelling as a specified felony would be to differentiate that crime from breaking and entering an unoccupied dwelling.
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> We note that the rule of *expressio unius est exclusio alterius* is a rule of statutory interpretation meant to help ascertain the intent of the Legislature, and "[i]t does not automatically lead to results." The rule does not subsume the plain language of the statute when determining the intent of the Legislature.

In the case of *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 448, 451(2009), the Detroit City Council passed a resolution transferring authority over Cobo Convention Center to the Detroit Regional Convention Facility. The Mayor contested this legislation and the suit to overthrow the Mayor's veto fell to Judge Torres who issued an Order which did overrule the Mayor finding that the Mayor's office had no veto power over this legislation, authorizing the Council's resolution per MCL 141.1369(1).

The Circuit Court relied upon the maxim e*xpressio unius est exclusio alterius* noting:

> Thus, applying this maxim to the Act leads to the conclusion that the Legislature did not mean to provide the chief executive officer with the veto power over disapproval resolutions since, while the Act delineates several duties or powers of the chief executive officer, none of these include the power to veto a disapproval resolution, and the Act expressly confers on the legislative body alone the power to disapprove the transfer. Pg. 448
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> Defendants ask this Court to interpret the Legislature's silence as bestowing a mayoral veto power that is not described in the statute. Should we adopt defendants' arguments and recognize a mayoral veto power over the city council's resolution, we would be nullifying MCL 123*123 141.1369(1), the only provision of the act that confers power on the city council. It is a well-established rule of statutory construction "that courts should avoid any construction that would render statutory language nugatory." *Flint City Council v. Michigan*, 253 Mich.App. 378, 394, 655 N.W.2d 604 (2002). We therefore do not construe the statute in a manner that would render MCL 141.1369(1) a nullity.
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> We read the plain language of MCL 141.1369 to mean that the transfer is exclusively conditioned on the actions of the city council. If the city council does not disapprove the transfer, then the transfer will occur. Under the clear terms of the act, if a majority of the city council

> affirmatively votes to disapprove the transfer, then the transfer does not occur. Hence, once the majority of the city council voted to disapprove the transfer, the transfer could not be effectuated. Because the city council's vote was dispositive, the mayoral veto was, in essence, irrelevant. We therefore must reject defendants' argument that the mayoral veto invalidated the city council's resolution. Pg. 451

This ruling is interesting because the Court of Appeals in this case reasoned in the same backwards way that the Mayor of Detroit presented his arguments. That is that because his veto powers were not listed in the language of the council resolution, he did not lose those power(s) in this particular resolution. The Court of Appeals held that this is contrary to the maxim e*xpressio unius est exclusio alterius*, the mention of some authority (power) excludes others NOT mentioned.

The Mayor's misunderstanding of the concept of the maxim e*xpressio unius est exclusio alterius* was as far off. It was exactly the opposite of the proper application of the maxim to the facts.

Next, in *Hackel v Macomb County Commissioner*, 298 Mich App 311, 324-325(2012), this case reports a power contest between the Macomb County Commission and the county Executive. The Executive, as did the Mayor of Detroit, applied the maxim e*xpressio unius est exclusio alterius* the opposite of what the doctrine stands for, that is, when people say (agree) to one thing they do not mean something else. The legislature reposed authority to approve/disapprove County Contracts in the Commission Mr. Hackel contended that he had the authority to accept or reject contracts. The Court explained:

> In addition, the Executive's argument fails under "the doctrine of *expressio unius est exclusio alterius*, or inclusion by specific mention excludes what is not mentioned." *Id.* at 448, 770 N.W.2d 117. This doctrine is "a rule of construction that is a product of logic and common sense. The doctrine characterizes the general practice that when people say one thing they do not mean something else." *Id.* at 456, 770 N.W.2d 117

(citations and quotation marks omitted). In *Detroit City Council*, a statute granted to the legislative body of certain cities the authority to disapprove the transfer of a convention center to a regional authority but was silent regarding granting comparable authority to the mayor of such a city. *Id.* at 446, 456, 770 N.W.2d 117. The city council passed a resolution disapproving the transfer; the mayor vetoed the resolution, and the city council did not override the veto. *Id.* at 446, 770 N.W.2d 117. This Court held that "under the doctrine of *expressio unius est exclusio alterius,* the Legislature's expression of the city council's disapproval power operates to exclude a mayoral veto power of that disapproval." *Id.* at 456, 770 N.W.2d 117. This Court declined to read into the statute a mayoral veto power that was not expressly stated. *Id.* at 461, 770 N.W.2d 117. Likewise, here, § 4.4(d) expressly grants to the Commission the authority to approve contracts. No such authority is granted to the Executive. As discussed, the Commission's power to approve a contract includes the power to disapprove a contract. *Alco Universal Inc.*, 386 Mich. at 362, 192 N.W.2d 247. The Commission thus could not exercise its power to *disapprove* a contract if the Executive possessed an implied power to approve the same contract. Accordingly, the charter's expression of the Commission's authority to approve contracts necessarily operates to exclude a comparable Executive power. *Detroit City Council*, 283 Mich.App. at 456, 770 N.W.2d 117.

Relief Requested

Defendant-Appellant prays this Court will Grant Leave to Appeal; or in the alternative issue an Order reversing the Court of Appeals Order; or reinstating the Order of Oakland County Circuit Court Judge McMillen.

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