IN THE SUPREME COURT

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

Plaintiffs/Appellees,

vs.

OTIS M. UNDERWOOD, JR.

Defendant/Appellant.

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

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PLAINTIFFS'/APPELLEES BRIEF IN OPPOSITION TO DEFENDANT'S SUPPLEMENTAL BRIEF IN REGARDS TO ITS APPLICATION FOR LEAVE TO APPEAL

Dated: June 25, 2018

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STATEMENT OF BASIS OF JURISDICTION

Plaintiffs concur with Defendant's Statement of the Basis of Jurisdiction.

STATEMENT OF QUESTIONS INVOLVED

I. Did the Court of Appeals properly interpret paragraph 10 of the underlying agreement between the parties?

Plaintiffs say "yes"

Defendant says "no"

The Court of Appeals says "yes"

COUNTER STATEMENT OF FACTS

Plaintiffs have set forth the facts underlying this dispute in the Brief in Response to Defendant's Application for Leave to Appeal and, rather than restate those facts, incorporate them herein.

There are, however, several "facts" alleged by Defendant in his Supplemental Brief without citation which warrant rebuttal:

- Throughout its Brief, Defendant claimed that Plaintiffs had failed to submit the "plan" required by the agreement. This is simply untrue. The Plaintiffs did submit a plan to Mr. Underwood. See Appendix of Exhibits pgs 14b - 20b (D. Walker Affidavit which was attached to Plaintiff's Response to Defendant's Motion for Summary Disposition as Exhibit I).
- Similarly, Defendant repeatedly asserted that Plaintiffs were obligated to pay for the materials needed to retrofit the space for the Plaintiffs' business. To support this assertion, Defendant referred the Court to paragraph 4(c) of the agreement between the parties. That paragraph states:

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

See Appendix of Exhibit at page 22b.

As is clear from the foregoing paragraph, the items for which Plaintiffs were obligated to pay were items which would be installed at the end of the construction and just prior to occupancy.

At the time the Plaintiffs declared the Defendant to have committed the first material breach of the contract, the Defendant had not even pulled the permits necessary for electrical, plumbing or HVAC work. Appendix of Exhibits at pgs 38b - 60b (Underwood deposition at pages 54-57, 64 and 70). In other words, the space was far from ready for appliances, sinks and the like and, thus, Plaintiffs had no obligation to make any payments to the Defendant.

- Without any support whatsoever, Defendant hypothesizes that Mr. Walker intended to operate the spa by himself without a license since Mrs. Walker is now working at Crestview Cadillac. This is similarly untrue. Mrs. Walker only sought other employment after Defendant breached their contract and, consequently, cause her spa to go out of business.
- Plaintiffs and the other anticipated tenant were "partners." They were not as is evident from the contract at issue which identifies the tenants as only "Donna Walker, William Walker and Head to Toes Massage Therapy of Oxford, Inc." Appendix of Exhibits at pgs 21b - 36b (Contract).
- Nor is Defendant's contention that Plaintiffs voluntarily left their prior location

accurate. The lease on the Plaintiffs prior expired during the summer of 2014 and Plaintiff was unable to remain at that location on a month to month extension. Appendix of Exhibits at pgs 14b - 20b (D. Walker Affidavit which was attached as Exhibit I to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Disposition).

- Inexplicably, the Defendant repeatedly asserted in his Brief that the Court of Appeal had erroneously believed that the Plaintiffs had not given Defendants notice of his breach of the contract. That assertion is inexplicable because on the first page of the Court of Appeals decision, the majority wrote, "Nine months later, plaintiffs informed Underwood that they could wait no longer for him to complete the work necessary for an occupancy permit." Appendix of Exhibits pgs. 6b - 13b.

Finally, and while this will be discussed in greater detail below, at no time did Plaintiffs communicate to Defendant that they wished to "rescind" the contract between the parties as Defendant repeatedly maintains in his Brief. Rather, on February 18, 2015, Plaintiffs provided Defendant with notice that he had committed the first material breach of the contract which relieved Plaintiffs of any further obligations under the contract. See Appendix of Exhibits at pg 37b. (February 18, 2015 letter to O. Underwood).

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).

Pursuant to the Court's direction, the Plaintiffs will not restate the arguments made in their Brief in Opposition to Defendant's Application for Leave to Appeal, but do incorporate those arguments herein.

In its Order dated April 26, 2018, the Court instructed the parties to provide supplemental briefs concerning the meaning of paragraph 10 of the agreement at issue and to discuss the applicability of the legal canon *expressio unius est exclusio alterius* in greater detail than previously briefed.

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

In addition to the arguments set forth in Plaintiffs' Brief in Opposition to Defendant's Application for Leave to Appeal, for the following reasons, Plaintiffs submit that the legal canon *expressio unius est exclusio alterius* was properly rejected by the Court of Appeals.

Defendant acknowledges, by attachment of the"Negative-Implication Canon" excerpt that he attached to his brief, that the canon must be applied with "great caution" and that its application should be limited to those circumstances where the context of the language at issue so warrants. Defendant's Appendix of Exhibits pg. 143a.

For the reasons set forth by the Court of Appeals, the case at bar is not one where

application of this canon is appropriate.

A. The language chosen by Defendant, Underwood, when he drafted the contract, illustrates that the canon is inapplicable to this paragraph.

To determine whether the canon applies it is necessary to examine both the language of the subject paragraph and the language of the agreement as a whole. The paragraph at issue states:

> 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.

Appendix to Exhibits at pg. 21b - 36b.

As the Court of Appeals recognized the paragraph actually consists of two clauses:

> -- 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

and

> -- The failure of either party to perform the preliminary duties outlined in this letter agreement will ***permit*** the obligee of the duty ... other remedy that may be agreed to by the parties.

The operative verb in each clause is the word "permit." *Dictionary.com* defines the word "permit" as "to allow to do something," "to allow to be done or occur" and "to tolerate; to agree to."

It is well settled that a contract containing a permissive verb instead of a

mandatory verb creates options for the parties and does not limit their behavior to the action identified. See, e.g., *NL Ventures VI Farmington, LLC vs. City of Livonia*, 314 Mich App 222, 886 N.W.2d 772 (2016) ("under the plain meaning rule, courts must give the ordinary and accepted meaning to the mandatory word "shall" and the permissive word "may..."). That Defendant's choice of the word "permit" in this paragraph was intended to provide options, but not a limitation is buttressed by the fact that both "permit" and "permissive" have the same etimological root in the Latin word, "permittere" *Etimonline.com*.

In addition to the analysis undertaken by the Court of Appeals, the above analysis validates the Court of Appeals' Opinion that the *expressio unius est exclusio alterius* canon is not applicable to the case at bar.

In order for the *expressio unius est exclusio alterius* canon to apply to this case, paragraph ten would have had to include an "associated group or series" of items "justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart vs. Peabody Coal Co.*, 537 U.S. 149, 169; 123 S Ct 748, 154 L Ed 2d 653 (2003). It did not. Instead, it only offered two possibilities to the parties.

The *Barnhart* Court further held, "*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." *Id* citing *State ex rel. Curtis vs. DeCorps*, 134 Ohio St. 295, 299,

16 N.E. 2d 459, 462 (1938).

B. Other rules of contract construction further support Plaintiffs' position.

The conclusion reached by the Court of Appeals and forwarded by Plaintiffs is further supported by application of several other rules of contract construction.

First, the contract must be construed most strictly against the drafter - in this case, the Defendant. *Lichnovsly vs. Ziebert Int'l Corp*., 414 Mich 228, 324 N.W.2d 732 (1982). Appendix of Exhibits pg. 21b - 36b. There is no dispute but that Defendant, Underwood - an attorney, drafted the contract. (Underwood deposition at page 19 - Appendix of Exhibits pgs. 38b - 60b).

Next, as the Court of Appeals noted, the contract contained multiple instances where the drafter, Mr. Underwood, chose to include mandatory terms thereby illustrating his awareness of the possibility of using mandatory instead of permissive verbs.[1]

And, when interpreting a contract it must be reviewed in its entirety. See, e.g.,

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[1] The use of the terms "will" or "shall" indicate mandatory action. See, e.g., *Neisloss vs. Gomez Associates, Inc.*, 2007 NY Slip Opinion 51782(U) (N.Y. Supreme Court, 2007). Appendix of Exhibits pgs 61b-63b (a copy of this opinion).

Throughout the contract, Mr. Underwood used the word "will" to identify mandatory behavior by the parties. For example:

Paragraph 4(c):	"The tenant will pay all expenses for the purchase of appliances..."
Paragraph 7:	"The Lease...will be signed for an initial 3 year term..."
Paragraph 9:	"Tennant (sic) agrees that at the lease signing they will have procured liability insurance..."

Spring Harbor Club Condo Ass'n vs. Wright, 499 Mich 863, 874 N.W.2d 689 (Mem) (2016). Paragraph 11 of the contract states, "The terms of the 13 page lease are agreed to and the forms of the lease will be signed by landlord and tenants and the forms of the lease referred to here will govern the rights and duties of the parties preliminary to and after its signing." Appendix of Exhibits pgs 21b - 36b (Contract).

The lease to which Mr. Underwood refers and incorporates into the contract states:

> (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.

When this rule of construction is paired with the foregoing analysis and the language of the contract, Plaintiffs submit that it is evident that the legal canon *expressio unius est exclusio alterius* cannot be applied to limit Plaintiffs' remedies.

Contrary to Defendant's assertion, the Court of Appeals didn't rewrite paragraph 10. It properly applied it as written.

II. Plaintiffs did not attempt to rescind the contract.

Inexplicably, without support and for the first time in his Supplemental Brief, Defendant has asserted that Plaintiffs rescinded the contract. That is not true. At no time did Plaintiffs rescind the contract. Rather, on February 18, 2015, Plaintiffs gave Mr. Underwood notice that he was in material breach of the contract and, thus, they were no

longer obligated to perform under the contract.

The "first material breach" doctrine holds that the party who commits the first material breach of a contract cannot, thereafter, pursue the other party for breach of contract. See., e.g., *Baith vs. Knapp Stiles, Inc.*, 380 Mich 119, 156 N.W.2d 575 (1968).

Rescission, on the other hand, occurs when a party has "declare[d] a contract void—of no legal force or binding effect—from its inception and thereby [seeks to] restore the parties to the positions they would have occupied had no contract ever been made." *West's Encyclopedia of American Law*, edition 2. Copyright 2008 The Gale Group, Inc.

Nothing within Plaintiff's February 18, 2015 letter indicates an intent or effort to rescind the contract. Appendix of Exhibits, pg. 37b (February 18, 2015 letter to O. Underwood). Nor has Defendant presented any evidence to the Court which would support his assertion that Plaintiffs rescinded the contract.

The contract was never rescinded by Plaintiffs. Instead, it was breached by Defendant. Accordingly, the arguments addressed to rescission should not be considered by the Court as they are inapplicable to this dispute.

III. Defendant's effort to label the contract as a "satisfaction contract" is without merit.

At various points in his Brief, Defendant describes the contract between the parties as a "satisfaction contract" which, according to Defendant, presumably should be interpreted as preventing Plaintiffs from pursuing their claim. When the contract between

the parties and the law is examined, it is apparent that this argument lacks merit.

To support this argument, Defendant relies upon paragraph 8 of the contract which states:

> 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.

Appendix of Exhibits at pgs. 21b - 36b.

As the parties were far from signing a lease since the permits for the most basic work on the building had not even been pulled, the Plaintiffs satisfaction or dissatisfaction with the premises was far from coming into play. Plaintiffs were not in a position to express satisfaction or dissatisfaction on February 18, 2018 as the premises was in no way ready for occupancy.

Even if the parties had reached the lease signing stage, the satisfaction language in paragraph 8 would not preclude Plaintiffs from bringing suit against Defendant for breach of contract. Defendant has not cited any case which holds otherwise. In fact, *Isbell vs. Anderson Carriage Co.*, 170 Mich 304 (1912), which was relied upon by Defendant, expressly recognized that satisfaction contracts are often the subject of litigation.

Similarly, if at the lease signing stage, Plaintiffs had indicated that they were not satisfied with the premises, Defendant could have sued them for breach of contract if their claims of dissatisfaction were not made in good faith See, e.g., *Purfield vs. Schleicher*, 215 Mich 664, 184 N.W.395 (1921).

IV. Short vs. Hollingsworth was properly relied upon by the Court of Appeals.

Defendant argues that the Court of Appeals reliance on *Short vs. Hollingsworth*, 291 Mich 271, 289 N.W.158 (1939) was misplaced because *Short* did not involve a commercial real estate lease. That the subject of the dispute in *Short* involved the sale of stock instead of a real estate lease is immaterial.

What is important is that in both case the parties were arguing over whether a term of the contract concerning remedies for breach was limiting or not.

In *Short,* the language at issue stated, "If and in the event the buyers shall fail to make any installment payment on the date specified the sellers ***may***....file a written request with said bank to return said stock to them..." *Id*. (Emphasis added)

The Defendant argued that the foregoing sentence set forth the Plaintiff's exclusive remedy in the event of a breach of the parties' contract. For reasons that similarly apply to the case at bar, the *Short* Court rejected that argument.

First, the Court held that "whether or not the remedy provided in the contract upon breach thereof by defendants is exclusive, depends upon the intention of the parties." *Id*. To determine the intent of the parties, the Court reviewed the entire contract, not just at the at issue clause, and considering the circumstances under which the contract was entered. Having done so, the Court found no evidence to support Defendant's argument.

Next, the Court looked to the language used in the clause. The Court determined that the contract's use of the permissive word "may" instead of the mandatory word

"shall" undermined Defendant's argument. The Court then concluded that "the words used in the contract should be construed according to their ordinary meaning unless it is clear that a different meaning was intended, and we find nothing that would authorize us to construe the word *may*, used as aforesaid, as meaning *shall*. *Id*. (emphasis supplied).

The above analysis applies with equal force to the case at bar.

Like the *Short* contract, the agreement between the parties in this case used a permissive verb rather than a mandatory one in its remedies clause. And, like the *Short* contract, the agreement between the parties in this case made use of mandatory verbs in other areas of the contract. Finally, like the *Short* contract, when the entire contract including the remedy paragraph in the Lease is considered it is apparent that the parties did not intend to limit an obligee's remedies to merely declaring a default.

To limit an obligee's remedies to only declaring a default also defies common sense. It is inconceivable that either party would have agreed to enter into a contract and agree to eliminate any possibility of receiving compensation for their damages in the event of a breach by the other party.[2]

CONCLUSION

For the reasons set forth herein and in Plaintiffs' Brief in Opposition to Defendant's Application for Leave to Appeal, your Plaintiffs pray this Honorable Court

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[2] The second clause in paragraph ten cannot be considered a credible remedy option as it is inconceivable that a breaching party would ever enter into a post-contract agreement to be sued.

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: June 25, 2018

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing
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 June 25, 2018.

/s/Kelly A. Kruse
Attorney for Plaintiff/Appelleeee