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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DEFFENDANT/APPELLANT'S REPLY BRIEF TO PLAINTIFF/APPELLEES' BRIEF IN OPPOSITION TO DEFENDANT APPELLANT'S SUPPLEMENTAL BRIEF. "ORAL ARGUMENT REQUESTED"

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Date: July 9, 2018

TABLE OF CONTENTS

INDEX OF AUTHORITIES

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

1. Did the Court of Appeals Misconstrue the Meaning of Paragraph 10 of the Parties' Agreement; and did it Err in Failing to Apply the Legal Canon *Expressio Unius Est Exclusio Alterius.*

Appellants say "Yes"

Appellees say "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

Defendant/Appellant incorporates his Statement of Facts from his Supplemental Brief in Support of Application for Leave to Appeal to Appeal filed 6/12/2018.

ARGUMENT

Paragraph 10 of the May 5, 2014, agreement, see **Exhibit 3a**, is the primary bone of contention in this matter. However, having read all the apposite cases, it seems to this writer that the best exegesis of the issue contained within the dissent of Justice Colleen A. O'Brien.

In her opening paragraph, Justice O'Brien, **Exhibit 4a-5a,** posits the central problem with the majority opinion, i.e. its insistence on that the insertion of "a word or words" are necessary to limit the available remedies for breach to those specified.

Paragraph 10 states:

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

The purpose of the canon *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is to divine the intent of the parties. *Luttrell v Dep't of Corrections*, 421 Mich 93, 107; 365 NW2d 74 (1984). The majority lost sight of that, and, as a consequence, ends up erasing the parties' expressed intent.

It should be noted that Mr. Underwood passed away on June 30, 2018. The record is replete with Mr. Underwood's contentious relationship with the Village of Lake Orion and the Township Building Department. At the time of execution of the agreement, he knew that

obtaining the required approvals from the Township might be difficult. That is why the May 5, 2014 agreement begins with:

> This preliminary agreement is written in outline form because some 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.

Mr. Underwood's words were prescient. When Plaintiffs failed to provide the build out plan required by Paragraph 4, see **Exhibit 2a,** Mr. Underwood, at his expense, had his architect, Brian Gill, prepare a detailed plan necessary for a building permit. Mr. Underwood, in his deposition, described the meeting as "hostile." Underwood Dep. pp. 40-42, see **Exhibit 12a-13a**. The inspectors refused to let Mr. Underwood examine their file and claimed there was no inspection report in the file approving the footings or masonry of the reconstruction. Mr. Underwood knew that this was untrue because he had been present when the inspections were performed. Underwood Dep., p. 40-42. The inspectors insisted the wall coverings had to be removed, and foundation blocks exposed to see if they had been cored with rebar and mortar. Mr. Underwood had to hire an engineer to examine photographs of the buildings reconstruction, inspect the building, and submit a sealed letter attesting that the building was structurally sound. Mr. Underwood prevailed but it delayed progress by 90 days.

Thus, we can see why the May 5, 2014 agreement has no completion date, and why the tenants weren't obligated until the build out was complete and they had accepted the property, see Paragraph 8, see **Exhibit 3a**. And further, it is apparent why Paragraph 10 offered either party the option to declare a default and walk away.

The majority recognized the canon *expressio unius est exclusion alterius,* and then refused to apply it, see **Exhibit 6a-11a**. The majority claims the canon only applies where the items expressed are part of an "associated group or series." Paragraph 10 deals with remedies, that is the associated group or series. Remedy 1, if a party feels that the other side is not performing, the remedy is to declare a default and walk away; Remedy 2 is to sit down with the opposition and negotiate something new. As Justice O'Brien states, "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 breach."

To ignore the listed remedies now, Justice O'Brien reasons, renders them meaningless. She cites *Nat'l Pride At Work, Inc. v. Governor of Michigan*, 481 Mich 56, 70; 748 NW2d 524 (2008) for the proposition that an interpretation which renders language meaningless must be avoided; and cites *Sandusky Grain Co. v Borden's Condensed Milk Co.,* 214 Mich 306, 311; 183 NW2d 218 (1921) for the proposition that "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 obliges."

And that is exactly what the majority opinion does. The parties made one contract, and the Court of Appeals majority has made them another. In the process the majority does violence not only to the parties' intent, but also deals a harsh blow to the continuing validity of the canon *expressio unius est exclusio alterius.*

CONCLUSION/RELIEF REQUESTED

The majority opinion of the Court of Appeals should be reversed; the reasoning of Justice O'Brien should be followed.

PHILLIP B. MAXWELL & ASSOCIATIES, PLLC

/S/ Phillip B. Maxwell
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Attorney for Defendant
57 N. Washington St.
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248-969-1490

Date: July 9, 2018

Contract signed by Plaintiff's on May 4, 2014 1a

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

April 29, 2014

DONNA WALKER
1112 Kings Cove Dr.
Rochester Hills MI 48306

RE: 18 S. Broadway St.
Lake Orion

Dear Mrs. Walker:

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

1. The parties are indulified as:

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

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

WILLIAM WALKER
1112 Kings Cove Dr.
Rochester Hills MI 48306

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

Contract signed by Plaintiff's on May 4, 2014

2a

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

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

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

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

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

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

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

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

Contract signed by Plaintiff's on May 4, 2014

3a

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

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

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

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

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

AS SO AGREED:

Donna Walker — 5/5/2014

DONNA WALKER, Individually — DATE

5-5-2014

WILLIAM WALKER, Individually — DATE

Donna Walker — 5/5/2014

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

5-5-2014

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

5-5-2014

OTIS M. UNDERWOOD, JR. /LANDLORD — DATE

STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs-Appellants,

v

OTIS M. UNDERWOOD, JR.,

Defendant-Appellee.

UNPUBLISHED
September 7, 2017

No. 332129
Oakland Circuit Court
LC No. 2015-145545-CK

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

Plaintiffs-Appellees,

v

OTIS M. UNDERWOOD, JR.,

Defendant-Appellant.

No. 333160
Oakland Circuit Court
LC No. 2015-145545-CK

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

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

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

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

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

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

/s/ Colleen A. O'Brien

6a

Court of Appeals unpublished
Opinion dated September 7, 2017

STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs-Appellants,

v

OTIS M. UNDERWOOD, JR.,

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UNPUBLISHED
September 7, 2017

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Plaintiffs-Appellees,

v

OTIS M. UNDERWOOD, JR.,

Defendant-Appellant.

No. 333160
Oakland Circuit Court
LC No. 2015-145545-CK

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

PER CURIAM.

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

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

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

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Paragraph 9 provides:

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

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

II

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

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

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

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

12a

Page 38

from Mrs. Walker to Brian Gill. I assume it was sent, but I personally don't know.
Q. Did Mr. Gill ever tell you that he had received a floor plan from Donna?
A. I can't answer that. I don't know. He was -- he had way more than my one little project.
Q. Now, the e-mail says, "Otis Underwood asked me to forward this drawing to you." Do you recall asking Donna to do that?
A. No.
Q. Is it possible that you did tell her to do that?
A. Highly likely maybe. If she told me that he had asked for one, I -- I didn't keep a log. I mean my staff keeps a log when calls come into the office and I'm not here to receive the call, but I didn't keep any log of who said what when.
Q. What was your understanding as to who was responsible for applying for a use permit from Lake Orion?
A. It would be the tenant.
Q. And do you know if that ever occurred?
A. I believe it occurred early on, and when I say early on, I believe it was, oh, maybe June or July.
Q. And do you know if that permit was then granted?
A. The Village granted it, yes. That wasn't our problem.
Q. What was the problem?

Page 39

A. Sorry?
Q. What was of the problem? You said that wasn't our problem.
A. Right.
Q. What problem are you referring to? What was the problem?
A. Well, I don't know. Maybe that was not a good choice of words on my part.
Q. Okay.
A. But the building department in Lake Orion.
Q. Did you want to say something? You said the building department in Lake Orion. Was there more to that sentence?
A. Well, that was in reply to your question what was the problem.
Q. So the problem was the building department in Lake Orion, okay.
A. Well, yeah.
Q. What was the problem with them?
A. Well, they're very busy, and I don't know. Everything just took a long time, and there's -- I had a meeting with the three inspectors.
Q. When did you have that meeting?
A. Well, it was sometime after we signed our agreement.
Q. Do you recall the name of those inspectors?

Page 40

A. I don't.
Q. What was discussed at that meeting?
A. Getting the fit-out constructed and approved.
Q. And what feedback did you get from the inspectors?
A. Essentially trouble.
Q. How so?
A. Well, they said that notwithstanding the fact that the shell had been constructed, bricked, roof put on and all of that for at least three years before this agreement, they told me that their file, which was only visible by me across the table like I'm looking at it, it appeared to me to be at least an inch or inch and a quarter high, and there were a lot of inspection reports in there, and at our meeting I was told that they had no inspection reports approving the footings, the masonry, all of that, which I knew had been inspected because I had been there back in the day on at least one or several occasions when an inspector came out. But when they come out to inspect, they don't give you a paper okay. They just tell the workers, it looks okay, fill it up, or pour the concrete, or whatever.
So part of the meeting was that they didn't have all that, and it could be reinspected, but only if I tore off the outer covering that was on the walls

Page 41

so they could see the masonry. They wanted me to take cinder blocks out to demonstrate that they had been cored with rerod and mortar. They wanted me to do the same with the elevator shaft. I mean, to be frank, I felt it was a quite hostile environment.
Q. If I recall correctly, you had also had some run-ins with the building department in the Village after the fire with respect to the demolition and things of that nature; is that right?
A. They sued me.
Q. And there was a consent agreement; is that what was the result of that lawsuit?
A. I don't really remember. I know when -- in the interim Sagebrush kept making overtures that he wanted to buy my spot, and the -- my spot to the north. He did wind up buying -- I forgot the people's names, but they owned a little ice cream shop to the south, and he wound up buying that, mostly because from meetings that I was in at the Village, the Village wouldn't approve any use for a rebuild for the ice cream shop. I think they only had 16 or 17 feet of frontage on the sidewalk, and they weren't gonna permit any use there whatsoever, so basically that was a squeeze play forcing them to sell to Sagebrush.
Q. So is it your belief that when the approvals -- or

when the inspections were done for the masonry work, etcetera, the footings, that there was no written record of whether the building passed inspection at that time?

A. No written record given either to me or the contractors that were working on the shell. And I asked for copies of the file, and they refused me.

Q. So you go and meet --

A. But that was long after the suit was over with.

Q. Right. So but you go and meet with them sometime after April 29th, and now we're at a little bit of an impasse. They don't want to let you go forward unless you let -- you know, tear apart a few things, and you don't want to tear apart a few things. So what happens next?

A. Well, I got the okay to hire an engineer, and they gave me a couple of -- or they gave me one name that they liked, I think his name was Gruber, and I never could get him to call me back, and then Brian Gill gave me the name of a fella in -- I think it was Madison Heights, Manginin.

He was -- I think he had a master's degree in engineering, structural engineering, and taught over at Lawrence Tech, so I hired him, and fortunately for me, I was down there during the construction just

about daily with my camera, and I have a banker's box full of photographs of every stage of the construction and all of the invoices for every sack of mortar and every yard of concrete that was delivered there, and so --

Q. Let me just interrupt you if I may, because I don't want to -- are you talking about this is when they did all of the footings and masonry and things like that, or is this --

A. Yes.

Q. Okay.

A. I'm talking from ground zero to the shell being fully erected. I had it all photographed and saved all my invoices, and I'm not saying they were in the best order, but I had them. And in any event, I retained Mr. Manginin, and he asked me for some of those, and oh, I don't know, there may have been 20 photographs or more that he wanted, and he finally issued me a letter under seal to present to the township that the building was structurally appropriate. The architect that had designed it had also inspected it but had left Michigan for retirement. I'm not sure -- it seems to me he was in Florida.

Q. Okay. So when did you retain Mr. Manginin?

A. I don't remember. It was probably August, September.

I don't exactly remember.

Q. And do you know when he gave you that letter?

A. Well, he came out and inspected the building, all my photographs, my invoices, and he told me that -- I think it was 24 floor joists holding up the first floor, he wanted the trusses stiffened by three-quarter plywood screwed to one side of the floor joists. So I did it.

Q. Okay. So --

A. And then he gave me a sealed letter, and as far as I know, that's off the table now.

Q. Okay.

A. They are not any longer complaining about they don't have approvals or something, but --

Q. Do you know when he gave you that letter approximately?

A. Well, I have a copy. I just don't remember it.

Q. Okay. And you then promptly turned it over to the Village?

A. No. The township.

Q. The township, I'm sorry.

A. The Village, they don't want to pays their own inspectors, so they --

Q. They use the township's?

A. They use the township.

Q. So then you promptly turned it over to the township building department?

A. Yes.

Q. Did the township then get back to you at all, or was it just understood that you could go on now and do whatever it was you needed to do?

A. Well, it was well after they already gave me the building permit to do the fit-out. I had green stickers that the -- from the -- earlier -- you see, once the shell was erected, we had all the rough inspection of plumbing, heating, there was some rough wiring, all of that was inspected and approved, and they put green stickers on the wall. That's the only notice that you get.

But unfortunately, over three years, the ink had faded out. I mean if it was under special lighting you could still make out some of what was written on the green approval stickers, but --

Q. Green probably means approval, red means you're not approved?

A. Right.

Q. Okay. So do you have any idea when you got that letter? I mean was it December, was it the summer, was it this year?

A. Oh, I'm sure it was -- it was toward the end of the