COMMERCIAL TRANSACTIONS AND CONTRACT LAW

MABLE MARTIN-SCOTT† AND KEVIN SCOTT††

I. INTRODUCTION

The following cases reflect recent developments in contract and commercial law in the state of Michigan for the 2010-2011 *Survey*

† Professor, Thomas M. Cooley Law School. B.S., 1980, University of Illinois; J.D., 1983, University of Iowa Law School. She would like to thank her research assistant, Cedric Osivandi, for his invaluable assistance.

†† Associate Professor, Thomas M. Cooley Law School. B.B.A., 1978, Western Michigan University; J.D., 1983, University of Michigan Law School.

period, June 1, 2010 to May 31, 2011. The purpose of this Article is to provide a survey of legal developments in Michigan case law for practitioners; however, this Article does not address every change in commercial and contract law during the *Survey* period. Part II discusses significant developments in the area of commercial law and Part III addresses the significant developments in the area of contract law.

II. COMMERCIAL LAW

A. Priority Rights of Secured Creditors under Estates and Protected Individuals Code (EPIC)

In *In re Lundy Estate*,[1] the Michigan Court of Appeals addressed the issue of "whether a bank, as holder of a perfected security interest in a CD [certificate of deposit] account that a decedent pledged as collateral to secure a mortgage, is entitled upon default to retain the funds in the account even though there are insufficient funds in the estate to pay the priority claims and allowances set forth in MCL 700.3805 of EPIC [the Estate and Protected Individuals Code]."[2]

David Lundy pledged a CD to First Federal Bank of the Midwest, as collateral to secure a mortgage loan.[3] At the same time, the parties "also entered into an assignment agreement, which granted the bank a security interest in the CD account as collateral for the loan."[4] According to the terms of the agreement, upon default, the bank was allowed, among other things, "to accelerate the indebtedness to make it immediately due and payable without notice."[5] Further, "[t]he assignment agreement also provided the bank the right to take all funds in the CD account and to apply the funds to the indebtedness."[6]

Upon Lundy's death, the bank held the loan in default, and pursuant to the assignment agreement, "liquidated the CD account and applied the funds to reduce the principal amount of the loan secured by the CD account."[7] The decedent's wife was appointed personal representative of decedent's estate and filed to have the CD account declared the homestead allowance pursuant to MCL 700.2404.[8] When it was discovered that the CD account had been applied by the bank to reduce

1. 291 Mich. App. 347, 804 N.W.2d 773 (2011).
2. *Id.* at 349.
3. *Id.*
4. *Id.*
5. *Id.* at 350.
6. *Id.*
7. *Lundy Estate*, 291 Mich. App. at 350.
8. *Id.* at 351.

the principal amount of the loan, the decedent's wife sued on behalf of the estate for the bank to return the money, arguing that "under MCL 700.3805 of EPIC, the bank's security interest in the CD account was of a lower priority than the family allowance."[9]

The bank responded that, pursuant to MCL 440.9607(1)(d), it "had properly perfected its security interest in the CD account [and had a superior interest] to any and all claims to the same collateral."[10] The court determined that "the bank, in addition to being the 'lender,' was . . . the holder or issuer of the deposit account . . . . [and therefore] was entitled, under article 9 of the UCC and the assignment agreement to apply the balance of the CD . . . to the obligation secured by the account. . . ."[11]

The court looked at several sections of EPIC to determine whether the statute supported the bank taking the funds from the CD account.[12] The court noted that MCL 700.3809 provides that "without even making a 'claim' against the estate, the bank[, as a secured creditor,] has a priority position with respect to the secured property."[13] MCL 700.3803 notes that secured creditors are given preferential treatment and "a priority position only as to the asset in which the security interest is held. If the security is inadequate, the creditor has no preference when trying to collect any deficiency."[14] Further, MCL 700.3805 provides that, "[n]o provision requires a secured creditor that is otherwise entitled to exhaust a security to first bring a claim against the estate in order to be permitted to exhaust the security. Indeed, MCL 700.3809 contemplates that the secured creditor may exercise that option."[15]

The court then reviewed decisions of the Minnesota and Arizona courts "regarding the appropriate treatment of secured creditors under EPIC."[16] Of course these cases are not controlling, but the court determined that the states had "interpreted the rights and remedies of secured creditors under statutory schemes very similar to EPIC, [and had offered consistent findings which] lend support to our conclusion that the bank was entitled to exhaust the funds in the CD account."[17]

---

9. *Id.*
10. *Id.*
11. *Id.* at 354.
12. *Id.* at 354-59.
13. *Lundy Estate*, 291 Mich. App. at 357.
14. *Id.* at 355 (emphasis added).
15. *Id.* at 357.
16. *Id.* at 359-61.
17. *Id.* at 361.

The court concluded that the bank had a right to take the funds from the CD account.[18] "In sum, none of these [EPIC] provisions prevents the secured creditor from exhausting the security. On the contrary, they treat a secured creditor differently and contemplate a secured creditor's right to collect from the security without bringing a claim against the estate for estate funds."[19]

Finally, the court noted that it was not required to determine the issue of whether the CD account was estate property because the bank was not required to make a claim against the estate.[20]

B. Interpretation of the Molders Lien Act Pursuant to MCL Section 445.611

The Michigan Court of Appeals was presented with a question of first impression regarding ownership rights in dies, molds, and forms pursuant to MCL 445.611.[21] The issue presented in *C.G. Automation & Fixtures, Inc. v. Autoform, Inc.* was whether the plaintiff had perfected its molder lien under the Act.[22] Specifically, the court was asked to determine "whether an enforceable molder's lien attaches absent some form of permanently recorded information on the mold, die, or tool identifying the name of the moldbuilder, its street address, city, and state."[23]

Plaintiff C.G. Automation & Fixture, Inc. (Automation) "manufactures . . . and sells [tool and die equipment] to automobile parts suppliers."[24] Defendant Autoform is an automobile parts supplier.[25] Autoform entered into an agreement with defendant Key Plastics, L.L.C. (Key Plastics) to design and manufacture tooling necessary to manufacture components for the spoke covers Chrysler would use on its JS41 vehicle platform.[26] Autoform contracted with Automation for the molds and dies.[27] Automation produced the molds and dies pursuant to the contract and shipped the dies to Autoform.[28]

---

18. *Id.*
19. *Lundy Estate*, 291 Mich. App. at 358-59.
20. *Id.* at 361-62.
21. C.G. Automation & Fixtures, Inc. v. Autoform, Inc., 291 Mich. App. 333, 804 N.W.2d 781 (2011).
22. *Id.* at 334.
23. *Id.*
24. *Id.* at 334-35.
25. *Id.* at 335.
26. *Id.*
27. *C.G. Automation*, 291 Mich. App. at 335.
28. *Id.*

"On the date of shipment, C.G. Automation placed an identification tag on the risers accompanying the dies."[29] Automation did not place the information on the die.[30] The court determined that a riser constitutes:

> [A] precise metal bar that is machined and bolted to the bottom of the tool to establish a shut height or a tool shut height. You buy the die set . . . . If it doesn't meet the required shut height, you put risers underneath it, and you bolt them to the bottom, so when they go into a press, they meet a certain shut height.[31]

The plant supervisor for Automation testified to the court that although the risers could be removed from the die and transferred to another tool, it was considered part of the die.[32] Finally, when Automation shipped the die to Autoform, Automation also filed a "financing statement under the Uniform Commercial Code (UCC) identifying its possession of a lien on the tooling."[33] The issue in the case is whether Automation acted in compliance with MCL 445.611 and therefore created a moldbuilder lien.[34]

The court looked at the statute and concluded that under MCL 445.619(1) and (2), a molder has two mandatory obligations in order to perfect a lien: "(1) A moldbuilder shall permanently record [specified identifying information] on every die, mold, or form" and "(2) A moldbuilder shall file a financing statement . . . ."[35]

The court then turned to subsection (3) of the statute, which addresses the creation of the lien.[36] The section states: "A moldbuilder has a lien on any die, mold, or form identified pursuant to subsection (1)."[37] In interpreting the statute, the court noted that the statute only references a lien creation pursuant to subsection (1) and does not mention subsection (2), stating that "the legislature elected not to create a lien effected through the filing of a financing statement. It could have done so by adding a second sentence here, stating to the effect that 'a moldbuilder has a lien on any die identified pursuant to subsection (2).'"[38] By deciding not to add such a sentence, statutory construction

---

29. *Id.*
30. *See id.*
31. *Id.* (second alteration in original) (footnote omitted).
32. *Id.* at 336.
33. *C.G. Automation*, 291 Mich. App. at 336.
34. *Id.* at 357-58.
35. *Id.* at 339.
36. *Id.*
37. *Id.*
38. *Id.* at 341.

clearly establishes the legislature's intent to forego the creation of a lien through the filing of a financing statement.[39]

The court noted the rationale for this legislative decision to not allow the financing statement to create a lien is because the "[m]oldbuilder's liens are nonconsensual, and they exist even absent privity of contract. Because those who ultimately acquire the tooling may have never agreed to a lien or entered into a security agreement with the moldbuilder, as occurred in this case, the statute creates a remedial security interest in the moldbuilder."[40] The court went on to state that subsection (3) further clarifies that as long as subsections (1) *and* (2) are complied with, they shall constitute "actual and constructive notice of the moldbuilder's lien . . . ."[41]

After establishing the requirements of an enforceable molder's lien pursuant to the statute, the court concluded that the circuit court erred in finding that Automation had complied with MCL 445.619(1) and had "permanently recorded identifying information on the dies."[42] The court held that because the identifying marks had been placed on the riser and not the dies, and because the risers did not constitute a part of the die, Automation had not "'permanently record[ed] on every die, mold or form' identifying information," and therefore had not complied with the statute.[43]

The court held that "[b]y directing moldbuilders to 'permanently record on every die, mold or form,' identifying information, the Legislature clearly intended that subsequent possessors of a die would receive actual notice of the name and address of the moldbuilder."[44] The court noted that "[t]he circuit court's determination that a moldbuilder could comply with the statutory mandate by permanently affixing its information to objects readily removable from the dies contravenes the plain meaning of MCL 445.619(1)."[45] The court went on to say "the fact that Key Plastics has successfully used the dies without the accessory risers confirms that the risers simply are not equivalent to the dies."[46] The court reversed the circuit court and remanded the case.[47]

---

39. *C.G. Automation*, 291 Mich. App. at 341.

40. *Id.*

41. *Id.* (alteration in original) (quoting MICH. COMP. LAWS ANN. § 445.619(3) (West 2002)).

42. *Id.* at 341.

43. *Id.* at 342 (quoting MICH. COMP. LAWS ANN. § 445.619(1)).

44. *Id.* (citation omitted) (quoting MICH. COMP. LAWS ANN. § 445.619(1)).

45. *C.G. Automation*, 291 Mich. App. at 342.

46. *Id.*

47. *Id.* at 343.

In her concurring opinion, Judge Gleicher stated that, while she agrees with the majority opinion, she was unable to join it because she believes MCL 445.619 is ambiguous and the legislature should reconsider the statutory language.[48]

C. Waiver of Sovereign Immunity by Indian Tribe

"'As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.' This immunity applies to a tribe's commercial contracts, whether made on or off an Indian reservation."[49] "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'"[50]

In *Bates*, the issue before the Michigan Court of Appeals was whether the Indian Tribe waived its sovereign immunity in a settlement agreement that contained waivers of sovereign immunity and tribal court jurisdiction and incorporated by reference such clear and unequivocal waivers set forth in the agreement of sale, which the tribe conceded was supported by a valid resolution.[51]

In 2000, the defendant, the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe) sought a license to open a casino in downtown Detroit.[52] However, the Tribe lacked adequate space for parking near the casino.[53] "Bates[, the plaintiff,] agreed to assign to defendants its right to purchase a parking garage near the casino [in exchange for defendant's agreement to (1)] make significant repairs to the garage[; and (2) allow] Bates an option to purchase the garage for $1 at any time within seven years after the execution of the agreement."[54] Bates exercised its option to purchase the garage but the defendant did not deliver title.[55] The parties disagreed on the contract performance and ultimately "reached a settlement agreement requiring that title to the garage be delivered to Bates and requiring [defendant] to pay Bates a total of $2,250,000 in four installments."[56] When defendant failed to comply with the settlement agreement, plaintiff "filed suit, alleging breach of the settlement

48. *Id.* (Gleicher, J., concurring).

49. Bates Assoc., L.L.C. v. 132 Assoc., L.L.C., 290 Mich. App. 52, 56, 799 N.W.2d 177 (2010) (quoting Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 754, 760 (1998)).

50. *Id.* (internal quotations omitted) (quoting C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001)).

51. *Id.* at 54-55.

52. *Id.* at 54.

53. *Id.*

54. *Id.*

55. *Bates*, 290 Mich. App. at 54.

56. *Id.*

agreement and requesting an order requiring defendants to transfer title to the garage [to Bates.]"[57]

Defendant counter-claimed by alleging, among other things, "that the Tribe's chief financial officer (CFO) . . . lacked authority to enter into the settlement agreement and that the waiver of sovereign immunity in the settlement agreement was invalid."[58] The Tribe argued that the waiver was invalid because waivers of sovereign immunity must be supported by a resolution of the Tribe's board of directors as set out by section 44.105 and 44.109 of the Tribe's Code.[59]

In this case, the parties' settlement agreement was not supported by a resolution of the tribe; however, it "specifically incorporated the waiver of sovereign immunity provided in . . . the sale agreement . . . . [and the] waiver specifically provided that it was enforceable in a court of competent jurisdiction and that laws of the state of Michigan would govern."[60]

In resolving the issue, the Michigan Court of Appeals looked to *C & L Enterprises, Inc.*, in which the U.S. Supreme Court ruled that an "Indian tribe had waived its immunity from suit by expressly agreeing to arbitrate disputes with the petitioner . . . ."[61] The court held that, similar to the waiver in *C & L Enterprises*, the contract was not ambiguous and "the settlement agreement . . . incorporated the Tribe's waiver of sovereign immunity set forth in the sale agreement and the waiver unequivocally provided that it was enforceable in a court of competent jurisdiction and that laws of the state of Michigan would govern . . . ."[62] The court went on to state that the United States Supreme Court "has not addressed this issue and has not required anything other than clear, unequivocal language for a valid waiver."[63]

In *Smith v. Hopland Band of Pomo Indians*,[64] the court rejected the Tribe's argument that the CFO did not have actual authority to waive the tribe's sovereign immunity "absent an ordinance or resolution explicitly providing for such a waiver . . . ."[65] The court recognized that "the tribe did not dispute that the chairperson had the authority to negotiate the contracts and execute the final versions that incorporated the arbitration

57. *Id.*
58. *Id.* at 54-55.
59. *Id.* at 59.
60. *Id.* at 55-56.
61. *Bates*, 290 Mich. App. at 57 (quoting *C & L Enters.*, 532 U.S. at 423).
62. *Id.* at 58.
63. *Id.* at 59.
64. 95 Cal. App. 4th 1 (2002).
65. *Bates*, 290 Mich. App. at 61 (citing *Smith*, 95 Cal. App. 4th at 7).

clause and choice-of-law provision."[66] The court also noted that, although the Tribe did not waive its sovereign immunity by resolution, the settlement agreement specified that "the tribe [did] subsequently approve[] the contracts by resolution and that [the CFO] gave all members of the tribal council copies of the contracts at a meeting during which the council authorized the [CFO] to negotiate and execute the contracts."[67] The court held that since "[the CFO] and the tribal council negotiated the contracts during a subsequent meeting and modified the . . . terms . . . . the tribal council was fully aware of the contractual terms and was not presented with a situation in which the tribal agent [lacked the] authority to act on the tribe's behalf."[68]

The court concluded that "the tribe, through its [CFO] and subsequent resolution by the tribal council, . . . executed contracts that clearly and explicitly waived the tribe's sovereign immunity."[69]

D. Contract Interpretation

MCL 123.742(1) provides that municipalities "may enter into a contract or contracts for . . . sewage disposal . . . for the payment of the costs by the contracting municipalities, with interest, over a period not exceeding 40 years."[70] MCL 123.232 further provides that "[a]ny 2 or more political subdivisions '*may* contract for the joint ownership, use and/or operation of sewers and/or sewer disposal facilities . . . . Any such contract . . . shall be effective for such term as shall be prescribed therein not exceeding 50 years."[71]

In 1977 and 1980, defendant, City of Cadillac, executed contracts with plaintiff townships to provide wastewater treatment services.[72] According to the terms expressed therein, the contracts were set to expire on May 12, 2017.[73] The 1980 contract provided that "[e]ither party may terminate this agreement at the end of the initial or subsequent terms upon a two (2) year written notice to the other party."[74] In November 2006, defendant informed the plaintiff in writing "that it did not intend to

66. *Id.*
67. *Id.*
68. *Id.* (citing *Smith*, 95 Cal. App. 4th at 8).
69. *Id.* at 62 (citing *Smith*, 95 Cal. App. 4th at 12).
70. Haring Charter Twp. v. City of Cadillac, 290 Mich. App. 728, 749 n.6, 811 N.W.2d 74 (2010) (quoting MICH. COMP. LAWS ANN. § 123.742(1) (West 2002)).
71. *Id.* (alterations in original) (quoting MICH. COMP. LAWS ANN. § 123.232 (West 2002)).
72. *Id.* at 733-34.
73. *Id.*
74. *Id.* at 736 (alteration omitted).

renew the contracts upon their expiration in May 2017."[75] Thereafter, plaintiff brought suit alleging that defendant had a legal obligation to continue providing wastewater treatment to them beyond the May 2017 date.[76] "[T]he circuit court . . . granted summary disposition for defendant, ruling that defendant was entitled to abide by the express termination date of May 12, 2017, and that defendant could accordingly terminate its services to plaintiffs at that time."[77] Plaintiffs thereafter appealed the circuit court's decision.[78]

The issue presented in this case is whether defendant was obligated to continue to provide services beyond the May 2017 date.[79] Plaintiffs did not dispute that the contract specified an expiration date of May 12, 2017.[80] However, they argue that defendant had an ongoing obligation to provide wastewater treatment and disposal services beyond the expiration date of the contract as a result of extrinsic requirements imposed on defendant by the Clean Water Act (CWA) grant-funding program.[81] In essence, plaintiff is alleging that defendant applied for and received a grant for approximately $5.3 million from the CWA for the expansion and improvement of defendant's facilities to service the region.[82] Plaintiffs alleged that, pursuant to the contracts and the CWA grant, "plaintiffs acquired contractual ownership of, and title to, a portion of the capacity of defendant's sewer system, that defendant is required to provide services to the townships . . . ."[83] "Plaintiffs further assert that they will continue to own capacity in the City System after May 12, 2017, and that this ownership interest renders the expiration dates specified in the contracts 'patently ambiguous.'"[84]

The Michigan Court of Appeals disagreed, stating that, "[t]he contracts [did] not provide for any automatic extension, or right to an extension; rather they provid[ed] only that the parties *may* by mutual agreement, extend the contracts."[85] The court held that there was no latent ambiguity in the plain expiration date set forth in the contracts.[86]

---

75. *Id.*
76. *Haring*, 290 Mich. App. at 736.
77. *Id.* at 751 (Jansen, J., dissenting).
78. *Id.* at 738.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Haring*, 290 Mich. App. at 733.
83. *Id.* at 737.
84. *Id.* at 739-40.
85. *Id.* at 740 (emphasis added).
86. *Id.*

Furthermore, the court stated that the plaintiffs did not have an ownership interest in the defendant's facility because the contract explicitly provided that "all responsibility for the operation, maintenance, expansion, improvements and administration of the City System rests exclusively with defendant and that the County was to have no obligation, liability, or responsibility for that System . . . ."[87]

Finally, plaintiffs argued that, pursuant to 40 CFR section 35.935-1(b), "the obligations of the CWA clearly 'enter into and form a part' of the Contracts and therefore, defendant has a continuing obligation to provide wastewater treatment services beyond May 12, 2017, as part of those contracts."[88]

The court, in concluding that the CWA did not create such an obligation, noted that 40 CFR section 35.935-1(b) was inapplicable because it was not in effect at the time the parties submitted the grant request or when the grant was actually awarded to defendant.[89] The plaintiffs argued that even if the regulation was not in effect, a combination of regulations that did in fact exist at the time the parties entered into the contracts indeed imposed such a requirement.[90] Plaintiffs argued that the grant agreement and the regulation required that defendant use the money solely for the designated townships.[91] If it failed to do so, it violated the regulation.[92] The court, in disagreement, stated that clearly the defendant had used the grant money solely for the purpose required in the grant.[93] However, the court went on to state, "[t]here is nothing in the regulations explicitly imposing a perpetual duty to operate the treatment works in a particular manner or for a particular period of time."[94] The court held that the regulation imposed no such duty.[95]

Finally, the court concluded that, contrary to the plaintiffs' argument, the defendant did not hold itself out as a public utility.[96] Plaintiffs argued "that defendant is the only source of sewage treatment in the townships . . . . [and therefore is] obligated to continue providing sewage service to the townships beyond the expiration of the contract."[97] The court noted

87. *Id.* at 740-41.
88. *Haring*, 290 Mich. App. at 742 (internal quotation marks omitted).
89. *Id.* at 743.
90. *Id.* at 744-45.
91. *Id.* at 745.
92. *Id.*
93. *Id.*
94. *Haring*, 290 Mich. App. at 745.
95. *Id.* at 746.
96. *Id.* at 747.
97. *Id.* at 747-48.

that pursuant to MCL 123.742 (1), Michigan law provides that municipalities have discretion as to whether to provide services to extraterritorial units such as townships.[98] The court determined that the defendant, "by exercising its discretion to provide wastewater treatment services to plaintiffs for a fixed duration in accordance with applicable law, . . . did not become a public utility obligated to continue to provide that service beyond the expiration of the contract."[99]

The dissent suggested that the contract was unripe for adjudication due to the fact that the termination date of the contract was years away, and the current city council was making a decision that a future city council might disagree with.[100] The Michigan Court of Appeals stated that the issue is one of statutory interpretation, noting that the contract was not ambiguous and "[whenever] a contract is unambiguous, then it must be enforced by its plain terms."[101]

E. Enforcement of a Garnishee Judgment—Bankruptcy

In *Vanderpool v. Pineview Estates, L.C.*,[102] the Michigan Court of Appeals was asked to determine whether a judgment against a garnishee defendant found in contempt for failing to comply with a garnishment order may be enforced where the judgment defendant, the obligor of the debt, subsequently filed for bankruptcy.[103]

On March 18, 2008, the district court entered a judgment against the garnishee defendants for violating a court order by failing to pay the plaintiff, Vanderpool, pursuant to a January 2007 garnishee disclosure, and failing to respond after being served various documents involved in the garnishment process.[104] The district court later vacated its judgment against the garnishee defendants for failure to comply with the payment order, noting that the "garnishee defendants were powerless to make garnishment payments"[105] as a result of the judgment defendant having filed for bankruptcy on August 3, 2007.[106] Defendant's bankruptcy filing resulted in an automatic stay preventing the enforcement, against

98. *Id.* at 749.
99. *Id.* at 749-50.
100. *Haring*, 290 Mich. App. at 750-51 (Jansen, J., dissenting).
101. *Id.* at 739.
102. 289 Mich. App. 119, 808 N.W.2d 227 (2010).
103. *See, e.g., id.*
104. *Id.* at 121-22.
105. *Id.* at 123.
106. *Id.*

defendant or against property of his estate, of a prior judgment according to 11 U.S.C. § 362.[107]

On appeal, the circuit court reinstated the judgment, finding that the "garnishee defendants 'did not disclose' under the 14-day rule in MCR 3.101(H) and 'ignored the show cause issued.'"[108]

In its review, the Michigan Court of Appeals stated that "by reinstating the judgment, the circuit court [had] implicitly found [the] garnishee defendants . . . in criminal contempt."[109] The court cited *Porter v. Porter*,[110] in which the court had stated that "'[w]hen a court exercises its criminal contempt power it is not attempting to force the contemnor to comply with an order, but is simply punishing the contemnor for past misconduct that was an affront to the court's dignity.'"[111] The Michigan Court of Appeals went on to say that

> Some courts have concluded that a . . . contempt finding against a garnishee defendant does not relate to the defendant or the property of the defendant's estate, but instead creates an independent and personal liability against the garnishee defendant, so the . . . contempt finding does not violate the automatic stay under 11 U.S.C. 362.[112]

The Michigan Court of Appeals noted that such interpretations are from lower federal courts and, though they may be persuasive, are not binding on state courts.[113] The court, contrary to the federal courts' interpretation, stated that "under MCR 3.101, a judgment against a garnishee for contempt is inextricably linked to enforcement of the prior judgment against the defendant or his or her estate."[114] It went on to say that "MCR 3.101(O)(7) provides, 'Satisfaction of all or part of the judgment against the garnishee constitutes satisfaction of a judgment to the same extent against the defendant.'"[115]

The court concluded that, if the garnishee defendants had satisfied the contempt judgment, the same amount of the defendant's outstanding judgment would also have been satisfied under MCR 3.101(O)(2), in

---

107. *Id.*
108. 289 Mich. App. at 123.
109. *Id.*
110. 285 Mich. App. 450; 776 N.W.2d 377 (2009).
111. *Vanderpool*, 289 Mich. App. at 123 (quoting *Porter*, 285 Mich. App. at 455).
112. *Id.* at 123-24.
113. *Id.* at 124 n.2.
114. *Id.* at 124.
115. *Id.* (quoting MICH. CT. R. 3.101(O)(7)).

violation of the automatic bankruptcy stay pursuant to 11 UCS § 362.[116] Therefore, the Michigan Court of Appeals vacated the circuit court's order and reinstated the judgment against the garnishee defendants, remanding the case to the district court for further proceedings.[117]

F. Construction Lien Act Filing Period: Improvement versus Warranty Work

In general, the Michigan Construction Lien Act[118] creates a statutory security interest in real property in order to protect and enforce by lien the rights of persons performing labor or providing material or equipment for the improvement of real property.[119] The Act's protections extend to contractors, subcontractors, suppliers of material, and laborers who have improved real property, but were not paid, as well as to protect property owners from having to pay twice for related expenses.[120] The Construction Lien Act requires, among other things, that

> [A lien] created by this act shall cease to exist unless, within 90 days after the lien claimant's last furnishing of labor or material for the improvement, pursuant to the lien claimant's contract, a claim of lien is recorded in the office of the register of deeds for each county where the real property to which the improvement was made is located.[121]

Stock Building Supply, L.L.C. v. Parsley Homes of Mazuchet Harbor, L.L.C.[122] required the Michigan Court of Appeals to determine whether certain work performed by a subcontractor was sufficient to constitute the basis for securing a construction lien where the subcontractor had not been paid for prior work he had performed, but where he had failed to timely file a lien.[123]

The action arises as a result of an appeal initiated by appellant, Weimer Pluming, Inc. ("Weimer"), a subcontractor, from the trial court's dismissal of its construction lien.[124] At trial, Weimer, being the intervening plaintiff, sought "priority of its construction lien [interest]

116. *Id.*
117. *Vanderpool*, 289 Mich. App. at 125.
118. MICH. COMP. LAWS ANN. §§ 570.1101-.1305 (West 1982).
119. *Id.*
120. *Id.*
121. MICH. COMP. LAWS ANN. § 570.1111(1) (West 1996).
122. 291 Mich. App. 403, 804 N.W.2d 898 (2011).
123. *Id.* at 406.
124. *Id.* at 404.

over the interests of Stock Building Supply, L.L.C. [("Stock")], which filed the initial complaint in this case after . . . Dwight E. Parsley and six [affiliated] companies [singularly and collectively refered to as "defendants"], failed to pay multiple subcontractors for work performed on various new residential real properties . . . ."[125]

In August 2005, Weimer entered into a contract with Parsley Homes of Mazuchet Harbor, the general contractor, and one of the defendant's affiliated companies for completion of certain rough and finish plumbing work on Lot 47.[126] Weimer completed the rough plumbing work on August 31, 2005, and was paid.[127] Weimer performed finish plumbing work on or about August 4, 2006 or September 29, 2006.[128] Thereafter, Weimer submitted its final invoice to the general contractor on August 5, 2006, which remained unpaid.[129]

On December 20, 2006 and May 29, 2007, Weimer was requested to repair minor leaks associated with the finish work it had performed.[130] The repair work was identified in the discovery documents as "Warranty Service Calls" for which Weimer did not request payment.[131]

On July 27, 2007, Stock brought an action against the defendant, including a lien for foreclosure that included Lot 47 on which Weimer had worked.[132] However, Weimer was not named as a defendant.[133] On August 23, 2007, Weimer finally filed its lien.[134] "On October 22, 2007, Stock obtained a default judgment against [the defendant]."[135] On November 5, 2007, the parties stipulated to allow Weimer to file a complaint as an intervening plaintiff, to file cross complaints, and to add defendants.[136] Weimer's complaint also sought a lien of foreclosure on Lot 47.[137] In addition, the parties agreed that Stock, having obtained a sheriff's deed, and because the redemption period expired, was the owner of Lot 47, effective October 24, 2008.[138]

"With respect to Weimer's foreclosure lien . . . the trial court found that Weimer had completed its construction work in either August 2006

125. *Id.* at 404-405.
126. *Id.* at 405.
127. *Id.*
128. *Stock Bldg. Supply*, 291 Mich. App. at 405.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 405-06.
134. *Stock Bldg. Supply*, 291 Mich. App. at 406.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

or September 2006."[139] As such, "the court ruled that Weimer's construction lien was invalid" for not having been filed within the 90-day statutory period.[140]

On appeal, Weimer argued that the trial court erred in finding its lien invalid under the Construction Lien Act because its lien filing was submitted within the 90-day period beginning on May 29, 2007, following its completion of the repair work requested by the defendant, and that the work in question constituted an "improvement" under the statute.[141]

The Michigan Court of Appeals stated that "[a]ccording to MCL 570.1111(1) and MCL 570.1104(5), a repair completed pursuant to a contract is an *improvement*, and the last furnishing of an improvement commences the 90-day filing period."[142]

> The Construction Lien Act in MCL 570.1104(5) defines "improvement" as the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract.[143]

The court of appeals went on to distinguish between work performed pursuant to a contract for repair services, which is an improvement to the property, and warranty work, which is not.[144] The court, citing *Woodman v. Walter*,[145] held that "the performance of 'warranty work' to correct deficiencies in work performed or defects in fixtures installed by the contractor does not constitute an improvement under the Construction Lien Act because '[i]t does not confer any value beyond the value furnished at the time the initial installation work was completed.'"[146] "Therefore, in such situations, '[t]he ninety-day filing period commences on the date of completion of the original installation work and is not

139. *Id.* at 406.
140. *Stock Bldg. Supply*, 291 Mich. App. at 406.
141. *Id.*
142. *Id.* at 407 (emphasis added).
143. *Id.* (quoting MICH. COMP. LAWS ANN.§ 570.1104(5) (West 2010)).
144. *Id.* at 407-08.
145. 204 Mich. App. 68, 514 N.W.2d 190 (1994).
146. *Stock Bldg. Supply*, 291 Mich. App. at 408 (alteration in original) (quoting *Woodman*, 204 Mich. App. at 69).

extended by the later performance of warranty work.'"[147] The court noted:

> The distinguishing factor between a repair [that] constitut[es] an improvement to the real property, which allows for the commencement of the 90-day filing period, and warranty work, which does not allow for the commencement . . . of the 90-day filing period, is whether the work in question conferred any value beyond the value furnished by the completion of the original work.[148]

"Weimer also reli[ed] on *J. Propes Electric Co. v. DeWitt-Newton, Inc.* for the proposition that the correct inquiry here is whether the subsequent work was done in good-faith performance to complete the contract or merely as an opportunity to revive an untimely claim of lien."[149] However, the court disagreed with Weimer's reliance on *J. Propes Electric Company*.[150]

In applying *Woodman*, the court distinguished *J. Propes Electric Company* from this case and stated that the proper inquiry is "whether the work in question conferred any value beyond the value furnished by completion of the original work."[151] The court stated that the record reflects that Weimer completed the contracted plumbing work by September 29, 2006.[152] The subsequent work performed by Weimer in December 2006 and May 2007 was, as described by Weimer, warranty work.[153] The court of appeals proceeded to state that the work provided on the aforementioned dates "was not an addition to the original agreement, nor was it in furtherance of the original agreement. Rather, it was performed because the original work had minor deficiencies that needed to be corrected."[154] Additionally, the court noted that "Weimer also indicat[ed] that subcontractors are expected to make these kinds of repairs when requested by the general contractor."[155]

Further, the court found unpersuasive Weimer's argument that the repair work constituted "value" pursuant to the Act because it "conferred

147. *Id.* (quoting *Woodman*, 204 Mich. App. at 70)).
148. *Id.*
149. *Id.* at 410 (citing J. Propes Electric Co. v. DeWitt-Newton, Inc., 97 Mich. App. 295, 300, 293 N.W.2d 801 (1980)).
150. *Id.*
151. *Id.* at 408.
152. *Stock Bldg. Supply* at 408.
153. *Id.* at 408-09.
154. *Id.* at 409.
155. *Id.* at 409.

a benefit on the general contractor . . . [and thus] qualif[ies] as an improvement under the Construction Lien Act," finding that Weimer never would have provided service in May 2007, except that it was work necessitated by defects in the initial work performed by Weimer.[156] As a consequence, the Michigan Court of Appeals held that the 90-day period, during which Weimer was required to file its lien pursuant to the Construction Lien Act, began in September 2006 when the original work was completed.[157]

G. Comerica Bank v. Cohen[158]

The appellant, Walter Cohen, appealed the issuance of summary disposition in favor of the plaintiff, Comerica Bank, pursuant to a contract dispute.[159] In part, the outcome of the case turned upon the court distinguishing the laws that govern a surety relationship from those governing a guarantor relationship and how it related to the unambiguous terms of the parties' agreement in this case.[160]

In the court below, defendant Cohen put forth three principal arguments concerning why the trial court erred in granting summary disposition for Comerica Bank.[161] First, he argued that the plaintiff failed to mitigate its alleged damages by not foreclosing and selling the real estate collateral that secured the debt obligation.[162] Second, defendant argued that the plaintiff failed to provide the guarantor's (Cohen's) attorney with proper notice of default.[163] Finally, defendant argued that the trial court erred in granting summary disposition before the close of discovery.[164] The Michigan Court of Appeals was not persuaded by defendant appellant's arguments; therefore, it affirmed the trial court's issuance of summary judgment.[165]

The defendant entered into a guarantor/guarantee relationship with the plaintiff for the purpose of establishing himself as the guarantor of a portion of an indebtedness (principal and interest) extended by the bank to a third party, 21 Century, on a non-revolving Euro-dollar note in the

156. *Id.*
157. *Id.* at 410.
158. 291 Mich. App. 40, 805 N.W.2d 544 (2010).
159. *Id.* at 42.
160. *Id.* at 46-47.
161. *Id.* at 44.
162. *Id.*
163. *Id.*
164. *Comerica Bank*, 291 Mich. App. at 45.
165. *Id.* at 54-55.

amount of $10,640,000.[166] The loan from Comerica Bank to 21 Century was made on August 1, 2006, and pursuant to its terms, 21 Century pledged certain real property as collateral.[167] In addition, on August 1, 2006, Walter Cohen executed a limited guaranty in favor of Comerica Bank on behalf of 21 Century.[168] The loan agreement specified default provisions in paragraph 6.1(a) including, inter alia:

> If a Borrower shall fail to pay the principal of and/or interest on the Loan or if a Borrower shall fail to pay any other monetary obligation as provided for in this Agreement or under any other Loan Document, and in any such case, any such failure shall continue for a period of five (5) days after written notice thereof shall have been given to Borrower by Lender.[169]

Paragraph 8.3 of the loan agreement contained the notice provision, which stated: "Any notice, demand, request or other instrument which may be or is required to be given under [the] Agreement shall be given to the parties . . . . A copy of any default notice sent to the Borrower shall also be sent to Borrower's attorney[.]"[170]

No claims or defenses were presented with reference to the terms of the loan agreement.[171] Thus, the issues before the Michigan Court of Appeals arose solely from the limited guaranty of the loan executed by Walter Cohen and Comerica Bank.[172] The limited guaranty provided in paragraphs 1 and 2 that:

> As of August 1, 2006 the undersigned . . . unconditionally and absolutely guarantee(s) to [plaintiff] . . . payment when due, whether by stated maturity, demand, acceleration or otherwise, of all existing and future indebtedness to [plaintiff] of 21 Century . . . arising under that certain Floating Non-Revolving Eurodollar Note, in the principal amount of $10,640,000 . . . .[173]

Further, paragraph 7 of the limited guaranty provided that "[t]he undersigned waive(s) any right to require the Bank to (a) proceed against

---

166. *Id.* at 42-43.
167. *Id.* at 42.
168. *Id.* at 43.
169. *Id.* at 42.
170. *Comerica Bank*, 291 Mich. App. at 42.
171. *See id.* at 45-55.
172. *Id.* at 46.
173. *Id.* at 48 (alterations in original).

Borrower, any property or collateral[.]"[174] Finally, paragraph 13(a) of the limited guaranty provided that:

> Notwithstanding anything to the contrary contained herein, the obligations of the Guarantor hereunder shall be limited to 30% of the indebtedness outstanding from time to time under the Note, the Loan Agreement and/or the Loan Documents . . . plus interest thereon . . . . Upon payment in full of its percentage share (as set forth above), Guarantor shall be released from liability hereunder . . . .[175]

The court initially addressed the defendant's argument that plaintiff failed to mitigate its damages when it failed to foreclose on the condominium project, which served as collateral on the debt, before trying to collect on the guaranty.[176] The court held that the defendant was a payment guarantor and the plaintiff was not required to foreclose on the condominium prior to collecting from the guarantor.[177] In rejecting defendant's argument, the court stated that "[t]he plain language of the limited guaranty forecloses defendant's arguments. As noted in the Facts section of this opinion, the agreement specified that defendant was the guarantor, and the limited guaranty clearly states the unconditional obligation undertaken by defendant."[178] Indeed, defendant guarantee stated "the undersigned . . . unconditionally and absolutely guarantee(s) to [plaintiff] . . . payment when due, whether by stated maturity, demand, acceleration or otherwise . . . ."[179]

The court went on to state that the defendant mistakenly believed that it was a collection guarantor when it was in fact a payment guarantor.[180] The court noted the difference in the two obligations, stating that unlike a payment guarantor whose obligation is unconditional, a collection guarantor is liable only if the "creditor [first] exercise[d] reasonable diligence in collecting from the principal debtor."[181] Furthermore, the court noted that "[r]easonable diligence in cases of guaranties of collection demands that, unless there are mitigating circumstances, the creditor prosecute to judgment and return

174. *Id.* at 43.
175. *Id.* (third alteration in original).
176. *Comerica Bank*, 291 Mich. App. at 47.
177. *Id.*
178. *Id.* at 48.
179. *Id.* (alterations in original).
180. *Id.*
181. *Id.*

of execution thereof unsatisfied."[182] The plain language of the defendant's guarantee was clearly unconditional.[183] In further noting defendant's unconditional obligation as a payment guarantor, the court referenced paragraphs 4 and 7 of the guaranty.[184] Paragraph 4 states:

> The undersigned acknowledge(s) and agree(s) that *the Bank has no obligation to acquire or perfect any lien on or security interest in any asset(s), whether realty or personalty, to secure payment of the Indebtedness*, and the undersigned is (are) not relying upon any asset(s) in which the Bank has or may have a lien or security interest for payment of the Indebtedness.[185]

In referencing paragraph 7, the court pointed out the defendant's waiver.[186] The waiver specifically stated that defendant "waive[d] any right to require the Bank to (a) proceed against Borrower, any property or collateral . . . or (c) pursue any other remedy in the Bank's power."[187]

Finally, the court noted that when defendant guaranteed that its unconditional obligation would be limited to thirty percent of the indebtedness, this meant that plaintiff could simultaneously pursue all of his remedies as long as plaintiff was not awarded double recovery.[188] The court stated that, "even if plaintiff *did* collect money through foreclosure, plaintiff would not be required to offset those funds against the money due from defendant unless the payment by defendant would result in recovery of more than 100 percent of the indebtedness."[189]

Next, the court addressed plaintiff's argument that no default occurred under the loan agreement, because plaintiff failed to provide defendant's attorney notice of default as required by the loan agreement.[190] The plaintiff admitted that it had failed to deliver notice of the default to defendant's attorney as required by the loan agreement, and in fact notice was not delivered to the attorney until after defendant was sued.[191] In rejecting defendant's argument that this omission was fatal to

---

182. *Comerica Bank*, 291 Mich. App. at 48 (citing Bastian Bros. Co. v. Broan, 293 Mich. 242, 248-49, 291 N.W. 644 (1940)).

183. *Id.*

184. *Id.*

185. *Id.* at 49 (alterations in original).

186. *Id.*

187. *Id.*

188. *Comerica Bank*, 291 Mich. App. at 49-50.

189. *Id.* at 49 (citation omitted).

190. *Id.* at 51.

191. *Id.*

plaintiff's claim, the court looked at the loan agreement to determine how it defined an event of default.[192] The agreement stated the following:

> (a) If a Borrower shall fail to pay the principal of and/or interest on the loan or if a Borrower shall fail to pay any other . . . obligation as provided for in this agreement or under any other Loan Document, and in any such case, any such failure shall continue for a period of five (5) days after written notice thereof shall have been given to Borrower by Lender.
>
> . . . .
>
> (l) If a Borrower or any guarantor shall repudiate, terminate or revoke . . . any obligation to the Lender under a Loan Document.[193]

"According to paragraph 6.2(b), if an event of default occurs, plaintiff is entitled to 'declare the entire outstanding principal balance of the Loan . . . .'"[194] The court, in rejecting defendant's argument, noted that although defendant's attorney had not been served notice of default under the loan agreement, plaintiff was personally served and "even if defendant, as guarantor, had not immediately received notice of default, which he clearly did,"[195]

> [A] failure to give notice of the principal's default or negligence in giving such notice, in a case where the guarantor is entitled to notice, does not of itself discharge him from liability and bar a recovery upon the guaranty; but there must be not only a want of notice within a reasonable time, but also some actual loss or damage thereby caused to the guarantor, and if such loss or damage does not go to the whole amount of the claim, but is only in part, the guarantor is discharged only *pro tanto*.[196]

The court noted that the "[d]efendant has not claimed that he suffered damages from an alleged lack of notice, and therefore, his obligation under the guaranty is not discharged."[197]

---

192. *Id.*
193. *Id.* at 52.
194. *Comerica Bank*, 291 Mich. App. at 52.
195. *Id.* at 53.
196. *Id.* (quoting Palmer v. Schrage, 258 Mich. 560, 570, 242 N.W.2d 751 (1932)).
197. *Id.* at 54.

Finally, the "defendant . . . argue[d] that the trial court erred in granting summary disposition before the close of discovery."[198] The court noted that "[a]lthough a motion brought under MCR 2.116(C)(10) is usually not properly granted until the parties have had a chance for discovery, 'summary disposition may . . . be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position.'"[199] The court held that further discovery was not necessary because "the meaning of the guaranty is clear and unambiguous, and discovery is not needed to uncover evidence regarding the parties' intent."[200] The court affirmed the trial court's decision.[201]

III. CONTRACT LAW

A. Contracts in Violation of Statutory Provisions or Public Policy

In *1031 Lapeer LLC v. Rice*,[202] the Michigan Court of Appeals affirmed the lower court's holding that contracts based on statutory violations or contrary to public policy must be found void, even in the absence of an enumerated remedy.[203]

This case centers on a fraud action brought in connection with a 2006 lease transaction concerning property being used as a gas station by the plaintiff lessees.[204] The plaintiffs agreed to lease the property for a period of ten years and the defendant lessor, despite having actual knowledge, failed to disclose that the property had been deemed environmentally contaminated in 1996.[205] Only after contacting the Michigan Department of Environmental Quality (MDEQ) a year after the transaction had been finalized did the plaintiffs discover that the environmental contamination existed.[206] Pursuant to this discovery, plaintiffs brought suit and were awarded $83,000.00 plus interest and costs.[207]

---

198. *Id.*

199. *Id.* at 54 (citing Stringwell v. Ann Arbor Pub. Sch. Dist., 262 Mich. App. 709, 714, 686 N.W.2d 825 (2004)).

200. *Comerica Bank*, 291 Mich. App. at 55.

201. *Id.*

202. 290 Mich. App. 225, 810 N.W.2d 293 (2010).

203. *Id.* at 231 (quoting Michelson v. Voison, 254 Mich. App. 691, 694, 658 N.W.2d 188 (2003)).

204. *Id.* at 227.

205. *Id.*

206. *Id.*

207. *Id.* at 228.

On appeal, the defendant claimed that the lower court's determination that the lease was void was incorrect and should be overturned.[208] Specifically, the defendant-lessor asserted four grounds for finding that the lower court's decision should be overturned: (1) "plaintiffs' lack of legal capacity"; (2) "plaintiffs' failure to exhaust their administrative remedies"; (3) "application of the statute of frauds"; and (4) non-existence of a genuine issue of material fact.[209] The court emphatically pointed out that it merely interprets the parties' arguments in light of the governing law; it will not flesh out a claim that was asserted, but unsupported, by the parties before it.[210] Although the appeals court quickly defused the defendant's claims, it focused mainly on the administrative remedies argument; more specifically, the court analyzed the legal justification for finding a commercial lease void in connection with a violation of environmental regulations.[211]

First, the court looks at the legislative intent for enacting the Michigan Natural Resources and Environmental Protection Act (NREPA).[212] Finding that NREPA was enacted to eradicate unacceptable public health risks while providing judicial remedies in addition to the then-existing statutory and common-law remedies,[213] the court looked to statutorily imposed requirements and remedies in connection with a party's conduct.[214] Specifically, "MCL 324.20107(a) states that a person who owns or operates property that the person knows is a facility containing hazardous substances shall, among other things, undertake measures that are necessary to prevent exacerbation of the existing contamination."[215]

Pursuant to MCL 324.20101(1)(y), an "operator" is someone "who is in control of, or responsible for, the operation of the facility."[216] A "facility" is defined as "property where a hazardous substance in excess of [permissible standards] has been . . . located" under MCL 324.20101(1)(o).[217] Applying the statutory language and the legislative intent to the case at bar, the court noted that plaintiff-lessees were clearly "operators" of a "facility" within the meaning of the statute and the risks

208. *1031 Lapeer*, 290 Mich. App. at 228.
209. *Id.* at 233.
210. *Id.* at 236.
211. *See generally*, *id.* at 225-26 (focusing on the invalidity of a commercial lease based on environmental regulations violations and public policy considerations).
212. *Id.* at 229-30.
213. *Id.*; *see also*, MICH. COMP. LAWS ANN. § 324.2012(c)-(d) (West 2011).
214. *1031 Lapeer*, 290 Mich. App. at 230.
215. *Id.* (citing MICH. COMP. LAWS ANN. § 324.20107a(1)(a) (West 2010)).
216. *Id.* at 232.
217. *Id.* at 230.

and potential liabilities that such an operator is exposed to necessitates the finding that a commercial agreement in violation of the disclosure at issue here is clearly contrary to public policy.[218] The court focused on MCL 324.20116(1), which provides:

> A person who has knowledge or information or is on notice through a recorded instrument that a parcel of his or her real property is a facility shall not transfer an interest in that real property unless he or she provides written notice to the purchaser or other person to which the property is transferred that the real property is a facility and discloses the general nature and extent of the release.[219]

The court points out that no specific remedy exists for a violation of MCL 324.20116(1).[220] However, citing case law in support of interpreting "shall" as a mandatory provision, the court opined that the phrase "shall not" within the statutory language of MCL 324.20116(1) could reasonably be interpreted as a prohibition.[221] Consequently, the defendant-lessor's failure to disclose actual knowledge of the environmental contamination amounted to fraud, in violation of a state statute. Public policy dictates that commercial agreements based on statutory violations must be found void.[222] In order to establish actionable fraud, a party must show that:

> (1) the defendant made a material representation, (2) the representation was false, (3) the defendant knew the representation was false or recklessly made the representation as a positive assertion without knowledge of its truth, (4) the defendant made the representation with the intention that the plaintiff act on it, (5) the plaintiff acted in reliance on the representation, and (6) the plaintiff suffered injury. Additionally, "[s]uppression of facts and truths can constitute silent fraud where the circumstances are such that there exists a legal or equitable duty to disclose." Importantly, to sustain a claim of fraud, the plaintiff must have reasonably relied on the false

218. *Id.* at 232.
219. *Id.* at 230 (quoting MICH. COMP. LAWS ANN. § 324.20116(1) (West 2010)).
220. *1031 Lapeer*, 290 Mich. App. at 231.
221. *Id.* at 231.
222. *Id.* at 236.

> representation. "There can be no fraud where a person has the means to determine that a representation is not true."[223]

The defendant-lessor pointed to several provisions of the lease agreement to argue that notice of environmental contamination was evident and precluded the plaintiffs from bringing an action against him.[224] However, the provisions merely outlined the lessor's obligations as landlord in regards to *potential* environmental contamination.[225] The court of appeals pointed out that defendant-lessor unquestionably had actual notice of the contamination and that the existence of fraud is not limited to the alleged wrongdoer's statements, but includes any material facts that he or she intentionally suppressed in order to create a false impression.[226] Specifically, because the defendant-lessor had a statutory duty to inform plaintiff-lessees of the contamination, and deliberately failed to do so, his silence on the matter constituted the element requisite in proving fraud, making it proper to submit the matter to a jury.[227]

In relation to the defendant-lessor's claim that the plaintiff-lessees failed to exhaust all administrative remedies before bringing a suit as required by MCL 324.20135(3)(a),[228] the court found that argument to be misplaced and inapplicable.[229] MCL 324.20135 provides in part:

> (1) Except as otherwise provided in this part, a person . . . may commence a civil action against any of the following:
>
> (a) An owner or operator who is liable under [MCL 324.20126] for injunctive relief necessary to prevent irreparable harm to the public health, safety, or welfare, or the environment from a release or threatened release in relation to that facility.
>
> . . . .
>
> (3) An action shall not be filed under subsection (1)(a) or (b) unless all of the following conditions exist:

---

223. *Id.* at 236-37 (quoting Mable Cleary Trust v. Edward-Marlah Muzyl Trust, 262 Mich. App. 485, 500, 686 N.W.2d 770 (2004); Nieves v. Bell Indus., Inc., 204 Mich. App. 459, 464, 517 N.W.2d 235 (1994)).

224. *Id.* at 237-38.

225. *Id.*

226. *1031 Lapeer*, 290 Mich. App. at 238 (citing M & D, Inc. v. McConkey, 231 Mich. App. 22, 25, 585 N.W.2d 33 (1998)).

227. *Id.* at 238-39.

228. *Id.* at 234.

229. *Id.* at 235.

> (a) The plaintiff has given at least 60 days' notice in writing of the plaintiff's intent to sue, the basis for the suit, and the relief to be requested to each of the following:
>
> (i) The department [MDEQ].
>
> (ii) The attorney general.
>
> (iii) The proposed defendants.[230]

The appellate court was quick to point out that the plaintiffs' claims originated in contract law and deal with fraud and statutory violations, whereas the above referenced statute, commonly referred to as part 201's "citizen suit" provision,[231] "governs only [suits] brought by a 'person . . . on behalf of its citizens, whose health or enjoyment of the environment is or may be adversely affected by a release . . . or threat of release from a facility . . . .'"[232]

B. Preemption: The Health Insurance Portability and Accountability Act (HIPAA) and Michigan MCL Section 600.2157

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) "is the federal regulation that governs the retention, use and transfer of information obtained during the course of the physician-patient relationship."[233] Under HIPAA, the general rule pertaining to the disclosure of protected health information is that a covered entity may not use or disclose protected health information without written authorization from the patient.[234] However, the statute provides specific exceptions that outline when a covered entity may disclose protected information without the written authorization of the patient.[235] One exception is when the information is disclosed in response to a subpoena or a discovery request.[236]

---

230. *Id.* at 234-35 (quoting MICH. COMP. LAWS ANN. § 324.20135 (West 2010)).

231. *Id.* at 235 (citing Carins v. City of E. Lansing, 275 Mich. App. 102, 114, 738 N.W.2d 246 (2007)).

232. *1031 Lapeer*, 290 Mich. App. at 235.

233. Isidore Steiner, DPM, PC v. Bonanni, 292 Mich. App. 265, 269, 807 N.W.2d 902 (2011) (citing *In re* Petition of Attorney Gen. for Investigative Subpoenas, 274 Mich. App. 696, 699, 736 N.W.2d 594 (2007)).

234. *Id.* at 270 (citing Holman v. Rasak, 486 Mich. 429, 438-39, 785 N.W.2d 98 (2010)).

235. *Id.*

236. *Id.*

Under MCL 600.2157, the physician-patient "privilege belongs to the patient and only the patient may waive it."[237] The statute provides in part that:

> [E]xcept as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.[238]

"Unlike HIPAA, MCL 600.2157 does not provide for a disclosure in judicial proceedings."[239] However, the privilege may be waived only in those circumstances where the patient engages in acts that waive the privilege.[240] The limited instances where the privilege may be waived by the patient are where the patient (1) pursues a medical malpractice claim and calls his physician as a witness, (2) where the heirs of a patient contest the will, or (3) where the beneficiaries of a life insurance policy provide the necessary documents to a life insurer when examining a claim for benefits.[241]

HIPAA further provides that where it is contrary to a provision of state law, it preempts the provision of state law unless, among other exceptions, the provision of state law relates to the privacy of individually identifiable health information, and is more stringent than a standard requirement or implementation specification adopted under HIPAA.[242] 45 CFR 160.202 defines "more stringent" as "provides greater privacy protection for the individual who is the subject of the individually identifiable health information."[243]

In *Isidore Steiner*, the court was asked to determine whether MCL 600.2157 was more stringent than HIPAA and therefore preempts HIPAA.[244] In holding that Michigan law was indeed more stringent, the court determined that MCL 600.2157 in fact preempts HIPAA and that the Michigan physician-patient privilege imposes an absolute bar.[245]

---

237. *Id.* at 271.
238. *Id.* (quoting MICH. COMP. LAWS ANN. § 600.2157 (West 1995)).
239. *Isidore Steiner*, 292 Mich. App. at 272.
240. *Id.*
241. *Id.* at 273.
242. *Id.*
243. *Id.* at 270-71 (quoting 45 C.F.R. 160.202).
244. *Id.*
245. *Isidore Steiner*, 292 Mich. App. at 274.

In the case at bar, defendant-physician entered into an employment agreement containing a covenant not to compete, which prohibited defendant from soliciting or servicing any patients of the employer for a three-year period after he left the practice.[246] Defendant subsequently left the practice and plaintiff sued, alleging defendant treated patients in violation of the employment agreement.[247] In order to prove its case, the plaintiff requested the names, addresses, and telephone numbers of every patient that the defendant treated since he left the practice in its discovery request.[248] Defendant objected to releasing said information, arguing that it was privileged information pursuant to HIPAA and MCL 600.2157.[249]

The court was asked to determine whether federal or state law controlled and whether disclosure violated the patients' privacy rights.[250] The court found that MCL 600.2157 controlled, and that it was more stringent than HIPAA.[251] The court held that the Michigan physician-patient privilege imposes an absolute bar to the release of said confidential information.[252]

The plaintiff argued that because the privilege may be involuntarily waived under MCL 600.2157, it is less stringent than HIPAA.[253] The court noted that HIPAA requires only notice to the patient to effectuate disclosure,[254] whereas Michigan law provides the added protection of requiring patient consent before disclosure of patient information.[255] Further, the court reiterated that HIPAA asserts supremacy, but allows application of state law if the state law is more protective of patient privacy rights.[256] The court pointed out that it was extremely significant that the patients in the case were not parties to the lawsuit.[257] This suggests that the patients were not engaging in any acts that might waive their privilege pursuant to the exceptions provided in MCL 600.2157.[258] The court held that "[b]ecause Michigan law [was] more protective of patients' privacy interests in the context of this litigation, Michigan law applies to plaintiff's attempted discovery of defendant's patient

246. *Id.* at 265-68.
247. *Id.* at 267.
248. *Id.*
249. *Id.*; *see* 42 U.S.C. § 1320d (2006); MICH. COMP. LAWS ANN. § 600.2157 (West 2006).
250. *Isidore Steiner*, 292 Mich. App. at 268.
251. *Id.*
252. *Id.* at 274.
253. *Id.* at 272.
254. *Id.* at 267.
255. *Id.* at 271-72.
256. *Isidore Steiner*, 292 Mich. App. at 267.
257. *Id.* at 275.
258. *Id.*; *see* MICH. COMP. LAWS ANN. § 600.2157 (West 2006).

information."[259] Therefore, Michigan law requires a patient's consent, and absent said consent, the plaintiff is not entitled to the confidential information.[260]

C. Modification of a Non-Modifiable Divorce Decree

In *Rose v. Rose*,[261] the issue was whether the parties to a divorce judgment can voluntarily waive their statutory right to seek modification of a spousal support agreement, and instead stipulate that their agreement regarding alimony is final, binding, and non-modifiable pursuant to MCR 2.612(C).[262]

After twenty-two years of marriage, the parties in this case divorced.[263] They had significant assets in the form of stocks.[264] Defendant wholly owned the stock for Die Tron, Inc. and did not want to liquidate the company in the divorce proceeding; he wished to keep the company and eventually sell it to his son from his previous marriage.[265] Therefore, instead of selling the company, defendant opted to keep the company in exchange for the annual payment of $230,000 per year in spousal support.[266] The parties further established that this spousal support was "all of the spousal support that plaintiff shall receive from defendant . . . . [and would] automatically terminate upon plaintiff's death or upon defendant's death."[267] The agreement further stated that it was "non-modifiable regarding duration and amount, except" upon the death of either party.[268]

Immediately following the divorce judgment, the company was turned over to defendant's son.[269] Almost immediately, the son began to engage in financial improprieties that resulted in the company's dissolution.[270] Thereafter, defendant moved to modify the non-modifiable support obligation.[271]

The court reiterated Michigan's long-standing position that parties to a divorce can voluntarily relinquish their statutory right to seek

259. *Isidore Steiner*, 292 Mich. App. at 267.
260. *Id.*
261. 289 Mich. App. 45; 795 N.W.2d 611 (2010).
262. *Id.*; *see also* MICH. CT. R. 2.612(C).
263. *Rose*, 289 Mich. App. at 47.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at 48.
268. *Id.*
269. *Rose*, 289 Mich. App. at 48.
270. *Id.*
271. *Id.* at 49.

modification of a spousal support agreement and instead stipulate that the agreement is final, binding, and non-modifiable.[272] The court went on to say that the parties can negotiate a settlement when "they clearly and unambiguously forgo their statutory right to petition for modification of spousal support [and the] courts must enforce their agreement."[273] However, under MCR 2.612(1) the court is authorized to relieve a party from such judgment only on certain enumerated grounds.[274]

The court found that plaintiff did not file a motion for relief from judgment within a year as required by MCR 2.612(C)(2), and therefore plaintiff was unable to set aside the judgment.[275]

The court then faced the issue of whether relief might be granted under the catchall sub-rule, MCR 2.612(C)(1)(f).[276] The court reaffirmed the three-part test for ascertaining whether the "extraordinary relief" envisioned in MCR 2.612(C)(1)(f) is warranted.[277] The test was established in the court's *Lark v. Detroit Edison Company* decision.[278] The test is:

> (I) [T]he reason for setting aside the judgment must not fall under sub-rules [(a) through (e)], (II) the substantial rights of the opposing party must not be detrimentally affected if the [judgment] is set aside, and (III) extraordinary circumstances must exist which mandate setting aside the judgment in order to achieve justice.[279]

The court found that the reason for setting aside the judgment did not fall under sub-rules (a) through (e) in that it was not timely filed.[280] Furthermore, the court found that setting aside the plain terms of the consent decree would detrimentally affect plaintiff's substantial rights.[281] The court held that plaintiff and defendant included clear and unambiguous language in their divorce judgment and both parties were represented by counsel, thereby ridding the agreement of any unwanted prejudice to either side.[282] The court held that "instead of opting for

272. *Id.* at 50.
273. *Id.*
274. *See* MICH. CT. R. 2.612(1).
275. *Rose*, 289 Mich. App. at 53; *see also* MICH. CT. R. 2.612(C)(2).
276. *Rose*, 289 Mich. App. at 53.
277. *Id.* at 54.
278. 99 Mich. App. 280, 297 N.W.2d 653 (1980).
279. *Rose*, 289 Mich. App. at 54 (quoting *Lark*, 99 Mich. App. at 284).
280. *Id.* at 61.
281. *Id.* at 59.
282. *Id.*

flexibility, the parties struck a bargain favoring finality, benefiting both. Defendant maintained full ownership of his business and . . . plaintiff obtained equitable and certain support. In striking their deal, both parties deliberately risked that future circumstances would render their contract inequitable."[283]

Additionally, the court held that the record in this case did not reflect the existence of extraordinary circumstances.[284] The court further stated that "caselaw construing MCR 2.612(C)(1)(f) contemplates that extraordinary circumstances warranting relief from a judgment generally arise when the judgment was obtained by the improper conduct of a party" and that there was no improper conduct on the part of the parties in this case.[285] Furthermore, the court noted that "a seasoned business owner, defendant undoubtedly understood that an economic downturn or financial mismanagement could endanger the solvency of his company. He nevertheless agreed that plaintiff could receive nonmodifiable spousal support."[286]

In conclusion, the court rejected the circuit court's position that spousal support was equitable in nature and plaintiff was only entitled to an equitable amount of spousal support.[287] The court held that "the parties conclusively waived their rights to a judicial determination of equitable spousal support"[288] when they entered into a divorce judgment with a non-modifiable support provision.[289] Finally, plaintiff argued that the spousal support provision was unconscionable.[290] The court noted that "[t]he determination of whether a given clause of a contract is in fact unconscionable is to be made at the time of its making rather than at some subsequent point in time."[291] The court stated that, at the time the parties entered into the contract, the contract was not unconscionable.[292] The court stated, "[w]e know of no authority permitting a court to find a contract unconscionable on the basis of events that occurred long after the contract's formation."[293]

283. *Id.*
284. *Id.* at 62.
285. *Rose*, 289 Mich. App. at 62.
286. *Id.*
287. *Id.*
288. *Id.* at 60.
289. *Id.*
290. *Id.* at 61.
291. *Rose*, 289 Mich. App. at 60 n.3.
292. *Id.* at 61.
293. *Id.*

D. Property Settlement Agreements

Property Settlement Agreements (PSAs) are final and cannot be modified.[294] Courts are bound by the terms absent "fraud, duress, mutual mistake, or severe stress."[295] In *Smith v. Smith*, the Michigan Court of Appeals reiterated the long-standing rule that "courts may not change or rewrite plain and unambiguous language in a contract."[296]

The issue before the court was whether the court should reform a PSA when, subsequent to the agreement, the value of an Investment Retirement Account increased. Plaintiff and defendant entered into a property settlement agreement when they divorced after forty years of marriage.[297] In the agreement, defendant was to retain his individual retirement account (IRA) and plaintiff was to retain all other retirement accounts.[298] There was no indication that the parties intended to take into account market fluctuations in dividing the accounts.[299] The date the PSA was negotiated, defendant's IRA "increased by nearly $1.4 million."[300] Thereafter, plaintiff sued, arguing that the increase in value of defendant's IRA should be taken into account for property settlement.[301]

In holding for the defendant, the trial court stated that "the increase in value of the IRA was an extrinsic fact not contained in the agreement," and because the terms of the agreement were unambiguous, the court was bound by them.[302] Therefore, the parties were required to live up to the terms of their agreement.[303]

In affirming the trial court's decision, the appellate court stated, "courts may not change or rewrite plain and unambiguous language in a contract under the guise of interpretation because 'the parties must live by the words of their agreement.'"[304] The court held that "the terms in the retirement-accounts section of the PSA were clear."[305] Specifically, the court commented that "the parties used fixed values for all the

294. Smith v. Smith, 292 Mich. App. 699, 806 N.W.2d 750 (2011).
295. *Id.* at 702.
296. *Id.*
297. *Id.* at 700.
298. *Id.* at 701.
299. *Id.* at 703.
300. *Smith*, 292 Mich. App. at 700.
301. *Id.* at 701.
302. *Id.* at 704.
303. *Id.*
304. *Id.* at 702 (quoting Harbor Park Market, Inc. v. Gronda, 277 Mich. App. 126, 130-31, 743 N.W.2d 585 (2007)).
305. *Id.*

retirement accounts. Defendant was to retain his IRA, and plaintiff was to retain all other retirement accounts."[306] The court found that "to equalize the value each was receiving, defendant was required to transfer approximately $1.4 million to plaintiff."[307] The court held that "looking at the PSA as a whole, there [was] no indication that the parties intended to take into account market fluctuations when dividing the retirement accounts."[308]

Indeed, the court found that in the final divorce decree plaintiff had offered inclusion of language that would allow plaintiff to share in the increase in the defendant's IRA, but defendant opposed it and it was not included in the final judgment.[309]

The court held that this case was similar to *Marshall v. Marshall*,[310] where the plaintiff and the defendant filed for the dissolution of their marriage.[311] The plaintiff in *Marshall* owned stock in a company; however, before the divorce became final, they entered into a purchase agreement for the stock.[312] "The plaintiff was awarded the stock" in exchange for having to pay money to the defendant.[313] "[P]laintiff's payment obligation was conditioned on the sale of the stock under the stock-purchase agreement."[314] "The sale went through," but "the price of the stock decreased" and "the plaintiff received less than [the parties] had . . . originally contemplated."[315] The plaintiff argued that payments to the defendant "should have been reduced in proportion to the decrease in stock price."[316] The court rejected plaintiff's argument stating "the property-settlement agreement only conditioned payment on the sale of the stock, which did in fact occur," and "nothing in the property-settlement agreement addressed what would happen if the price of the stock decreased."[317] The court held that the mistake was "an extrinsic fact [and] reformation [was] not allowed even though the fact is one which probably would have caused the parties to make a different contract."[318]

---

306. *Smith*, 292 Mich. App. at 702.
307. *Id.* at 702-03.
308. *Id.* at 703.
309. *Id.* at 701.
310. *Id.* at 703; *see* 135 Mich. App. 702, 355 N.W.2d 661 (1984).
311. *Smith*, 292 Mich. App. at 703.
312. *Id.* (citing *Marshall*, 135 Mich. App. at 704-05).
313. *Id.* (citing *Marshall*, 135 Mich. App. at 704).
314. *Id.* (citing *Marshall*, 135 Mich. App. at 705-06).
315. *Id.* (citing *Marshall*, 135 Mich. App. at 706).
316. *Id.* (citing *Marshall*, 135 Mich. App. at 709).
317. *Smith*, 292 Mich. App. at 704 (citing *Marshall*, 135 Mich. App. at 709).
318. *Id.* (quoting *Marshall*, 135 Mich. App. at 710-11).

In *Smith*, plaintiff argued that there was a full-disclosure provision in the property settlement agreement that defendant violated when he failed to inform plaintiff of the increase in value of the IRA.[319] However, the court disagreed and held that defendant had no duty to disclose the increase in the value of the IRA.[320] The court reasoned that plaintiff had a copy of the statement and was capable of calculating the current market value of the stock contained in the IRA.[321] The court concluded that the increase in value of the IRA in this case, as in *Marshall*, was an extrinsic fact not contained in the agreement.[322] It held that "[t]here was no mistake regarding the agreement actually entered into," noting that "stocks fluctuate on a daily basis. The parties . . . . could have expressly provided that the division of the retirement accounts was subject to modification for market fluctuations[, but instead] . . . . plaintiff essentially asks us to rewrite the agreement to her advantage, and we cannot do so."[323] Therefore, the parties must be held to their agreement.[324]

E. Third-Party Beneficiaries

"In Michigan, a third-party beneficiary of a contract 'stands in the shoes of the promisee' and thus may enforce the contract against the promisor."[325] If one is to create a third-party beneficiary, a contract must expressly promise to act to benefit the third party.[326] In *White v. Taylor Distributing Company Inc.*, the court was again asked to address this well settled rule.[327] The court addressed the issue of whether defendants were third-party beneficiaries to a release signed by a plaintiff with her no-fault insurance carrier, Amex Insurance Company.[328]

In *White*, plaintiff Sherita White allegedly suffered severe injuries when her van was rear-ended by defendant Birkenheuer, who was driving a tractor-trailer in the course of his employment with defendant

319. *Id.* at 701.
320. *Id.*
321. *Id.*
322. *Id.* at 704.
323. *Smith*, 292 Mich. App. at 704-05.
324. *Id.* (citing *Harbor Park Market*, 277 Mich. App. at 130-31).
325. White v. Taylor Distrib. Co., 289 Mich. App. 731, 734, 798 N.W.2d 354 (2010) (citing Koppers Co., Inc. v. Garling & Langlois, 594 F.2d 1094, 1098 (6th Cir. 1979) (citing MICH. COMP. LAWS ANN. § 600.1405 (West 2006))).
326. *Id.* (citation omitted) (citing Dynamic Constr. Co. v. Barton Mallow Co., 214 Mich. App. 425, 437-38, 543 N.W.2d 31 (1995)).
327. *Id.*
328. *Id.* at 733.

Taylor Distributing Company.[329] Plaintiff sued, and the trial court granted summary disposition to defendant, stating that defendants were third-party beneficiaries of the release plaintiff signed with her no-fault insurance carrier, Amex Insurance Company.[330] The trial court held that as third-party beneficiaries, the release relieved defendants of liability in the matter.[331]

The release plaintiff signed with her insurance carrier included the following provision:

> IN CONSIDERATION of the payment to the undersigned, . . . [plaintiff] does hereby release and forever discharge AMEX INSURANCE COMPANY . . . , and their officers, employees, principals, shareholders, executors, administrators, agents, successors, insurers and assigns of and from any and all actions, causes of action, claims, demands, damages, costs, loss of services, expenses and/or compensation on account of, or in any way growing out of, any and all known and unknown personal injuries and property damage resulting or to result from an accident that occurred on or about March 15, 2004.
>
> IT IS expressly agreed that this Release also refers to any and all (past, present and future) claims/benefits arising or that may arise from the March 15, 2004 accident.[332]

Defendants argued that the "any and all actions, cause of action" language in the release included all claims in connection with defendant.[333] The trial court agreed, citing *Romska v. Opper*,[334] as controlling law for its holding.[335]

In reversing the decision of the trial court, the Michigan Court of Appeals stated that the release identified plaintiff's insurer and its agents in great detail, but made no mention of any other person, including defendant.[336] The court held that the issue in the case was "whether defendants were members of a class somehow identified within the release."[337] The court went on to say, "to qualify as [a] third-party

329. *Id.* 732-33.
330. *Id.* at 733-34.
331. *White*, 289 Mich. App. at 733-34.
332. *Id.* at 733 (alterations in original).
333. *Id.* at 736.
334. Romska v. Opper, 234 Mich. App. 512, 594 N.W.2d 853 (1999).
335. *White*, 289 Mich. App. at 735.
336. *Id.*
337. *Id.*

beneficiar[y], the language of a release must have demonstrated an undertaking by plaintiff *directly* for the benefit of [defendants] or for a sufficiently designated class that would include [defendants]."[338]

The court distinguished *Romska*, in which the language of the release stated, "I/we hereby release and discharge [two named individuals] . . . and *all other parties, firms, or corporations who are or might be liable, from all claims*[.]"[339] It held that the release in *Romska* was broader than the instant release in which the only class described was AMEX INSURANCE COMPANY, and "their officers, employees, principals, shareholders, executors, administrators, agents, successors, insurers and assigns . . . ."[340] The court went on to state that the class identified in *White* was only "those persons or entities who might be subject to liability because of a relationship with the insurer."[341] The court correctly concluded that the description did not include defendant.[342]

Finally, in reversing the trial court, the court stated, "we disagree that this language invoked all humanity as released from potential liability," but rather, the release simply "underscored the absolute immunity of the specified class."[343] The court held that there was no intent by plaintiff to benefit defendants as third-party beneficiaries in its release with its insurer, therefore defendants were not third-party beneficiaries of the contract.[344]

F. Admissibility of Parol Evidence to Determine the Scope of a Third-Party Beneficiary Release

In *Shay v. Aldrich*,[345] the Michigan Supreme Court overruled the appellate court's *Romska v. Opper* decision.[346] In overruling *Romska*, the court held that parol evidence was admissible to determine the scope of the release document in accordance with the latent-ambiguity doctrine.[347]

This case originated as a result of plaintiff's claim that a group of Melvindale police officers assaulted him while a group of Allen Park officers stood idly by.[348] Specifically, after the Melvindale officers

338. *Id.* (quoting Shay v. Aldrich, 487 Mich. 648, 790 N.W.2d 629 (2010)).
339. *Id.* (alteration in original) (quoting *Romska*, 234 Mich. App. at 514).
340. *Id.* at 733.
341. *White*, 289 Mich. App. at 735.
342. *Id.*
343. *Id.* at 736.
344. *Id.* at 735.
345. 487 Mich. 648, 790 N.W.2d 629 (2010).
346. *Id.* at 651.
347. *Id.*
348. *Id.*

(Aldrich, Plemons, and Miller) reported to plaintiff's home in response to a car alarm, those same officers returned to plaintiff's home along with two Allen Park officers (Allbright and Locklear) later that day.[349] Plaintiff claimed that the Melvindale officers committed an assault and battery against him while the Allen Park officers' inaction constituted gross negligence.[350]

Different insurance companies represented both groups, they had different insurance policies, and the two groups retained separate defense counsel.[351] A case-evaluation hearing was conducted and it was determined that the liability of the Melvindale officers was valued at $500,000 each against officers Aldrich and Plemons, and $450,000 against officer Miller.[352] Additionally, the Allen Park officers' liability was valued at $12,500 against officers Allbright and Locklear respectively.[353] In sum, the Melvindale officers' liability totaled $1,450,000 and the Allen Park officers' liability amounted to $25,000.[354]

Plaintiff and the Allen Park officers both agreed to the case-evaluation awards.[355] Additionally, plaintiff was prepared to accept the $450,000 award against Melvindale officer Miller, but plaintiff rejected the awards against officers Aldrich and Plemons.[356] However, all three Melvindale Police officers rejected the awards that resulted from the case-evaluation hearing.[357] Thereafter, the two Allen Park officers entered into a separate release, and they were dismissed from the case.[358] A trial date was set for the dispute between the Melvindale officers and plaintiff.[359]

Nearly two months after plaintiff and the Allen Park officers had signed the release agreements, the Melvindale officers sought summary disposition under MCR 2.116(C)(7) as third-party beneficiaries to the releases signed by the Allen Park officers.[360] The Officers' claim was based on the language used in the release documents, which stated:

---

349. *Id.* at 651-52.
350. *Id.* at 652.
351. *Shay*, 487 Mich. at 652.
352. *Id.*
353. *Id.*
354. *See id.*
355. *Id.*
356. *Id.*
357. *Shay*, 487 Mich. at 653.
358. *Id.*
359. *Id.*
360. *Id.*

> For the sole consideration of TWELVE THOUSAND FIVE HUNDRED AND NO/100 ($ 12,500.00) DOLLARS to me in hand paid by **Michigan Municipal Liability and Property Pool** do for ourselves, executors, administrators, successors and assigns, discharge, *ALLEN PARK POLICE OFFICER KEVIN LOCKLEAR and Michigan Municipal Liability and Property Pool, insurer,* together with all other persons, firms and corporations, from any and all claims, demands and actions which I have now or may have arising out of any and all damages, expenses, and any loss or damage resulting from an incident occurring on September 8, 2004.[361]

The Michigan Supreme Court disagreed with the appellate court's view that the language in the release document was unambiguous,[362] centering the issue on whether *Romska* was properly decided and whether that holding should control this case.[363] Specifically, the court considered the admissibility of extrinsic evidence where a nonparty to a broadly worded release sought to assert third-party beneficiary rights.[364] The court realized that allowing nonparties to assert these types of rights without examining the context of the release could lead to a general aversion toward entering into releases.[365]

In deciding this issue, the court looked to two broad categories: (1) the classification of a nonparty as a third-party beneficiary and that party's ability to assert rights as a nonparty, and (2) the general rules of contract interpretation in connection with latent ambiguity and extrinsic evidence.[366] In regards to third-party beneficiary status, the Court undertook a step-by-step analysis.[367]

1. Third-Party Beneficiary Analysis

First, in addressing the third-party beneficiary analysis, the court has to determine whether the nonparty qualified as a third-party beneficiary.[368] Second, under MCL 600.1405, the issue is whether the agreement was intended to benefit a third-party.[369] The party had to be an

361. *Id.* at 653 (emphasis added).
362. *Id.* at 655-56.
363. *Shay*, 487 Mich. at 660.
364. *Id.*
365. *Id.*
366. *See id.*
367. *Id.*
368. *Id.* at 662.
369. *Shay*, 487 Mich. at 662.

intended third-party beneficiary or a member of an *intended* class that was sufficiently described in order to properly assert such a right.[370] The language of the statute clarifies the legislature's intent to limit a third-party beneficiary's assertion of rights by stating, in pertinent part, the following:

> Any person *for whose benefit* a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something *directly to or for said person.*[371]

Furthermore, the court included its own interpretation of the statute, which was articulated in its *Koenig v. South Haven*[372] opinion:

> In describing the conditions under which a contractual promise is to be construed as for the benefit of a third party to the contract in § 1405, the Legislature utilized the modifier "directly." Simply stated, *section 1405 does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation "directly" to or for the person.* This language indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.[373]

Here, the court notes that historical interpretation of the third-party beneficiary statute does result in the Melvindale officers being classified as third-party beneficiaries because the language of the release, on its face, unambiguously releases "all other persons."[374] Generally, a third-

370. *Id.* at 663-64.

371. *Id.* at 662 (emphasis added) (quoting MICH. COMP. LAWS ANN. § 600.1405 (West 2006)).

372. 460 Mich. 667, 597 N.W.2d 99 (1999).

373. *Shay*, 487 Mich. at 663 (citing *Koenig*, 460 Mich. at 676-77).

374. *Id.* at 665.

party beneficiary "effectively 'stands in the shoes' of the original promisee and 'has the same right to enforce said promise that he would have had if the said promise had been made directly to him as promisee."[375]

However, the court noted that merely qualifying as a third-party beneficiary does not carry with it the automatic right to enforce a release agreement against the parties thereto.[376] Instead, once the nonparty has been properly determined to be a third-party beneficiary, his or her rights as such must be analyzed.[377] Said beneficiary is "subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject."[378] Therefore, after a party has been properly identified as a third-party beneficiary, courts must look to "basic principles of contract interpretation [to] determin[e] the extent of the third party's rights under the contract."[379]

2. *Latent Ambiguity and Contract Interpretation*

In looking to the second broad category outlined in its opinion, the interpretation of the contract, the court reiterated that general contract law theories and principles must be applied to disputes arising out of a release.[380] Chief among them is the notion that a court must effectuate the parties' intent whenever possible.[381] The use of general contract principles presents a contrast to the objective test utilized in determining the existence of a third-party beneficiary.[382]

First, the court distinguished a patent ambiguity, to which the parol evidence rule applies—meaning that extrinsic evidence cannot be introduced to interpret the writing—from a latent ambiguity, which represents an exception to the parol evidence rule and which can be proven by extrinsic evidence.[383] The court pointed out the long-standing history of the latent-ambiguity doctrine under Michigan law and defined a latent ambiguity as:

---

375. *Id.* at 665-66 (quoting MICH. COMP. LAWS ANN. § 600.1405 (West 2006)).
376. *Id.*
377. *Id.* at 666.
378. *Id.*
379. *Shay*, 487 Mich. at 666.
380. *Id.* at 660.
381. *Id.*
382. *Id.* at 666-67.
383. *Id.* at 667.

> [O]ne 'that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed.' *Because 'the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist.'*[384]

The court also explained that whenever "the language of the contract is unambiguous, it is to be construed according to its plain meaning."[385] Therefore, the parol evidence rule applies to contracts and releases, meaning that extrinsic evidence cannot be introduced to supplement or interpret such an unambiguous writing.[386] "On the other hand, if the language of a contract is ambiguous, courts may consider extrinsic evidence . . . ."[387] According to the Restatement of Torts, "[c]ontract law permits inquiry into extrinsic evidence that might explain the negotiations of the parties, the circumstances in which the release was prepared, the respective goals of the parties in entering into the settlement and release . . . ."[388]

Applying this analysis to the case at bar, the supreme court seemed to agree with the trial court's opinion, which recognized the existence of broad language similar to that used in *Romska*, but distinguished that case from the present case based on several facts.[389] Based on a finding of latent ambiguity, which allowed the plaintiff to produce extrinsic evidence, the trial court found numerous distinctions between this case and *Romska*.[390] Specifically, the plaintiff supported the existence of latent ambiguity within the release document by producing following the extrinsic evidence:

> (1) the Allen Park Officers and the Melvindale Officers were represented by different counsel, (2) it was expressly agreed that plaintiff would accept the combined $25,000 case-evaluation awards with respect to the Allen Park Officers, but would not accept the $ 1.5 million award with respect to the Melvindale Officers, (3) counsel for the Allen Park Officers explained to

384. *Id.* at 668 (emphasis added) (citing City of Grosse Pointe Park v. Mich. Mun. Liab. & Prop. Pool, 473 Mich. 188, 198, 702 N.W.2d 106 (2005)).

385. *Shay*, 487 Mich. at 660 (citing *City of Grosse Pointe Park*, 473 Mich. at 197-98).

386. *Id.* at 661.

387. *Id.* at 660 (citing *City of Grosse Pointe Park*, 473 Mich. at 198).

388. *Id.* at 670 n.64 (quoting REST. (THIRD) TORTS § 24, at 307)).

389. *Id.* at 664.

390. *Id.*

> plaintiff that the releases were drafted in order to settle plaintiff's claims against his clients, (4) a stipulation and order dismissing the Allen Park Officers *only* was entered, and (5) the Melvindale Officers remained parties to plaintiff's lawsuit with a trial date set for plaintiff to proceed against them. The extrinsic evidence is further bolstered by the affidavit from counsel for the Allen Park Officers--the drafter of the releases--indicating that when he drafted the releases, he had not intended to provide for the release of the Melvindale Officers as well.[391]

In summary, the Michigan Supreme Court found that, despite qualifying as third-party beneficiaries, the Melvindale officers were not *intended* beneficiaries.[392] The court surmised that allowing the Melvindale officers to be released from liability would result in an unjust windfall.[393] Moreover, it would be contrary to the parties' intentions.[394] The latent-ambiguity doctrine constitutes an exception to the parol evidence rule and requires extrinsic evidence be presented in order to contextualize the "all other persons" language in the release.[395]

G. Contract Construction/Insurance Policies

The general rule is that an unambiguous contract is to be enforced as written unless the provision violates law or public policy.[396] The language in the insurance contract is given its plain and ordinary meaning if apparent to a reader of the instrument.[397]

In *Bradley v. State Farm Mutual Automobile Insurance Company*, the issue before the court was whether plaintiff's failure to join defendants Sandra Bowen and William Bowen per the unambiguous language of the insurance policy was a breach of contract, thereby denying plaintiff the ability to recover under the uninsured motorist provision of her insurance policy.[398]

Plaintiff sustained multiple injuries in a car accident when uninsured motorist William Bowen (Bowen) hit her car.[399] Prior to filing the instant

---

391. *Shay*, 487 Mich. at 671.
392. *Id.* at 674.
393. *Id.*
394. *Id.*
395. *Id.* at 675.
396. Bradley v. State Farm Mut. Auto. Ins. Co., 290 Mich. App. 156, 161, 810 N.W.2d 386 (2010).
397. *Id.* at 160.
398. *Id.* at 159.
399. *Id.* at 158.

action, plaintiff sued Bowen as the driver of the car that caused the collision, and Sandra Bowen (Sandra) as the owner of the car.[400] It was determined during discovery that Bowen was specifically excluded as a driver under Sandra Bowen's insurance policy with her insurer, AIG, because Bowen was charged with stealing and Sandra had been dismissed from the suit.[401] Bowen failed to defend the suit and a default judgment for $50,000 was entered against him.[402] Plaintiff then attempted to recover benefits from defendant, her insurance company, State Farm.[403] Plaintiff claimed she was entitled to recover benefits from defendant under the uninsured motor vehicle provision of her policy, which was limited to $25,000.[404] Defendant refused to settle and plaintiff filed this lawsuit claiming breach of contract.[405]

Defendant filed a motion for summary disposition arguing that plaintiff breached the contract when she failed to join Bowen and Sandra as parties because of their statuses as owner and driver of the uninsured vehicle.[406] Defendant argued that plaintiff failed to join all parties and was therefore not entitled to uninsured motorist benefits because the unambiguous language of the policy "required joinder of all tortfeasors in the suit brought against defendant."[407]

The court cited the Michigan Supreme Court's decision in *Koski v. Allstate Insurance Company*,[408] which stated that "one who files suit for performance of a contractual obligation must prove that all contractual conditions prerequisite to performance have been satisfied,"[409] and that "an insurer who seeks to cut off responsibility on the grounds that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position."[410] Furthermore, the court said that even though the instant case involved a joinder provision, not a notice provision as in *Koski*, "[w]e conclude that the *Koski* principle is equally applicable to an analogous joinder provision; there is no valid distinguishing reason not to apply *Koski*."[411]

---

400. *Id.*
401. *Id.*
402. *Bradley*, 290 Mich. App. at 158.
403. *Id.* at 159.
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*
408. 456 Mich. 439, 572 N.W.2d 636 (1998).
409. *Bradley*, 290 Mich. App. at 160 (citing *Koski*, 456 Mich. at 444).
410. *Id.* at 161 (citing *Koski*, 456 Mich. at 444).
411. *Id.*

The court went on to say that plaintiff in no way prejudiced defendant's rights to subrogation or its ability to defend plaintiff's tort action.[412] The court reasoned that defendant could subrogate "to plaintiff's right to enforce the $50,000 default judgment against Bowen" up to the policy limit of $25,000.[413] The court determined that, given that the uninsured motorist benefit was capped at $25,000, "defendant's subrogation rights will not be prejudiced."[414]

Defendant further alleged "that the entry of the default judgment resulted in the loss of an opportunity to challenge the elements of plaintiff's tort action," and consequently precluded "defendant from challenging its liability under the insurance policy."[415]

The court rejected this argument, stating that not only is defendant not bound by the default judgment,[416] but, in fact, defendant has specific language in its contract stipulating defendant is not bound by the judgment.[417] The court went on to say that,

> Regardless of the default judgment . . . plaintiff will still have to prove her tort case in relation to the accident, including establishing that she suffered a serious impairment of a body function . . . . Plaintiff cannot simply rely on the prior suit that led to the default judgment; the case effectively starts from scratch.[418]

The court ultimately concluded that the lawsuit could proceed because the defendant failed to show that it was prejudiced.[419]

The majority in this case was compelled to state that *Koski* was still good law despite *Rory v. Continental Insurance Company*, where the supreme court stated, "an unambiguous provision in an uninsured-motorist policy must be enforced as written regardless of the equities and reasonableness of the provision."[420] The court noted that "*Koski* carved out a narrow prejudice requirement relative to all insurance contracts, and *Rory* did not overrule the Supreme Court's earlier ruling in *Koski*,

---

412. *Id.* at 162-63.
413. *Id.* at 162.
414. *Id.*
415. *Bradley*, 290 Mich. App. at 162.
416. *Id.*
417. *Id.*
418. *Id.* at 162-63.
419. *Id.* at 163.
420. *Id.* at 161 (citing Rory v. Continental Ins. Co., 473 Mich. 457, 461, 703 N.W.2d 23 (2005)).

which we find controlling."[421] The dissent in *Bradley*, however, viewed *Rory* as overruling *Koski*, displacing it as the controlling legal principle; the court stated that the defendant was not required "to show prejudice from plaintiff's failure to comply with the joinder provision" because prejudice is not a defense to the contract.[422] The dissent also contended that in requiring defendant to show prejudice, the court failed to enforce the insurance provision as written.[423] Moreover, since *Rory* was the latest Michigan Supreme Court decision on the issue of constructing insurance contracts, the majority of the court "fail[ed] to [enforce] the Supreme Court's most recent pronouncement of how to construe an insurance policy."[424]

IV. CONCLUSION

Although the Michigan courts addressed a number of issues that did not drastically change or alter the state's commercial or contract law during the *Survey* period, they did clarify issues within both areas of law, and addressed issues of first impression in a couple of matters.

In regards to commercial law, the Michigan courts dealt with issues involving priority rights of secured creditors under the Estate and Protected Individual Code (EPIC); filings under the Construction Lien Act; interpretation of the Molders Lien Act; and the Construction Lien Act. Within contract law, the Michigan courts were presented with issues involving preemption under the Health Insurance Portability and Accountability Act (HIPAA); third party beneficiaries' rights; waiver of sovereign immunity; and issues involving divorce decrees, settlement agreements, and modification.

421. *Bradley*, 290 Mich. App. at 161.
422. *Id.* at 165 (Hoekstra, J., dissenting).
423. *Id.* at 166 (Hoekstra, J., dissenting).
424. *Id.*