COMMERCIAL AND CONTRACT LAW

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Table of Contents

I. INTRODUCTION

This article ostensibly surveys the major commercial law and contracts law cases decided by the Michigan Supreme Court and Michigan Court of Appeals for the period spanning from June 1, 2006 to May 31, 2007. However, the primary focus of this article will be on the significant commercial law/contracts cases decided by Michigan Court of Appeals, because the Michigan Supreme Court did not decide any jurisprudentially significant cases during the relevant period. For the sake of convenience and organization the commercial law cases will be discussed first, followed by the contract law cases.

II. COMMERCIAL LAW

The most important commercial law decisions rendered during the past year involve two distinct areas, insurance law and landlord-tenant law. Therefore, the discussion of commercial law has been divided accordingly.

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A. Insurance Law

In *Cole v. Auto Owners Insurance Company*,[1] a case of first impression, the Michigan Court of Appeals was called upon to define the term "pedestrian" for purposes of uninsured motorist coverage.[2] In *Cole*, plaintiff was injured "when he was riding a bicycle and was struck from behind by a vehicle driven by an unidentified driver."[3] Plaintiff "sought uninsured motorist benefits from the insurance company under a policy issued to his father."[4] Plaintiff's policy provided benefits and the payment of compensatory damages "for bodily injury you accidentally sustain and which arises out of the ownership, maintenance or use of the uninsured automobile when you are a *pedestrian* or while occupying an automobile you do not own."[5] The term "pedestrian" was not defined in the insurance policy[6] and the definition thereof became the central issue of the litigation.[7] The term pedestrian was of critical importance in *Cole* because the insurance company denied plaintiff coverage by determining that plaintiff was not a pedestrian at the time of the accident.[8] Plaintiff urged the court to adopt a broad definition of the term pedestrian in the context of interpreting uninsured motorist coverage.[9] Thus, plaintiff requested the court to expansively construe the term to include anyone "not in or operating motor vehicles."[10]

The trial court noted that the insurance company had provided two conflicting definitions of the term "pedestrian" to the court;[11] and, therefore, held that that contract term was ambiguous.[12] The trial court relied on the traditional principle of contract interpretation that when a contract term is ambiguous, "the language must be construed against the drafter," in this case the insurance company. Therefore, the trial court granted plaintiff's motion for summary disposition and extended coverage to plaintiff.[13]

The Court of Appeals began its analysis by noting that interpretation of the policy language is not a matter of statutory analysis because uninsured motorist coverage is optional and not mandated by the no-fault act.[14] More appropriately, the policy language is governed by the general

1. 272 Mich. App. 50, 723 N.W.2d 922 (2006).
2. *Id.* at 51, 723 N.W.2d at 923.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Cole*, 272 Mich. App. at 52, 723 N.W.2d at 924.
8. *Id.* at 51, 723 N.W.2d at 923.
9. *Id.* at 54-55, 723 N.W.2d at 925.
10. *Id.*
11. *Id.* at 52, 723 N.W.2d at 923.
12. *Id.* at 52, 723 N.W.2d at 923-24.
13. *Cole*, 272 Mich. App. at 52, 723 N.W.2d at 923-24.
14. *Id.* at 53, 723 N.W.2d at 924.

rules of contract interpretation.[15] Since the term pedestrian was not defined in the policy, the appellate court relied on the plain, ordinary dictionary definition of the term pedestrian.[16] The Court of Appeals proceeded to define the plain meaning of pedestrian as "a person who goes or travels on foot."[17] Under this very narrow definition, the Court of Appeals reversed the trial court, and held that "plaintiff was not a 'pedestrian' because he was riding a bicycle."[18] Ultimately, the Court of Appeals' narrow definition of pedestrian resulted in denial of insurance coverage to plaintiff.[19]

The court's definition of pedestrian is very narrow, pro-insurance company, and seems to defeat the purpose of uninsured motorist coverage.[20] For example, if the plaintiff were injured while in-line skating or skateboarding, he would have also not qualified as a "pedestrian" under the terms of the policy because he was not "traveling on foot," a potential result that would strain credulity and fly in the face of common sense.[21]

B. Landlord and Tenant Law

The other commercial law case of jurisprudential importance arose in the area of landlord and tenant law. In *Laurel Woods Apartments v. Roumayah*,[22] defendant was a tenant in an apartment complex owned and operated by plaintiff.[23] The lease agreement between the parties provided in Paragraph 9, *inter alia* that:

> Maintenance Repairs and Damage of Premises. Tenant shall keep the Premises and all appliances in good condition and repair, and shall allow no waste of the Premises or any utilities. Tenant shall also be liable for any damage to the Premises or to Landlord's other property (i.e., other units, common facilities and equipment) that is caused by the acts or omissions of Tenant or Tenant's guests. Landlord shall perform all maintenance and repairs to the roof, walls and structural elements, all mechanical, plumbing and electrical systems at Landlord's cost and expense, unless such damage is caused by Tenant[']s acts or neglect, in

15. *See id.*
16. *Id.*
17. *Id.* at 54, 723 N.W.2d at 924-25 (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 960 (2nd ed. 1997)).
18. *Id.* at 57, 723 N.W.2d at 927.
19. *See Cole*, 272 Mich. App. at 57 n.5, 723 N.W.2d at 927 n.5.
20. *Id.* at 57, 723 N.W.2d at 927.
21. *Id.* at 54-57, 723 N.W.2d at 924-27.
22. 274 Mich. App. 631, 734 N.W.2d 217 (2007).
23. *Id.* at 632, 734 N.W.2d at 218.

> which case such cost and expense incurred by Landlord shall be paid by Tenant.[24]

A fire occurred in tenant's apartment "that resulted in substantial damage to the premises."[25] A fire department investigation determined that the fire started in the kitchen and was caused by tenant's guest failing to turn off the stove.[26] Pursuant to the lease agreement, landlord filed a complaint against tenant and his guest, seeking joint and several liabilities for damages caused to the premises.[27]

In response to landlord's suit, tenant relied on *New Hampshire Insurance Group v. Labombard*[28] to assert that they were not liable for the damage caused by the fire.[29] Tenant specifically argued that "despite a contractual provision that the tenant agreed to 'yield up' the premises 'in like condition as when taken,' there was no express agreement that tenant would be liable to the landlord for the fire damage," and absent such an agreement, no liability could be imposed on tenant.[30] Tenant further argued that several portions of the lease agreement indicated that the landlord would carry fire insurance coverage, which suggests that the tenant should not be liable for and released from "any damage covered by such a policy".[31] Moreover, tenant asserted that the lease agreement did not expressly require tenant to insure the premises for fire damage.[32]

Landlord maintained that the tenant's arguments and reliance on *Labombard*[33] was inappropriate because it was based on the inaccurate presumption that the pending action was a negligence claim, whereas landlord argued that the tenant's cause of action was based on a breach of contract claim, rendering *Labombard* inapplicable.[34]

The appellate court majority agreed with landlord that *Labombard*[35] was not applicable to the facts of this case, by stating the following:

> *Labombard* does not apply to this case. *Labombard* was a negligence action, whereas this is a breach of contract action. The holding in *Labombard* makes plain that the Court was limiting negligence claims for fire damage against tenants to circumstances in which there is an express agreement allowing such liability. Thus, although the *Labombard* court considered

24. *Id.* at 632-33, 734 N.W.2d at 218.
25. *Id.* at 633, 734 N.W.2d at 218.
26. *Id.*
27. *Id.*
28. 155 Mich. App. 369, 399 N.W.2d 527 (1986).
29. *Laurel Woods*, 274 Mich. App. at 634, 734 N.W.2d at 218.
30. *Id.* (quoting *Labombard,* 155 Mich. App. 369, 399 N.W.2d 527).
31. *Laurel Woods,* 274 Mich. App. at 634, 734 N.W.2d at 218.
32. *Id.* at 634-35, 734 N.W.2d at 219.
33. 155 Mich. App. 369, 399 N.W.2d 527.
34. *Laurel Woods*, 274 Mich. App. at 634-35, 734 N.W.2d at 219.
35. 155 Mich. App. 369, 399 N.W.2d 527.

> the parties' lease agreement, the holding in *Labombard* has no applicability here.[36]

Judge Borrello wrote a stinging dissent in response to the majority, in which he stated that the majority decision, in effect, nullified the court's holding in *Labombard.*[37] He contended that the majority erred in ruling that *Labombard* was inapplicable because it only applied to tort cases, and not to contract cases.[38] Judge Borrello relied on the court's previous decision in *Antoon v. Community Emergency Medical Service,*[39] to support his opinion of *Labombard's* applicability because "the contract create[d] the state of things that furnishe[d] the occasion of the tort."[40] Judge Borrello continued to explain that the lease agreement was merely the conduit that brought together tenant and landlord, and such an agreement may expressly determine the limits of tort liability.[41] Further, Judge Borrello stated that "pursuant to our jurisprudence, we must look to the lease agreement to determine whether defendants expressly and unequivocally agreed to be liable in tort for negligently caused fire damages."[42] Moreover, Judge Borrello argued that the primary issue that the majority failed to either address or resolve was whether the lease agreement expressed that the premises would not be insured for fire damage, along with how the risk of loss for fire damage was allocated.[43]

Judge Borrello then examined Paragraph 9 of the instant lease agreement and concluded that it was not the "express and unequivocal agreement" of tenant to be liable to lessor or lessor's fire insurer in tort for negligently caused fire damage to the premises as required by *Labombard* and *Antoon.*[44] Justice Borello's argument is better reasoned than that of the majority. The majority's ruling that *Labombard* was inapplicable because that case involved a negligence claim, whereas this

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36. *Laurel Woods*, 274 Mich. App. at 637, 734 N.W.2d at 220.

37. *Id.* at 649, 734 N.W.2d at 226 (Borrello, J., dissenting).

38. *Id.* Judge Borrello also disagreed with the majority's holding that the tenants were jointly and severally liable pursuant to Michigan Compiled Laws ("MCL") section 600.2956, which provides:

> Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

MICH. COMP. LAWS ANN. § 600.2956 (West 2000).

39. 190 Mich. App. 592, 476 N.W.2d 479 (1991).

40. *Laurel Woods,* 274 Mich. App. at 646, 734 N.W.2d at 225 (Borrello, J., dissenting) (quoting *Antoon*, 190 Mich. App. at 595, 476 N.W.2d at 481).

41. *Id.* at 646-47, 734 N.W.2d at 225 (Borrello, J., dissenting).

42. *Id.* (Borrello, J., dissenting).

43. *Id.* (Borrello, J., dissenting).

44. *Id.* at 647, 734 N.W.2d at 225 (Borrello, J., dissenting) (quoting *Labombard,* 155 Mich. App. at 371 n.1, 399 N.W.2d at 528 n.1).

case involving a contract dispute should be viewed as a distinction without a difference.

III. CONTRACT LAW

For the sake of convenience I have divided the contracts cases into five major topic areas: conditions to the formation of contracts, third-party beneficiary contracts, forum selection/choice of law clauses, remedies, and avoidance of the contract.

A. Conditions to the Formation of Contracts

In the past year the Michigan Court of Appeals published two noteworthy decisions regarding conditions to the formation of contracts: *Able Demolition, Inc. v. Pontiac*[45] and *Real Estate One v. Heller*,[46] which will be discussed respectively.

Able Demolition[47] involved a dispute between a demolition contractor, Able Demolition, Inc. ("Contractor") and the City of Pontiac ("City"), in which Contractor agreed to demolish houses for the City.[48] Under the terms of the agreement, on the day of each demolition, Contractor was required to obtain written assurance (a "Letter to Proceed") from the City's Director of Law before proceeding to tear down the building.[49] The purpose of this requirement was "to minimize the risk of legal liability" to the City, and to protect "citizens' property rights", as a property owner could have "obtain[ed] a last-minute temporary restraining order to prevent the destruction of [the] building."[50] The contract further provided that if Contractor performed demolition services without first obtaining the requisite "Letter to Proceed" authorization, the contractor would "forfeit any payment for unauthorized services performed."[51]

In Contractor's complaint against the City, Contractor alleged that the City demolished numerous buildings under the contract, but that City refused to pay for eleven of those demolitions.[52] City contended that Contractor was not entitled to any payment for those demolitions because it did not comply with the material terms of the agreement by failing to obtain a Letter to Proceed.[53]

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45. 275 Mich. App. 577, 739 N.W.2d 696 (2007).
46. 272 Mich. App. 174, 724 N.W.2d 738 (2006).
47. *Able Demolition*, 275 Mich. App. 577, 739 N.W.2d 696.
48. *Id.* at 578, 739 N.W.2d at 697.
49. *Id.* at 739 N.W.2d at 698.
50. *Id.* at 585, 739 N.W.2d at 701.
51. *Id.* at 579, 739 N.W.2d at 698.
52. *Id.* at 580, 739 N.W.2d at 699.
53. *Able Demolition*, 275 Mich. App. at 580, 739 N.W.2d at 698.

After reviewing the contract, the Michigan Court of Appeals concluded that the contract language was "clear and unambiguous" and did not require interpretation.[54] The court further held that the contract provision at issue, which required Contractor to obtain a Letter to Proceed, was a condition precedent to payment.[55] The court relied on previous case law to define a condition precedent as "a fact or event that the parties intend must take place before there is a right to performance."[56] The nonoccurrence of a condition precedent results in a forfeiture of the contract.[57]

By way of dicta, the court stated that even if the court had construed the Letter to Proceed provision as a promise and not a condition, thereby, allowing Contractor to sue for damages, the contractor would have still failed in this case.[58] The court asserted this position by stating, "[t]he rule in Michigan . . . is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform."[59] This rule only applies, however, "if the initial breach was substantial."[60] The court held that Contractor's initial breach was "substantial," and therefore, affirmed the trial court's decision to grant summary disposition to City.[61]

The court's ruling in Able Demolition is correct and consistent with the law in Michigan, that "[c]ourts are not inclined to construe stipulations of a contract as conditions precedent unless compelled by the language in the contract."[62]

The other significant case discussing conditions to the formation of a contract arose in the real estate context in *Real Estate One v. Heller*.[63] In *Heller*, Real Estate One entered into a real estate listing agreement with the Hellers, in which Real Estate One agreed to list the Hellers' home in Bloomfield Hills for sale or lease.[64] In October, 1997 the Hellers entered into a lease agreement with a lessee, Stuart Gorelick, in which Gorelick was given a right of first refusal to purchase the property in the event it was offered for sale, and which further provided that the Hellers would pay a commission of six percent to Real Estate One if the property was

54. *Id.* at 583, 739 N.W.2d at 700.

55. *Id.*

56. *Id.* (quoting Mikonczyk v. Detroit Newspapers, Inc., 238 Mich. App. 347, 350, 605 N.W.2d 360, 363 (1999)).

57. *Id.*

58. *Id.* at 584-85, 739 N.W.2d at 701.

59. *Able Demolition*, 275 Mich. App. at 585, 739 N.W.2d at 701 (quoting Michaels v. Amway Corp., 206 Mich. App. 644, 650, 522 N.W.2d 703, 706 (1994)).

60. *Id.*

61. *Id.* at 586, 739 N.W.2d at 702.

62. *Id.* at 584, 739 N.W.2d at 701 (quoting *Mikonczyk*, 238 Mich. App. at 350, 605 N.W.2d at 363).

63. 272 Mich. App. 174, 724 N.W.2d 738 (2006).

64. *Id.* at 175, 724 N.W.2d at 739.

sold.[65] Gorelick was referred to the Hellers by Real Estate One.[66] In January 1999, after the death of Mr. Heller, Gorelick offered to buy the house from Mrs. Heller but was told that it was not for sale.[67] However, five months later, in June1999, Mrs. Heller signed an agreement with Gorelick to sell him the house on a land contract for $850,000.[68] Gorelick paid the entire purchase price due under the land contract and became the fee simple owner of the home in May 2001.[69] Mrs. Heller refused to pay Real Estate One the six percent commission on the sale price as stated in the contract; and, therefore, Real Estate One initiated this action in May, 2005, alleging breach of contract and fraud.[70]

The trial court granted summary judgment to Mrs. Heller, on the basis that Gorelick offered to purchase the property, Mrs. Heller did not affirmatively offer to sell the property, and that Real Estate One did not perform any services relative to the sale.[71] On appeal, Real Estate One claimed that the trial court erred in granting summary disposition to Mrs. Heller, asserting that the agreement was clear and unambiguous, and that Mrs. Heller's duty to pay the six percent commission was not dependent on any alleged conditions precedent.[72]

The contract language disputed in this case, specifically Paragraph 28, states:

> Landlord agrees to pay Broker a commission of _____ for lease. Further, in the event this property is offered for sale, Tenant(s) has first right to refusal to purchase it at a price to be determined at that time and the Landlord/Seller will pay a commission of *six percent.*[73]

Mrs. Heller contended that the terms "offer" and "first refusal" were conditions precedent to the payment of commission, and argues that she was excused from paying the commission because those conditions never occurred.[74] Simply stated, Mrs. Heller claimed that the intent of the parties was that in order to activate her duty to pay a commission to Real Estate One, she must personally offer to sell the property and offer the right of first refusal to Gorelick.[75] Relying on Michigan Court of Appeals precedent, the court reaffirmed the law in Michigan by stating that

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65. *Id.*
66. *Id.* at 179, 724 N.W.2d at 741.
67. *Id.* at 175, 724 N.W.2d at 739.
68. *Id.*
69. *Heller*, 272 Mich. App. at 175, 724 N.W.2d at 739.
70. *Id.* at 176, 724 N.W.2d at 739.
71. *Id.*
72. *Id.*
73. *Id.* at 177, 724 N.W.2d at 740 (emphasis in original).
74. *Id.* at 179, 724 N.W.2d at 741.
75. *Heller*, 272 Mich. App. at 180, 724 N.W.2d at 741-42.

"unless the contract language itself makes clear that the parties intended a term to be a condition precedent, this court will not read such a requirement into the contract."[76] The court, therefore, concluded that the contract did not construe the "offer" and "first right to refusal" provisions as conditions to Real Estate One's entitlement to a sales commission.[77]

The Court of Appeals ruling is a correct interpretation of the law in Michigan.[78] Moreover, it is wholly consistent with the Restatement of Contracts Second approach of avoiding contract forfeiture if at all possible.[79] Restatement of Contracts Second, section 227 (1) states:

> In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.[80]

Section 227 of the Second Restatement of Contracts may be paraphrased to say that the law abhors forfeiture; and, if there is any doubt whether a clause in a contract is to be construed as a promise or a failed condition that would result in contract forfeiture, an interpretation is preferred that will result in enforcement of the contract.[81]

B. Third-Party Beneficiary Contracts

Two cases of note decided during the relevant period addressed third-party beneficiary issues, namely *Kisiel v. Holz* [82] and the aforementioned *Real Estate One v. Heller*.[83]

In *Kisiel*,[84] the Michigan Court of Appeals addressed the novel issue of whether a property owner, under Michigan law, is a third-party beneficiary of an oral construction contract between a general contractor and his subcontractor.[85]

Plaintiff contracted with defendant Holz Building Company, Inc. ("Holz") for the construction of a residential home.[86] Holz, in turn, contracted with GFA Development, Inc. ("GFA") for "excavation work

76. *Id.* at 179, 724 N.W.2d at 741. *See also Mikonczyk*, 238 Mich. App. at 350, 605 N.W.2d at 363.
77. *Id.* at 180, 724 N.W.2d at 741.
78. *See Mikonczyk*, 238 Mich. App. at 350, 605 N.W.2d at 362.
79. *See* RESTATEMENT (SECOND) OF CONTRACTS § 227 (1981).
80. *Id.*
81. *Id.*
82. 272 Mich. App. 168, 725 N.W.2d 67 (2006).
83. 272 Mich. App. 174, 724 N.W.2d 738 (2006).
84. 272 Mich. App. 168, 725 N.W.2d 67.
85. *Id.* at 170, 725 N.W.2d at 69.
86. *Id.* at 169, 725 N.W.2d at 69.

and the pouring of concrete."[87] After the home had been completed, cracks appeared in the basement floor and walls.[88] Plaintiff sued Holz, GFA, and other defendants for negligent performance of the subcontract, and breach of the implied warranty of habitability, claiming that he was a third-party beneficiary of the oral contract between Holz and GFA.[89]

The Michigan Court of Appeals began by clarifying the jurisprudence in Michigan; that only intended third-party beneficiaries may sue under a contract, whereas, incidental beneficiaries cannot.[90] Further, the court stated that third-party beneficiary contracts always require an "express promise" to benefit the third-party.[91] The aforementioned guiding principles led the court to state that "[i]n general, although work performed by a subcontractor on a given parcel of property ultimately benefits the property owner, the property owner is not an intended third-party beneficiary of the contract between the general contractor and the subcontractor."[92] The court went on to state that "[a]bsent clear contractual language to the contrary, a property owner does not attain intended third-party beneficiary status merely because the parties to the subcontract knew, or even intended, that the construction would ultimately benefit the property owner."[93]

The court concluded that plaintiff was not an intended third-party beneficiary of the oral contract between Holz and GFA.[94] The court held that "[t]here is nothing in the scope of the oral contract to suggest that GFA expressly promised to provide plaintiff with concrete walls [or] . . . an express promise to create the basement walls for plaintiff's benefit."[95] The court further concluded that "because the contract was primarily executed for the benefit of the contracting parties, plaintiff was only an incidental beneficiary . . . plaintiff is unable to maintain an action against GFA for breach of the subcontract."[96]

In the other third-party beneficiary case, *Heller,*[97] neither party actually raised the issue of whether Real Estate One was an intended third-party beneficiary of the contract between Mrs. Heller (the homeowner) and Gorelick (the lessee/purchaser).[98] Nonetheless, the Court of Appeals went out of its way to clarify the rule of law in

87. *Id.*
88. *Id.*
89. *Id.* at 169-70, 725 N.W.2d at 69.
90. *Kisiel*, 272 Mich. App. at 170, 725 N.W.2d at 69 (citing MICH. COMP. LAWS ANN. § 600.1405 (West 1996)).
91. *Id.* at 171, 725 N.W.2d at 69-70.
92. *Id.* at 71, 725 N.W.2d at 70.
93. *Id.*
94. *Id.* at 171-72, 725 N.W.2d at 70.
95. *Id.* at 172, 725 N.W.2d at 70.
96. *Kisiel*, 272 Mich. App. at 172, 725 N.W.2d at 70.
97. 272 Mich. App. 174, 724 N.W.2d 738 (2006).
98. *Id.* at 177, 724 N.W.2d at 740.

Michigan on the third-party beneficiary issue.[99] Relying on Michigan's third-party beneficiary statute[100] and a 2003 Michigan Supreme Court decision,[101] the appellate court stated that Real Estate One was clearly an intended third-party beneficiary of the contract between Heller and Gorelick; and, was entitled to enforce its rights under that agreement.[102]

Both *Kisiel* and *Heller* were properly decided. The difference between *Kisiel*, in which the court did not find third-party beneficiary status, and the *Heller* case in which the court did find third-party beneficiary status, turns on whether the promisor intended to directly benefit the third-party.[103] Again, the decision reached by the Court of Appeals is in accord with the Second Restatement of Contracts approach. In defining contract beneficiaries, Restatement of Contracts Second makes a distinction between intended third-party beneficiaries, who can enforce the agreement between the promisor and promisee, and incidental third-party beneficiaries who cannot. Thus, Restatement of Contracts Second, section 302 states:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
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> (a) the performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or
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> (b) the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.[104]

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99. *Id.* at 178, 724 N.W.2d at 740.

100. *Id.* at 177, 724 N.W.2d at 740. (citing MICH. COMP. LAWS ANN. § 600.1405 (West 1996)). MCL section 600.1405 states:

> 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.

MICH. COMP. LAWS ANN. § 600.1405 (West 1996).

101. Schmalfeldt v. N. Pointe Ins. Co., 469 Mich. 422, 428, 670 N.W.2d 651, 654 (2003).

102. *Heller*, 272 Mich. App. at 178, 724 N.W.2d at 740.

103. *See Kisiel*, 272 Mich. App at 172, 725 N.W.2d at 70; *Heller*, 272 Mich. App. at 178, 724 N.W.2d at 741.

104. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

Under the Second Restatement of Contracts, specifically subsection (1)(b) of section 302, the plaintiff in *Kisiel* would not qualify as an intended third-party beneficiary because there was no indication that Holz and GFA intended to give plaintiff the "benefit of the promised performance". Contrariwise, it is clear that Mrs. Heller and Gorelick did intend to provide a "benefit" to Real Estate One under the terms of their agreement.

C. Forum-Selection and Choice-of-Law Clauses

During the past year, the Michigan appellate courts only decided one significant case in the area of forum-selection and choice-of-law clauses: *Turcheck v. Amerifund Fin., Inc.*[105] In *Turcheck,* the Michigan Court of Appeals considered for the first time the proper legal standard to apply when reviewing a trial court's dismissal based on a forum-selection clause.[106] Additionally, the court was required to determine what law governs a contract that contains both a forum-selection clause and a choice-of-law clause.[107]

In *Turcheck*, pursuant to an employment contract, plaintiff worked as a branch manager of defendant, a corporation based in the State of Washington.[108] As previously alluded to, the contract contained both a forum-selection and choice-of-law provision.[109] The forum-selection clause of the contract stated:

> Both parties hereby agree that the Circuit Court of Pierce County, State of Washington, shall have the exclusive jurisdiction to hear and determine any and all disputes, controversies, or claims arising out of, or relating to this Agreement, or concerning the respective rights of the parties hereunder and, for such purposes, do hereby submit themselves to the sole personal jurisdiction of that Court.[110]

Whereas, the choice-of-law provision read: "This agreement shall be subject to and governed by the laws of Washington, irrespective of the fact that a party is or may become a resident of a different state."[111]

Plaintiff filed suit in the Wayne County Circuit Court of Michigan claiming that defendant had failed to pay her sales commissions that she had earned and was "owed under the contract."[112] Defendant argued that,

105. 272 Mich. App. 341, 725 N.W.2d 684 (2006).
106. *Id.* at 344-45, 725 N.W.2d at 687.
107. *Id.* at 346, 725 N.W.2d at 688.
108. *Id.* at 342, 725 N.W.2d at 686.
109. *Id.* at 346, 725 N.W.2d at 688.
110. *Id.* at 342-43, 725 N.W.2d at 686.
111. *Turcheck*, 272 Mich. App. at 342, 725 N.W.2d at 686.
112. *Id.* at 343, 725 N.W.2d at 686.

pursuant to the forum-selection clause, Plaintiff's action should have been brought in the State of Washington.[113]

Plaintiff countered defendant's argument by stating that the forum-selection clause was unenforceable in Michigan, citing MCL section 600.745(3), which states in part:

> If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:
>
> . . . .
>
> (c) The other state would be a substantially less convenient place for the trial of the action than this state.
>
> (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> (e) It would for some other reason be unfair or unreasonable to enforce the agreement.[114]

The trial court stated that contracting parties "are free to bargain for the [forum] where any dispute will be litigated . . . . [P]laintiff freely consented to the forum-selection provision . . . [therefore] the trial court enforced the forum-selection clause and dismissed the action without prejudice."[115]

The Court of Appeals of Michigan began its review of the case by considering what the proper legal standard for reviewing a trial court's dismissal of a forum-selection clause should be.[116] Both plaintiff and defendant asserted that a trial court's dismissal of an action pursuant to a forum-selection clause should be reviewed *de novo*.[117] The appellate court agreed, and noted that:

> While not identical, dismissal based on a forum-selection clause is similar to a grant of summary disposition for lack of personal jurisdiction. Although a valid forum-selection clause does not *divest* the Michigan courts of personal jurisdiction over the parties, it evinces the parties' intent to forgo personal jurisdiction

113. *Id.*

114. *Id.* at 343, 725 N.W.2d at 686-87 (quoting MICH. COMP. LAWS ANN. § 600.745(3)(c)-(e) (West 1996)).

115. *Id.* at 343-44, 725 N.W.2d at 687.

116. *Id.* at 344, 725 N.W.2d at 687.

117. *Turcheck*, 272 Mich. App. at 344, 725 N.W.2d at 687.

> in Michigan and consent to *exclusive* jurisdiction in another forum.[118]

The court continued to discuss the analytical backdrop of determining the appropriate legal standard of review for a dismissal per a forum-selection clause by stating that "a dismissal based on a forum-selection clause necessarily requires interpretation and application of contractual language. The legal effect of a contractual clause is a question of law that we review de novo."[119]

The court then considered the issue of what law to apply since the contract contained both a forum-selection clause and choice-of-law provision, a matter of first impression for Michigan appellate courts.[120] The Court of Appeals of Michigan described said problem as follows:

> The analysis grows more complicated, however, when a single agreement contains both a forum-selection clause and a choice-of-law provision. When a party to such an agreement sues in a state that is not designated by either the forum-selection clause or the choice-of-law provision, it becomes necessary to determine which state's law will govern the enforceability of the forum-selection clause itself. In other words, the trial court where the action is filed must decide whether to determine the enforceability of the forum-selection clause by applying its own law, or by applying the law designated in the choice-of-law provision.[121]

With the issue specifically defined, the court continued its analysis by comparing the law of other jurisdictions.[122] The court's extra-jurisdictional survey revealed that most states fall into one of two views.[123]

One view followed by a large number of jurisdictions states that "provided the choice-of-law provision is enforceable under the law of the state where the action was filed, the law selected in the choice-of-law provision will govern the applicability or enforceability of the forum-selection clause."[124] This view is supported by the belief that parties bargained and agreed upon "the law of a specific jurisdiction" and that

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118. *Id.* at 344, 725 N.W.2d at 687 (emphasis in original).
119. *Id.* at 345, 725 N.W.2d at 687.
120. *Id.* at 347 n.3, 725 N.W.2d at 688 n.3.
121. *Id.* at 346, 725 N.W.2d at 688.
122. *Id.* at 347 n.3, 725 N.W.2d at 688 n.3.
123. *Turcheck*, 272 Mich. App. at 347 n. 3, 725 N.W.2d at 688 n. 3.
124. *Id. See, e.g.*, Jacobsen Constr. Co. v. Teton Builders, 106 P.3d 719, 723 (Utah 2005); Szymczyk v. Signs Now Corp., 606 S.E.2d 728 (N.C. Ct. App. 2005); Jacobsen v. Mailboxes Etc. USA, Inc., 646 N.E.2d 741 (Mass. App. Ct. 1995); Cerami-Kote, Inc. v. Energywave Corp., 773 P.2d 1143 (Idaho Ct. App. 1989).

the parties binding agreement should not be displaced by the law where the suit was initiated.[125]

Whereas, the other prevailing jurisdictional view states that "a contract's forum-selection clause is to be read independently of the choice-of-law provision, and that the validity of the forum-selection clause will always be determined according to the law of the jurisdiction where the action was filed."[126] The rationale behind this view is essentially that "because choice-of-law provisions only require application of the chosen states substantive law, the state where the action was filed remains free to apply its own law on matters of procedure, including the question whether the forum-selection clause is valid in the first place."[127]

However, the court determined that it did not need to decide which state's law should ultimately govern the clause's applicability because in the present case the forum-selection clause would have been equally enforceable under either Michigan or Washington law.[128]

Finally, the court stated that a party seeking to avoid a contractual forum-selection clause bears the burden of proving that one of the statutory exceptions of MCL section 600.745(3) applies.[129] In this case the court found that plaintiff failed to shoulder that burden.[130]

Considering the ever increasing popularity of forum-selection and choice of law provisions in contracts and the court's failure to specifically address which state's law would govern the applicability of a forum selection clause, this important issue will undoubtedly be re-visited by the Michigan appellate courts in the future.

D. Damages

Three cases of note were decided during the past year that dealt with the issue of damages. The most significant damages case for practicing Michigan attorneys was *Dykema Gossett, PLLC v. Ajluni.*[131] In *Dykema,* the Court of Appeals addressed the issue of whether *quantum meruit* relief is available to attorneys when there is an express contract for legal services between the parties.[132] The current action stemmed from Dykema Gossett's legal representation of the defendant, Dr. Ajluni, a medical doctor, in an action against Blue Cross Blue Shield of Michigan

125. *Turcheck,* 272 Mich. App. at 347 n.3, 725 N.W.2d at 688 n.3.

126. *Id. See, e.g.*, Golden Palm Hospitality, Inc. v. Stearns Bank Nat'l Ass'n, 874 So.2d 1231 (Fla. Dist. Ct. App. 2004); Yamada Corp. v. Yasuda Fire & Marine Ins. Co., 712 N.E.2d 926 (Ill. App. Ct. 1999).

127. *Turcheck,* 272 Mich. App. at 347 n.3, 725 N.W.2d at 688 n.3.

128. *Id.* at 348 n.4, 725 N.W.2d at 689 n.4.

129. *Id.* at 348, 725 N.W.2d at 689.

130. *Id.* at 349-50, 725 N.W.2d at 690.

131. 273 Mich. App. 1, 730 N.W.2d 29 (2006).

132. *Id.* at 8-9, 730 N.W.2d at 34-35.

(BCBSM) for "departicipating" him from its programs.[133] Being "departicipated" meant that the doctor "could no longer bill Blue Cross directly for services to patients covered by Blue Cross."[134]

Dr. Ajluni retained Dykema Gossett to represent him in a suit filed against BCBSM, in which the parties entered into a retention agreement that composed of a mixed hourly and contingency fee agreement.[135] The agreement provided that work performed by Dykema Gossett "would be billed on an hourly basis at half the normal billing rate, up to a maximum of $50,000, and Dykema [Gossett] would receive 25% of any net monetary recovery realized by Dr. Ajluni."[136] The agreement further provided that "[i]f there is a resolution of the litigation which involves something other than a cash payment, fair value will be given for the benefit based on an agreement to be reached between you and the Dykema firm."[137]

Approximately four weeks after the commencement of the trial that Dr. Ajluni filed against BCBSM, the law firm learned that BCBSM was conducting a second investigation of Dr. Ajluni's billing practices.[138] Dykema Gossett attorneys then discussed the possibility of settling the lawsuit against BCBSM with Dr. Ajluni, which he agreed to and dropped the suit.[139]

Thereafter, Dykema Gossett requested payment from Dr. Ajluni for costs and services incurred in the BCBSM litigation, which he refused to pay.[140] The law firm filed suit against Dr. Ajluni seeking, among other things, quantum meruit damages.[141]

On appeal, Dr. Ajluni argued that the plaintiff's quantum meruit claim should have been dismissed because quantum meruit relief is not available in Michigan "where there is an express contract."[142] The Court of Appeals of Michigan agreed with Dr. Ajluni's articulation of the general rule that "where an express contract exists, a contract will not be implied. And where an express contract is breached, quantum meruit is still inappropriate."[143]

Nevertheless, the court distinguished between quantum meruit relief for contracts involving legal services and all other contracts.[144] The court explained the distinction by stating that "where there is an express contract for legal services, prior case law in Michigan suggests that

133. *Id.* at 4-5, 730 N.W.2d at 32-33.
134. *Id.* at 5, 730 N.W.2d at 33.
135. *Id.*
136. *Id.*
137. *Dykema*, 273 Mich. App. at 5, 730 N.W.2d at 33.
138. *Id.* at 6, 730 N.W.2d at 33.
139. *Id.* at 7, 730 N.W.2d at 34.
140. *Id.*
141. *Id.*
142. *Id.* at 8, 730 N.W.2d at 34.
143. *Dykema*, 273 Mich. App. at 8-9, 730 N.W.2d at 34-35 (citation omitted).
144. *Id.* at 9, 730 N.W.2d at 35.

quantum meruit has been an available remedy only if the express contract is expressly terminated by either party."[145] The court supported its argument via precedent, which stated that "an attorney on a contingent fee arrangement who is wrongfully discharged, or who rightfully withdraws, is entitled to compensation for the reasonable value of his services based upon quantum meruit, and not the contingent fee contract."[146]

In *Dykema*, the court held that neither party terminated the contract and that Dykema Gossett fully performed its obligations under the contract by representing Dr. Ajluni through to settlement.[147] Therefore, the court concluded that it would be unjust to deny Dykema Gossett quantum meruit damages for the reasonable value of their services because they did not expressly terminate the contract and abandon the representation of their client.[148]

Judge Jansen concurred in the result reached by the majority, but wrote separately to dissent the majority's determining the case on quantum meruit grounds and apparent articulation of a "new rule of law."[149] Judge Jansen simply stated that the court should have merely affirmed the trial court's ruling that Dr. Ajluni "breached the parties' express contract".[150] Further, Judge Jansen opined that the majority's discussion of quantum meruit was "irrelevant" and "cumulative."[151]

It is not clear why the majority took a circuitous route to decide this case on the basis of quantum meruit, while carving out a legal services exception to general quantum meruit principles in the process. The majority could have just as easily found that defendants breached an express contract, which entitled plaintiff to receive money damages.

The second significant damages case, *Morris Pumps* v. *Centerline Piping, Inc.*, involved the equitable remedy of unjust enrichment.[152] In *Morris Pumps*, the City of Detroit contracted with defendant EBI-Detroit (EBI) to be the general contractor to construct a wastewater treatment plan in St. Clair County, Michigan.[153] EBI, in turn, subcontracted with defendant Centerline Piping, Inc. (Centerline) to act as the mechanical subcontractor on the wastewater treatment plant project.[154] Defendant Centerline then contracted with several material suppliers, including plaintiff, to provide equipment and supplies as needed to complete the

145. *Id.*

146. *Id.* at 9-10, 730 N.W.2d at 36 (citing Ambrose v. Detroit Edison Co., 65 Mich. App. 484, 491, 237 N.W.2d 520, 524).

147. *Id.* at 10, 730 N.W.2d. at 35.

148. *Id.*

149. *Dykema*, 273 Mich. App. at 24, 730 N.W.2d. at 43 (Jansen, J., concurring in part and dissenting in part).

150. *Id.*

151. *Id.* at 24-25, 730 N.W.2d. at 43.

152. 273 Mich. App. 187, 191, 729 N.W. 2d 898, 902 (2006).

153. *Id.* at 190, 729 N.W.2d at 901.

154. *Id.*

mechanical portion of the project.[155] Defendant Centerline eventually went out of business, abandoned the project, and failed to pay the plaintiffs.[156]

In response to Centerline's abandoning the project, defendant EBI retained a replacement contractor to complete the mechanical construction on the treatment plant.[157] The replacement contractor completed the mechanical portion of the project by using the equipment and materials that had been previously delivered to the construction site by plaintiffs.[158] Despite the fact that the supplies provided by plaintiffs were used to complete the project, "neither defendant [EBI] nor the replacement contractor" paid the plaintiffs.[159]

Some of the plaintiffs sought payment from defendant EBI through their payment bond, whereas, others also filed suit against defendant EBI for unjust enrichment.[160]

Plaintiffs brought a motion for partial summary disposition[161] relative to liability on their claims of unjust enrichment against defendant EBI.[162] The trial court granted the motions in favor of two of the plaintiffs, including Morris Pumps.[163]

On appeal, defendant EBI argued against plaintiffs' unjust enrichment claims on several grounds, but most notably that the claim was "barred by the existence of express contracts executed between plaintiffs and defendant Centerline, which covered the same subject matter."[164] The appeals court disagreed with defendant EBI's express contract argument.[165] While the court acknowledged that defendant Centerline had express contracts with plaintiffs for supplies and materials, the court ruled that mere existence of those express contracts between plaintiffs and defendant Centerline was not sufficient to bar plaintiffs' unjust enrichment claims against defendant EBI, with whom plaintiffs did not have an express contractual relationship.[166] The court supported its holding through the persuasive authority of *Corpus Juris Secundum*, which states that "[g]enerally, an implied contract may not be found if there is an express contract *between the same parties* on the same subject matter."[167] However, in this case, since defendant EBI was

155. *Id.*
156. *Id.*
157. *Id.* at 190-91, 729 N.W.2d at 902.
158. *Morris Pumps*, 273 Mich. App. at 191, 729 N.W.2d at 902.
159. *Id.*
160. *Id.*
161. *Id.* at 192, 729 N.W.2d at 902 (citing MICH. CT. R. 2.116(C)(10)).
162. *Id.* at 192, 729 N.W.2d at 902
163. *Id.*
164. *Morris Pumps*, 273 Mich. App. at 194, 729 N.W.2d at 903.
165. *Id.*
166. *Id.* at 194-95, 729 N.W.2d at 903.
167. *Id.* at 194, 729 N.W.2d at 903 (quoting 42 C.J.S. *Implied and Constructive Contracts*, § 38 (2007)) (emphasis added by the court).

not a party to any of the express contracts the court said that their argument on this issue must fail.[168]

In the third damages case, *Fleet Bus. Credit, LLC v. Krapohl Ford Lincoln Mercury Co.*, the Court of Appeals of Michigan addressed the question of whether attorney's fees incurred during litigation constituted general or specific damages, when the contract expressly provides for attorneys fees for the prevailing party.[169] The court held that where attorney's fees for the prevailing party are permitted by contract they are not considered special damages under Michigan law.[170] The impact of this ruling is that such attorney's fees are not required to be specifically pled under Michigan law.[171]

E. Avoidance of the Contract

The only significant contract avoidance case decided during the survey period was *Custom Data Solutions, Inc. v Preferred Capital, Inc.*[172] In *Custom Data Solutions*, plaintiff entered into a telephone communications services contract and five separate equipment contracts with Norvergence, Inc.[173] The equipment rental agreements were for a "matrix" box that Norvergence would install on plaintiff's premises to allow reception of communications services and products that Norvergence was to provide to plaintiff under the services contract between the parties.[174] Norvergence later assigned three of the equipment rental agreements to defendant, and the other two rental agreements to a different assignee, who was not involved in this dispute.[175]

Plaintiff contended in its complaint that its service agreement with Norvergence for a communications package, and the accompanying rental agreements, was the result of a fraudulent scheme by Norvergence because Norvergence knew that it lacked the capability to provide the services and products promised at the time the contracts were made.[176] The trial court found that Nonvergence was engaged in a fraud based on uncontested evidence presented by plaintiff, which led the court to hold all of the contracts invalid.[177]

On appeal, defendant argued that the existence of a merger clause in the equipment rental contracts barred plaintiff's claim of fraud in the

168. *Id.* at 194-95, 729 N.W.2d at 903-04.
169. 274 Mich. App. 584, 735 N.W.2d 644 (2007).
170. *Id.* at 589, 735 N.W.2d at 647.
171. *Id.* at 590, 735 N.W.2d at 648 (citing MICH. CT. R. 2.112(I) (requiring that claims for special damages must be specifically stated)).
172. 274 Mich. App. 239, 240, 733 N.W.2d 102, 103 (2006).
173. *Id.*
174. *Id.* at 240-41, 733 N.W.2d at 103-04.
175. *Id.*
176. *Id.* at 241, 733 N.W.2d at 104.
177. *Id.*

inducement.[178] The merger clause contained in the equipment rental contracts stated:

> You [plaintiff] agree to all the terms and conditions shown above and the reverse side of this Rental, that those terms and conditions are a complete and exclusive statement of our agreement and that they may be modified only by written agreement between you and us. Terms or oral promises which are not contained in the written Rental may not be legally enforced . . . .[179]

Both plaintiff and defendant agreed that a fraud in the inducement claim must rest on promises of future conduct made under circumstances in which the assertions may *reasonably* be expected to be relied on.[180] In this case, however, defendant asserted plaintiff's "reliance on Norvergence's pre-contract representations were patently *unreasonable* because Norvergence's alleged statements or promises were not contained in the written" equipment rental agreements.[181]

The Court of Appeals of Michigan properly rejected defendant's argument that the existence of the merger clause barred plaintiff's claim of fraud in the inducement.[182]

In terms of the legal standard for establishing fraud in the inducement the court stated that "'in general, actionable fraud must be predicated on a statement relating to a past or an existing fact."[183] Whereas, "Michigan also recognizes fraud in the inducement . . . [which] occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon."[184] The court then provided specific factors that must be shown to "establish fraud in the inducement, which include:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the

178. *Custom Data Solutions*, 274 Mich. App. at 241-42, 733 N.W.2d at 104.
179. *Id.* at 242 n.3., 733 N.W.2d at 104 n.3.
180. *Id.* at 242, 733 N.W.2d at 104 (emphasis added).
181. *Id.* (emphasis in original).
182. *Id.*
183. *Id.* (quoting Samuel D. Begola Services, Inc v. Wild Bros., 210 Mich. App. 636, 639, 534 N.W.2d 217, 219 (1995)).
184. *Custom Data Solutions*, 274 Mich. App. at 242-43, 733 N.W.2d at 104-05.

> intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.[185]

The court considered the effect of the merger clause on plaintiff's claim of fraudulent inducement, and stated that in order to defeat the merger clause, the fraudulent conduct would have to be of the type that tainted and invalidated the merger clause, and therefore, the entire contract.[186] In this case, the court concluded that the service agreement, as well as the related equipment leases were the result of fraud in the inducement by Norvergence, which conduct invalidated the entire contract between plaintiff and defendant, including the merger clause.[187]

IV. CONCLUSION

In several instances during the survey period, the Michigan Court of Appeals decided cases that clarified existing Michigan law. It is likely, however, that the Michigan Supreme Court will weigh in on some of those decisions in the near future. This is especially true since that court did not decide any jurisprudentially significant cases during the relevant period, and some of the cases discussed herein will undoubtedly wind their way through the appellate process. In addition, since the Michigan Court of Appeals did not address in *Turcheck* which state's law should ultimately govern the applicability of a forum selection clause, further litigation in this area can be anticipated.

185. *Id.* at 243, 733 N.W.2d at 105 (quoting Belle Isle Grill Corp. v. Detroit, 256 Mich. App. 463, 477, 666 N.W.2d 271, 280 (2003)).

186. *Id.*

187. *Id.* at 244-45, 733 N.W.2d at 105-06.