STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

GREG WIERSZEWSKI, an individual,
RICHMOND RECYCLING, a
Michigan corporation,

Plaintiffs,

Case No. 24-205471-CB
Hon. Victoria A. Valentine

v

AGGRESSIVE METALS, a Michigan
limited liability company, and
BRADLEY BERGMAN, an individual,

Defendants.

OPINION AND ORDER REGARDING
DEFENDANTS' SUMMARY DISPOSITION MOTION
AND
DEFENDANTS' SUMMARY DISPOSITION MOTION OF COUNTERCLAIMS 2-4
AND
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(10)

At a session of said Court, held in the
County of Oakland, State of Michigan
January 24, 2025

HONORABLE VICTORIA A. VALENTINE

This matter is before the Court on the Defendants' Summary Disposition Motion, Defendants' Summary Disposition Motion of Counterclaims 2-4, and Plaintiffs' Motion for Partial Summary Disposition Pursuant to MCR 2.116(C)(10). This Court has reviewed the pleadings filed

by the parties and the motions for summary disposition.[1] Oral argument was held on the above-entitled motions on January 8, 2025.

OPINION

I.

Overview

This case arises out of the breakdown of the business relationship between Defendant Bradley Bergman and Plaintiff Greg Wierszewski and their related entities. Bergman is the sole owner of Aggressive Metals, a company which performs commercial and industrial demolition and salvage work.[2] Wierszewski is an owner of Richmond Recycling ("Richmond"), which also engages in commercial and industrial demolition and salvage work.[3]

On September 24, 2020, Richmond entered into a Rental Agreement with Bergman and Aggressive Metals for an excavator owned by Richmond.[4] The excavator failed in the field during the rental period.[5] Richmond litigated with the seller of the equipment, Alta Construction

[1] Both parties filed responses after the deadline to do so passed. MCR 2.116(G)(1)(a)(ii). Accordingly, those responses were rejected. Under Michigan jurisprudence, the Court need not await or accept an untimely filing. *Edi Holdings LLC v Lear Corp*, 469 Mich 1021; 678 N.W.2d 440 (2004) (summarily reversing the Court of Appeals' determination that the trial court abused its discretion by refusing to accept a brief filed after the deadline established by the trail court's summary disposition scheduling order: "The Court of Appeals clearly erred in finding that the Oakland Circuit Court abused its discretion when it enforced the summary disposition scheduling order"). See also *Henning v Verizon Wireless*, unpublished per curiam opinion of the Court of Appeals, issued January 25, 2005 (Docket No. 251241) (affirming the trial court's reliance on MCR 2.401(B) and MCR 2.116(G)(1)(a)(ii) in striking an untimely reply submitted in support of a motion for summary disposition). See also *Master Beat v Skill*, unpublished per curiam opinion of the Court of Appeals, issued February 29, 2024 (Docket No. 363340) ("in light of the lack of a properly and timely filed responsive brief, the trial court did not err by granting plaintiffs' motion for summary disposition"); *INXS V LLC v Kathelene's Compassionate Adult Day Care*, unpublished, per curiam opinion of the Court of Appeals, issued February 29, 2024 (Docket No. 365939) ("Defendants failed to respond to plaintiff's motion [for summary disposition] and did not present any documentary evidence establishing the existence of a material factual dispute. In so doing, defendants failed to meet their burden. The trial court, therefore, did not err by granting plaintiff's unopposed motion for summary disposition".)

[2] First Amended Complaint ¶ 11.

[3] *Id.* ¶ 12.

[4] *Id.* ¶ 13.

[5] *Id.* ¶ 14.

Equipment, L.L.C. ("Alta") (Macomb County Case Number 21-000772-CB, *Alta Construction Equipment, LLC. v Richmond Recycling Inc and Greg Wierszewski*).[6]

While the litigation between Alta and Richmond was ongoing, Wierszewski hired Bergman to work as an employee of Richmond in February 2022.[7] Wierszewski, Bergman, and a third shareholder also formed Big Dig Excavating, Inc. ("Big Dig") in April 2022.[8] Wierszewski contends that he supplied all the capital for Big Dig,[9] although Bergman disputes this.[10]

In June 2022, the Plaintiffs purchased a 2021 Ford truck.[11] The 2021 Ford truck was then traded in for a 2022 Ford truck in November 2022.[12] The circumstances surrounding the purchase of these trucks are disputed. The Plaintiffs contend that "Richmond bought a brand-new Ford F-550 Super Duty truck," and Richmond "gave Bergman permission to use the Ford F-550 with the intention that the vehicle would be used for Richmond directed jobs and business purposes. . . ."[13]

It is undisputed that the vehicles were registered in Richmond's name, but Bergman contends that the vehicles were always intended to be used by Big Dig, not Richmond. The original June 2022 emails with a representative of Murdock Ford, the seller of the vehicle, describe the purchase of the 2021 truck as the "Big Dig F550 Purchase Agreement."[14] Later, when the Murdock Ford representative alerted Barbara Wierszewski that Big Dig had insufficient credit history to purchase the vehicle, Mrs. Wierszewski replied, "we will purchase the vehicle under Richmond Recycling, Inc."[15] Bergman contends that he paid the initial $1,000 deposit for the vehicle from

[6] *Id.*
[7] *Id.* ¶ 16.
[8] *Id.* ¶ 17.
[9] *Id.* ¶ 19.
[10] Counterclaim ¶ 42.
[11] *Id.* ¶ 53.
[12] First Amended Complaint, Exhibit 3.
[13] First Amended Complaint ¶¶ 25, 27.
[14] Defendants' First Amended Answer to Plaintiffs' First Amended Complaint, Exhibit L.
[15] *Id.*

his personal account and the remaining $11,000 came from Big Dig's account.[16] Bergman also contends that several of the early payments for the 2021 truck were processed directly from the Big Dig account.[17] The 2021 truck was later traded in for the 2022 F-550 in November 2022. After the trade-in, Bergman contends that "Richmond began directly paying Ford the monthly installments, but then reimbursed themselves from the Big Dig account."[18]

The relationship between the parties began to sour around this time. According to the Plaintiffs, "Bergman began contracting [sic] Plaintiffs customers and prospects and made false statements about Plaintiffs to discourage these business customers and prospects from conducting any new or further business with Plaintiffs."[19] Bergman was fired as an employee of Richmond on January 20, 2023.[20] In her email announcing Bergman's termination, Barbara Wierszewski stated that Bergman continued to be a part owner and managing director of Big Dig, and that Big Dig "should be a first referral, first choice contractor" for earth-moving and demolition services.[21]

Subsequent to Bergman's departure from Richmond, the Plaintiffs demanded that Bergman return the 2022 Ford truck, but Bergman refused to do so.[22] The Plaintiffs ultimately asked the police to intervene and the vehicle was recovered.[23] Bergman was charged with receiving and concealing a stolen motor vehicle in violation of MCL 750.535(7), a felony.[24] Bergman ultimately pled no contest to the lesser offense of disorderly conduct.[25] The Plaintiffs allege that the vehicle was returned in a damaged state, requiring approximately $6,704 in repairs.[26]

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[16] Counterclaim ¶¶ 54-56 and Exhibits J & K.
[17] Counterclaim ¶ 58.
[18] *Id.*
[19] First Amended Complaint ¶ 32.
[20] *Id.* ¶ 34.
[21] Counterclaim, Exhibit N.
[22] First Amended Complaint ¶ 36.
[23] *Id.* ¶ 40.
[24] Counterclaim, Exhibit M.
[25] Counterclaim ¶ 70.
[26] First Amended Complaint ¶ 42.

Big Dig was dissolved in May 2023.[27] Bergman contends that he did not consent to the dissolution of Big Dig, and that Big Dig was improperly dissolved without a shareholder vote. [28]

The Plaintiffs filed this suit in February 2024. The First Amended Complaint alleges Tortious Interference with Business Relations against Bergman (Count I), Breach of Implied-in-Fact Contract against Bergman (Count II), and Breach of Contract against Bergman and Aggressive Metals (Count III). The Defendants filed counterclaims alleging Conversion of Bergman's Tools (Claim 1), Replevin for the Big Dig Truck (Claim 2), Dissolution and Equitable Liquidation of Big Dig Excavating Inc. (Claim 3), and Breach of Fiduciary Duty by Greg Wierszewski (Claim 4).

The Defendants move for summary disposition of each of the claims in the First Amended Complaint pursuant to MCR 2.116(C)(8) and (10). The Plaintiffs move for summary disposition in their favor of Counts II (Breach of Implied-in-Fact Contract) and III (Breach of Contract). Separately, the Defendants have moved for summary disposition of Counterclaims 2 (Replevin for the Big Dig Truck), 3 (Dissolution and Equitable Liquidation of Big Dig Excavating Inc.) and 4 (Breach of Fiduciary Duty by Greg Wierszewski). The Plaintiffs also move for summary disposition in their favor of Counterclaim 2 (Replevin). All arguments are addressed below.

II.

Standards of Review

A. MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019); *Pawlak v Redox Corp*, 182 Mich

[27] Counterclaim, Exhibit O.
[28] Defendants Summary Disposition Motion of Counterclaims 2-4, Affidavit of B. Bergman ¶ 9.

App 758, 763; 453 NW2d 304 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360; 466 NW2d 404 (1991).

"All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

B. MCR 2.116(C)(10)

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden,* 461 Mich at 119-120; *Quinto*, 451 Mich at 358.

The moving party "must specifically identify the issues" as to which it "believes there is no genuine issue" of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4). Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. *Quinto*, 451 Mich at 361. If the moving party properly supports its motion, the burden "then shifts to the opposing

party to establish that a genuine issue of disputed fact exists." *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the non-moving party has no duty to respond, and the trial court should deny the motion. MCR 2.116(G)(4). See also *Meyer v City of Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion, *Maiden*, 461 Mich at 120-121 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil*, 504 Mich at 160 (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

III.

Summary Disposition of Claims in the First Amended Complaint

A. Count I (Tortious Interference with Business Relations)(Defendant Bergman)

i. The Arguments

Bergman argues that summary disposition of the Plaintiffs' claim for Tortious Interference with Business Relations is warranted because the Plaintiffs have failed to plead all the required elements of the claim and because the Plaintiffs do not have evidence to support the claim.

ii. The Law

The elements of tortious interference with a business relationship claim are "[1] the existence of a valid business relationship or expectancy, [2] knowledge of the relationship or expectancy on the part of the defendant, [3] an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and [4] resultant damage to the plaintiff." *Dalley v Dykema Gossett*, 287 Mich App 296, 323; 788 NW2d 679 (2010).

To establish the third element of the tort, a plaintiff must demonstrate that the defendant acted intentionally and the interference was improper or without justification:

> In other words, the intentional act that defendants committed must lack justification and purposely interfere with plaintiffs' contractual rights or plaintiffs' business relationship or expectancy. *Winiemko v Valenti*, 203 Mich App 411, 418 n. 3; 513 NW2d 181 (1994) (citations omitted); *Feldman v Green*, 138 Mich App 360, 369; 360 NW2d 881 (1984). The "improper" interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs' contractual rights or business relationship. *Id*.
>
> [*Advoc Org for Patients & Providers v Auto Club Ins. Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003)].

iii. Analysis

As a preliminary matter, the Defendants' argument pursuant to MCR 2.116(C)(8) that the Plaintiffs have failed to state a claim is without merit. The First Amended Complaint includes allegations that meet each of the requirement elements for tortious interference with business relations. Specifically, the Plaintiffs have alleged that they had valid business relationships or expectancies,[29] that Bergman knew about these relationships and expectancies,[30] that Bergman's intentional interference caused a breach or termination of the relationships or expectancies,[31] and that the Plaintiffs were damaged as a result.[32] Accordingly, the Plaintiffs have properly pled all the required elements of the claim, and summary disposition pursuant to MCR 2.116(C)(8) is not warranted.

The Defendants also argue that Count I fails under MCR 2.116(C)(10) because the Plaintiffs have not presented evidence that an existing business relationship or expectancy was breached due to Bergman's conduct. Specifically, the Defendants argue that the evidence "fails to establish any wrongful act per se or that defendant Bergman did anything illegal, unethical, or fraudulent."[33] The First Amended Complaint alleges that Bergman interfered with the Plaintiffs' valid business relationships by intentionally making untrue and highly prejudicial statements to the Plaintiffs' potential business partners.[34] "Tortious interference with business relations may be caused by defamatory statements." *Lakeshore Cmty Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995).

[29] First Amended Complaint ¶ 71.
[30] *Id.* ¶ 72.
[31] *Id.* ¶¶ 73-74.
[32] *Id.* ¶¶ 75-77.
[33] Defendants' Motion for Summary Disposition, p 7.
[34] First Amended Complaint ¶ 73.

Because the Defendants argue that the Plaintiffs' evidence is insufficient to support all elements of their claim for Tortious Interference with Business Relations, the Court must determine whether the record before it contains evidence of Bergman's alleged defamation and evidence that the alleged defamation was the cause of a breach or termination of a business relationship or expectancy. The Defendants presented arguments and evidence to meet their burden under MCR 2.116(C)(10), and the burden then shifts to the party opposing the motion to produce evidence to show that there is a genuine issue of material fact. *Quinto*, 451 Mich at 362. Plaintiffs failed to present evidence that would show there is a genuine issue of material fact as to whether the elements for their tortious interference claim are met. See *Cleveland v Hath*, ___ Mich App ___, ___ (2024) ("Here, defendants expressly sought relief under MCR 2.116(C)(10) and presented arguments and evidence supporting that relief, so plaintiff's failure to timely submit responses to defendants' motions left the trial court little choice but to conclude that relief must be awarded."). Consequently, summary disposition of the claim for Tortious Interference with Business Relations is warranted under MCR 2.116(C)(10).

B. Count II (Breach of Implied-in-Fact Contract)(Defendant Bergman)

i. The Arguments

Both parties argue that summary disposition is warranted on Count II in the First Amended Complaint, Breach of Implied-in-Fact Contract. The Plaintiffs argue that each of the required elements of the claim is met, and therefore summary disposition in their favor is warranted. Conversely, the Defendants argue that the Plaintiffs have claimed there was a lease in place between Richmond to Big Dig for use of the truck, which would invalidate the implied contract. They also argue that the plaintiffs are judicially estopped from claiming an implied-in-fact contract

because they asserted in the criminal case against Bergman that the truck was stolen and that Michigan's No-Fault Act precludes recovery.

ii. The Law

"A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction." *Auto-Owners Ins Co v Campbell-Durocher Grp Painting & Gen Contracting, LLC*, 322 Mich App 218, 232; 911 NW2d 493 (2017) (citation omitted). "A contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding of men, show a mutual intention to contract." *Erickson v Goodell Oil Co*, 384 Mich 207, 211-12; 180 NW2d 798 (1970). Because the existence of an implied contract is determined by examining inferences drawn from the parties' actions and language, it is usually a case-specific question of fact. *Id.*

Like a written contract, an implied contract must satisfy the following elements (1) parties competent to contract; (2) a proper subject matter; (3) consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Mallory v. City of Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). Contract formation requires a "meeting of the minds on all the essential terms of the contract," i.e., mutual assent. *Hall v Small*, 267 Mich App 330, 333; 705 NW2d 741 (2005) (citations omitted). "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kamalnath v Mercy Mem'l Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499, 503 (1992) (citations omitted).

iii. Analysis

The Plaintiffs argue that each of the elements for contract formation was met, and a valid implied-in-fact contract was formed between Richmond and Bergman in which Richmond provided Bergman use of the truck in exchange for Bergman's performance of his job as a Richmond employee. The evidence submitted by the parties on this issue however, is conflicting. There is evidence that the Plaintiffs' view of the situation is accurate, i.e. that Richmond owned the truck and allowed Bergman to use it in exchange for his continued employment. Such evidence includes:

- The truck was registered in Richmond's name, and Richmond secured the financing for the purchase of the truck.[35]

There is also, however, conflicting evidence that suggests that Bergman's view of the situation is accurate, i.e., that although the legal title of the truck was held by Richmond, the truck was intended to be used by Bergman in his role as an owner of Big Dig. Such evidence includes:

- The June 2022 emails with the Ford dealership were titled "Big Dig F550 Purchase Agreement."[36] The June 20, 2022 email in this chain where Barbara Wierszewski tells a representative from Murdock Ford that Richmond Recycling Inc. would be the entity to purchase the vehicle does not appear to include Bergman.

- Bergman personally paid $1,000 for the down payment toward the purchase of the truck.[37]

- A check drawn from the Big Dig account was used to pay the other $11,000 for the truck's down payment.[38]

- Big Dig made monthly payments directly to Ford for the truck prior to the trade in for the 2022 truck.[39]

[35] First Amended Complaint, Exhibit 3.
[36] Defendants' Motion for Summary Disposition of Counterclaims 2-4, Exhibit M.
[37] Defendants' Motion for Summary Disposition of Counterclaims 2-4, Affidavit of B. Bergman ¶ 3.
[38] *Id.* ¶ 6.
[39] Defendants' Motion for Summary Disposition of Counterclaims 2-4, Exhibit K.

- After the trade in for the 2022 truck, Richmond made the monthly payments for the 2022 truck, but there are checks from the Big Dig account to cover the payments which labeled the payments as "Truck Lease."[40]

In sum, there is conflicting evidence regarding the purchase and use of the truck. The Plaintiffs contend that the truck was purchased by Richmond, and it was always intended to be used by Bergman in his role *as a Richmond employee*. However, the Defendants have submitted conflicting evidence that although the title was held by Richmond, the truck was always intended to be used by Bergman in his role as an *owner of Big Dig.* This conflicting evidence is relevant as to whether there was a meeting of the minds between the Plaintiffs and Bergman regarding his use of the truck. It is well-settled that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" *Id*. at 625 (citations omitted). Accordingly, because there is conflicting evidence as to whether there was a meeting of the minds regarding the use of the truck, summary disposition is not warranted in favor of either party.[41][42]

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[40] *Id.*, Exhibit P (see e.g., check dated December 14, 2022).

[41] The Defendants also argue that the Plaintiffs are judicially estopped from claiming an implied contract to use the truck existed because they filed criminal charges claiming "theft" of the truck. Judicial estoppel prevents a party from adopting a legal position in conflict with a position taken in the same or a related case. *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 537; 847 NW2d 657 (2014) (citations omitted). Here, however, the positions taken by the Plaintiffs are not inconsistent. Rather, the Plaintiffs are claiming that Richmond and Bergman had an implied contract during the term of his employment with Richmond that allowed him to use the truck, and when he was no longer employed by Richmond, he no longer had permission to use the truck. When he refused to return the truck, this amounted to theft. Because the positions are not inconsistent, judicial estoppel does not warrant dismissal of Count II.

[42] The Defendants also assert that Michigan's No Fault Act precludes recovery for breach of an implied contract. In support of this position, the Defendants cite *State Farm Mut Auto Ins Co v Enter Leasing Co*, 452 Mich 25; 549 NW2d 345 (1996). In *State Farm*, the Michigan Supreme Court held that the No Fault Act requires rental car companies and their insurers to provide primary residual liability coverage for the permissive use of their rental cars. The Defendants did not explain why they view this case as controlling when the facts are so dissimilar. Michigan jurisprudence is well-settled that this trial court need not divine the intentions, search for arguments, or otherwise make conclusions on a party's behalf. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough . . . to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and rationalize the basis for his arguments, and then search for authority either to sustain or reject his position"). "Trial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008). "A

C. Count III (Breach of Contract)(Defendants Aggressive Metals and Bergman)

i. The Arguments

The Plaintiffs' claim for breach of contract against Aggressive Metals and Bergman relates to the Defendants' rental of an excavator and attachment in September 2020. The Plaintiffs claim that the equipment was "damaged" while in the possession of the Defendants, and the Defendants are liable, under the terms of the Rental Agreement, for the "reasonable cost of repair" and the "rental on the Equipment at the regular rental rate until all repairs have been completed."[43] In contrast, the Defendants argue that the equipment "malfunctioned," and under Section 8 of the Rental Agreement, Richmond was responsible for repairing or replacing the equipment, not the Defendants.

ii. The Law

Under Michigan law "[a] party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). A court's "goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself." *Wyandotte Elec Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 143-144; 881 NW2d 95 (2016). "[I]t has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008). See also *Kendzierski v Macomb County*, 503 Mich 296, 311-312; 931 NW2d 604 (2019) (emphasis in original) ("A fundamental tenet of our jurisprudence is that

party abandons a claim when it fails to make a meaningful argument in support of its position." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Here, the Defendants have not presented a meaningful argument as to why the *State Farm* case is controlling. Accordingly, the Court does not find it persuasive.

[43] First Amended Complaint, Exhibit 5 § 9.

unambiguous contracts are not open to judicial construction and must be *enforced as written*" and a court "will not create ambiguity where the terms of the contract are clear").

"The rights and duties of parties to a contract are derived from the terms of the agreement." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003). "A party's expectations do not supersede the language of an unambiguous contract." *Zwiker v Lake Superior State Univ*, 340 Mich App 448, 478; 986 NW2d 427 (2022), appeal denied, 10 NW3d 456 (Mich 2024). Accordingly, courts will "enforce only those obligations actually assented to by the parties." *Wilkie,* 469 Mich at 63.

Under Michigan law, contracts are subject to the parol evidence rule which prohibits the use of extrinsic evidence to interpret unambiguous language within the contract. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). See also *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998) (quotation marks and citation omitted) ("[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.")

The question of whether contract language is ambiguous is a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). A contract is ambiguous if there is an irreconcilable conflict between provisions in the contract or "when a term is equally susceptible to more than a single meaning." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019). Under such circumstances the ambiguous contract language presents a question of fact. *Klapp*, 468 Mich at 469. "[I]f a contract is ambiguous, then extrinsic evidence is admissible to determine the actual intent of the parties." *Shay*, 487 Mich at 667 (quotation marks and citation omitted). See also *Klapp*, 468 Mich at 469 ("In resolving such a question of fact, i.e.,

the interpretation of a contract whose language is ambiguous, [trier of fact] is to consider relevant extrinsic evidence").

iii. Analysis

i. Equipment Malfunction

In this instance, there are two contract provisions in the Rental Agreement that address the parties' rights and responsibilities when the rented equipment fails or is damaged:

> **Section 8. Malfunctioning Equipment**. Should the Equipment be involved in an accident, become unsafe, malfunction or require repair, customer shall immediately cease using the Equipment and immediately notify RRI/CIS. If such condition is the result of normal operation, RRI/CIS will repair or replace the Equipment with reasonably-similar Equipment in working order, if such replacement Equipment is available. RRI/CIS has no obligation to repair or replace Equipment rendered inoperable by misuse, abuse or neglect. Customer's sole remedy for any failure or defect in Equipment shall be the termination of any rental charges accruing after the time of failure. Customer must return the Equipment to the RRI/CIS Location within 24 hours from the time of defect in order to terminate rental charges.
>
> **Section 9. Return of Equipment/Damaged & Lost Equipment**. Customer shall be liable for all damages to or loss of the Equipment from the time the Equipment leaves the RRI/CIS location until the Equipment is: (i) returned to the RRI/CIS Location, including any damage during transit to or from customer; (ii) or picked up by RRI/CIS after issuance of an "off rent" confirmation number. In the case of the loss or destruction of any Equipment, or inability or failure to return same to RRI/CIS for any reason whatsoever, Customer will pay RRI/CIS the then full replacement value of the Equipment together with the full rental rate as specified until such Equipment is replaced. If the Equipment is returned in a damaged or excessively worn condition, Customer shall pay RRI/CIS the reasonable cost of repair and pay rental on the Equipment at the regular rental rate until all repairs have been completed. RRI/CIS shall be under no obligation to commence repair work until Customer has paid to RRI/CIS the estimated cost therefore. Customer agrees that RRI/CIS reserves the right to charge the Credit Card and/or Customer's account for any amount owed by Customer pursuant to this section due to damaged or lost Equipment.[44]

[44] First Amended Complaint, Exhibit 5 §§ 8-9.

It is undisputed that the excavator suffered a mechanical failure during the rental period. Greg Wierszewski testified in his deposition that "the pump failed and from the pump failing the debris from the pump failure went through the machine, and from that point on, it was inoperable and still is."[45] Wierszewski further testified that individuals repairing the machine told him that the pump "malfunctioned."[46] Further, during discovery, the Plaintiffs admitted that "the GENESIS SHEAR malfunctioned during its use by Aggressive Metals on the Comins Job."

Consequently, Section 8 of the Rental Agreement applies and Richmond had the obligation to "repair or replace the Equipment with reasonably-similar Equipment in working order, if such replacement Equipment is available," provided that the malfunction was the result of normal operations.[47] Alternatively, Richmond was not required to repair or replace the equipment if it was "rendered inoperable by misuse, abuse or neglect,"[48] but Richmond has not alleged that the failure was due to "misuse, abuse, or neglect." In his deposition, Wierszewski testified that the malfunctioning shear attachment was never repaired because "Brad never paid for it to get it repaired."[49] This, however, ignores Richmond's contractual obligation under Section 8 of the Rental Agreement to repair malfunctioning equipment unless it was rendered inoperable by misuse, abuse, or neglect. If the equipment was rendered inoperable by misuse, abuse, or neglect, then Richmond would not have an obligation to repair the machinery and Bergman and Aggressive Metals would need to pay for repair or replacement pursuant to Section 9. Because the Plaintiffs have not alleged that the equipment was rendered inoperable by misuse, abuse, or neglect on the part of the Defendants, the Plaintiff had an obligation to repair the equipment under Section 8 of

[45] Defendants' Motion for Summary Disposition, Deposition Transcript of G. Wierszewski, pp 15-16.
[46] *Id.*
[47] First Amended Complaint, Exhibit 5 § 8.
[48] *Id.*
[49] Defendants' Motion for Summary Disposition, Deposition Transcript of G. Wierszewski, pp 59-60.

the Rental Agreement. Consequently, summary disposition in favor of the Defendants is warranted for breach of contract claim related to the costs of repairing the malfunctioning equipment.

ii. Rental Payment Due

Although Section 8 provides that the Plaintiffs were responsible for the repair of the excavator and shear attachment, the Defendants are obligated to pay the rental rate for using the equipment per the terms of the Rental Agreement. The First Amended Complaint alleges that "Aggressive Metals and Bergman never paid for the use of the heavy machinery pursuant to the Rental Agreement."[50] The Defendants, in response, allege that they paid Richmond for the rental charges in scrap loads, which covered the cost of the rental.[51] In support of this claim, the Defendants point to the deposition testimony of Wierszewski:

> Q. Okay. And then you would have conceivably had a record of paying him for that load; correct?
>
> A. It would have been a[pp]lied to what he owed.
>
> Q. Okay. So you're saying that, at least, some of the scrap loads were credited toward his rental?
>
> A. Yes.
>
> Q. And you just don't recall how much of that was?
>
> A. I don't recall specific amounts right now.[52]

In order to determine whether the Defendants breached the Rental Agreement for failing to remit the rental payment, the Court would need to first determine how much was contractually owed and then determine whether the Defendants have or have not paid that amount. As a preliminary matter, Section 8 of the Rental Agreement provides that:

[50] First Amended Complaint ¶ 103.
[51] Defendants' First Amended Answer ¶ 54.
[52] Defendants' Motion for Summary Disposition, Deposition Transcript of G. Wierszewski, pp 14-15.

> Customer's sole remedy for any failure or defect in Equipment shall be the termination of any rental charges accruing after the time of failure. Customer must return the Equipment to the RRI/CIS Location within 24 hours from the time of defect in order to terminate rental charges.

Bergman testified in his deposition that he did not return the equipment to Richmond's facilities within 24 hours despite the Rental Agreement's requirement that he do so because "Greg instructed me not to."[53] The Rental Agreement does provide, however, that "Any failure of RRI/CIS to insist upon strict performance by Customer of any terms and conditions of this Rental Agreement shall not be construed as a waiver of RRI/CIS's right to demand strict compliance."[54]

In general, parties are free to "mutually waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract." *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). This mutuality requirement is "satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract." *Id.* at 364-365. If a contract contains a written modification requirement or an anti-waiver provision, "[a]ny clear and convincing evidence of conduct must overcome not only the substantive portions of the previous contract allegedly amended, but also the parties' express statements regarding their own ground rules for modification or waiver as reflected in any restrictive amendment clauses." *Id*. at 374-375.

Here, based on the record that is currently before the Court, summary disposition is not warranted as to the breach of contract claim for the Defendants' alleged failure to remit rental

[53] Plaintiffs' Motion for Partial Summary Disposition Pursuant to MCR 2.116(C)(10), Exhibit 2, Deposition Transcript of B. Bergman, p 17.
[54] First Amended Complaint, Exhibit 5, § 25(A).

payments. There are genuine issues of material fact that will need to be determined in order to resolve this claim, including:

- How much is due and owing (if anything) under the Rental Agreement?
- Did the parties agree to waive the requirement in the Rental Agreement that the Defendants return the equipment to Richmond's facilities in order to terminate rental charges after the equipment malfunctioned?
- Did the Defendants' payment to the Plaintiffs in scrap loads satisfy the amount due and owing under the Rental Agreement?

Accordingly, both parties' motions for summary disposition as to this aspect of the claim are denied.

IV.

Summary Disposition of the Defendants' Counterclaims

A. Counterclaim 2 (Replevin for Big Dig Truck)

i. The Arguments

Both parties move for summary disposition of the Defendants' counterclaim for replevin of the truck (Counterclaim 2). The Plaintiffs argue that there is no genuine issue of material fact that Richmond is the sole owner of the truck. In contrast, the Defendants argue that they have a superior right to possession of the truck and that the Court should impose a constructive trust over the truck in favor of Big Dig.

ii. The Law

The claim formerly known as "replevin" is now known as "claim and delivery." *Whitcraft v Wolfe*, 148 Mich App 40, 44 n. 1; 384 N.W.2d 400 (1985). Claim and delivery seeks the return of wrongfully held property and damages for the period of wrongful detention. MCR 3.105(A). Under MCL 600.2920(1), "[a] civil action may be brought to recover possession of any goods or chattels which have been unlawfully taken or unlawfully detained and to recover damages

sustained by the unlawful taking or unlawful detention. . . .” An action may not be brought under MCL 600.2920 “by a person who, at the time the action is commenced, does not have a right to possession of the goods or chattels taken or detained.” MCL 600.2920(1)(c).

“A constructive trust is an equitable remedy created not by intent or by agreement, but by the operation of law.” *In re Filibeck Estate*, 305 Mich App 550, 552; 853 NW2d 448 (2014). “The imposition of a constructive trust makes the holder of legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest.” *Id*. (quotation marks and citations omitted). Courts may impose a constructive trust where it is “necessary to do equity or to prevent unjust enrichment.” *Id*. at 553. “A constructive trust is not an independent cause of action; rather, it is an equitable remedy.” *CPAN v MCCA*, 305 Mich App 301, 325; 852 NW2d 229 (2014), vacated in part on other grounds by 498 Mich 896 (2015). “[A] constructive trust is a remedy imposed after a plaintiff prevails on its principal cause of action.” *Willie McCormick & Associates, Inc v D’Agostini & Sons, Inc*, unpublished per curiam opinion of the Court of Appeals, issued May 19, 2005 (Docket Nos. 252941, 253283), p 4.

iii. Analysis

As noted above, the parties dispute who has the right to possess the truck. The Plaintiffs argue that there is no dispute that Richmond owned the truck and let Bergman use it in exchange for his continued employment. Evidence in support of this claim includes:

- The truck was registered in Richmond’s name, and Richmond secured the financing for the purchase of the truck.[55]

There is also, however, conflicting evidence that suggests that the truck was intended to be used by Big Dig and Bergman and was possibly even leased to Big Dig. Such evidence includes:

[55] First Amended Complaint, Exhibit 3.

- The June 2022 emails with the Ford dealership were titled "Big Dig F550 Purchase Agreement."[56] The June 20, 2022 email in this chain where Barbara Wierszewski tells a representative from Murdock Ford that Richmond Recycling Inc. would be the entity to purchase the vehicle does not include Bergman.

- Bergman personally paid $1,000 for the down payment toward the purchase of the truck.[57]

- A check drawn from the Big Dig account was used to pay the other $11,000 for the down payment of the truck.[58]

- Big Dig made monthly payments directly to Ford for the truck prior to the trade in for the 2022 truck.[59]

- After the trade in for the 2022 truck, Richmond made the monthly payments for the 2022 truck, but there are checks from the Big Dig account to cover the payments which labeled the payments as "Truck Lease."[60]

In short, the evidence as to who had the right to possess the truck is conflicting. The Plaintiffs admitted that "payments were made from the Big Dig account as those payments were in place of the lease payments owed to Richmond for use of the F-550."[61] Likewise at least one payment was made from the Big Dig account to Richmond in 2022 in payment for a "truck lease."[62] The use of the term "lease" suggests that Big Dig had a possessory right to the truck, although the duration and terms of any alleged lease are unclear. Likewise, the fact that the down payment for the purchase of the truck was paid from the Big Dig account suggests that Big Dig may have been the intended user of the truck. However, the truck was registered in Richmond's

[56] Defendants' Motion for Summary Disposition of Counterclaims 2-4, Exhibit M.
[57] Defendants' Motion for Summary Disposition of Counterclaims 2-4, Affidavit of B. Bergman ¶ 3.
[58] *Id.* ¶ 6.
[59] Defendants' Motion for Summary Disposition of Counterclaims 2-4, Exhibit K.
[60] *Id.*, Exhibit P (see e.g., check dated December 14, 2022).
[61] *Id.*, Exhibit J, RFAs 8-9.
[62] *Id.*, Exhibit P.

name. When deciding a motion for summary disposition, this Court is not permitted to weigh conflicting evidence in order to determine who had the greater possessory right to the truck. *Skinner*, 445 Mich at 161. Accordingly, this issue must be presented to the factfinder and summary disposition in favor of either party is not warranted.

B. Counterclaim 3 (Dissolution and Equitable Liquidation of Big Dig Excavating, Inc.)

i. The Arguments

The Defendants argue that the dissolution of Big Dig was improper under MCL 450.4801(b). They also argue that the Plaintiffs failed to conduct an equitable liquidation of the assets of Big Dig following its dissolution.

ii. The Law

MCL 450.4801 provides:

> A limited liability company is dissolved and its affairs shall be wound up when the first of the following occurs:
>
> (a) Automatically, if a time specified in the articles of organization is reached.
>
> (b) If a vote of the members or other event specified in the articles of organization or in an operating agreement takes place.
>
> (c) The members entitled to vote unanimously vote for dissolution.
>
> (d) Automatically, if a decree of judicial dissolution is entered.
>
> (e) A majority of the organizers of the limited liability company vote for dissolution, if the limited liability company has not commenced business; has not issued any membership interests; has no debts or other liabilities; and has not received any payments, or has returned any payments it has received after deducting any amount disbursed for payment of expenses, for subscriptions for its membership interests.

iii. Analysis

As a preliminary matter, Big Dig Excavating, Inc. was organized as a corporation, not an LLC.[63] Thus, the relevant standards are found in the Michigan Business Corporation Act, not the Michigan Limited Liability Company Act. The Defendants have not presented evidence that Big Dig was dissolved contrary to the Business Corporation Act or its organizational documents. Accordingly, summary disposition is not warranted.

C. Counterclaim 4 (Breach of Fiduciary Duty by Greg Wierszewski)

i. The Arguments

The Defendants move for summary disposition of Counterclaim 4 (Breach of Fiduciary Duty by Greg Wierszewski) because they argue that Greg breached his duties of loyalty and care to Big Dig and its members, including Bergman.

ii. The Law

Under MCL 450.4404, a manager of a limited liability company is required to discharge his or her duties in good faith "in a manner the manager reasonably believes to be in the best interests of the limited liability company."

"In general, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether rising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee." *Michigan Nat Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). This general rule does not apply, however, where "the individual shows a violation of a duty owed directly to him." *Id.* at 680.

[63] Defendants' Summary Disposition Brief of Counterclaims 2-4, Exhibit Q.

iii. Analysis

In their motion for summary disposition of this Counterclaim, the Defendants have again referenced the Michigan Limited Liability Company Act. Because Big Dig was a corporation, this is not the controlling standard.

Further, the Defendants have not met their burden of demonstrating that summary disposition is warranted. The Defendants allege that Wierszewski breached his fiduciary duty by cutting off distributions, improperly dissolving Big Dig without member consent, and forging Bergman's signature, thereby excluding him from financial access to the company's accounts. Although the Defendants have presented evidence that the company was dissolved without Bergman's consent, this does not prove that the dissolution was improper under the Business Corporation Act or the corporation's organizing documents. Similarly, the Defendants have presented evidence that funds were transferred from the Big Dig account to Richmond. However, the Defendants have not demonstrated that the transfers were *improper* rather than the payment of Big Dig's legitimate expenses. Bergman also alleges that he was owed compensation and distributions that were not paid out during the winding up of Big Dig. Under MCL 450.1855a, "[w]hen winding up a corporation, it should fist pay debts, obligations, and liabilities before distributing the remaining assets to the shareholders." Bergman has not provided evidence that after Big Dig wound up its affairs and paid all debts and liabilities, there were funds remaining that should have been distributed to Bergman. Accordingly, the Defendants have not met their burden, and summary disposition in their favor is not warranted.

V.

Attorneys' Fees

The Plaintiffs argue that they are entitled to attorneys' fees pursuant to Section 25(B) of the Rental Agreement, which provides:

> Customer agrees to pay all reasonable costs of collection, court, attorneys' fees and other expenses incurred by RRI/CIS in the collection of any charges due under this Rental Agreement or in connection with the enforcement of its terms.

As noted above, there are material issues of fact as to whether the Plaintiffs are entitled to "any charges due under this Rental Agreement." Accordingly, a determination of whether attorneys' fees and other costs are warranted under the Rental Agreement is also premature.

ORDER

Based upon the foregoing Opinion:

IT IS HEREBY ORDERED that Defendants' Motion for Summary Disposition of Count I of the First Amended Complaint (Tortious Interference with Business Relations) is GRANTED.

IT IS FURTHER ORDERED that both parties' Motions for Summary Disposition of Count II of the First Amended Complaint (Breach of Implied-in-Fact Contract) are DENIED.

IT IS FURTHER ORDERED that the Defendants' Motion for Summary Disposition of Count III of the First Amended Complaint (Breach of Contract) is GRANTED and the Plaintiffs' Motion for Partial Summary Disposition is DENIED with respect to the costs to repair the malfunctioning rental equipment. Both parties' motions for summary disposition are DENIED as to the rental payments due under the Rental Agreement.

IT IS FURTHER ORDERED that both parties' Motions for Summary Disposition of Counterclaim 2 (Replevin for Big Dig Truck) are DENIED.

IT IS FURTHER ORDERED that the Defendants' Motion for Summary Disposition of Counterclaim 3 (Dissolution and Equitable Liquidation of Big Dig Excavating Inc.) is DENIED.

IT IS FURTHER ORDERED that the Defendants' Motion for Summary Disposition of Counterclaim 4 (Breach of Fiduciary Duty by Greg Wierszewski) is DENIED.

This Order DOES NOT resolve the last pending matter and DOES NOT close the case.

/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
BUSINESS COURT JUDGE

Dated: 1/24/25